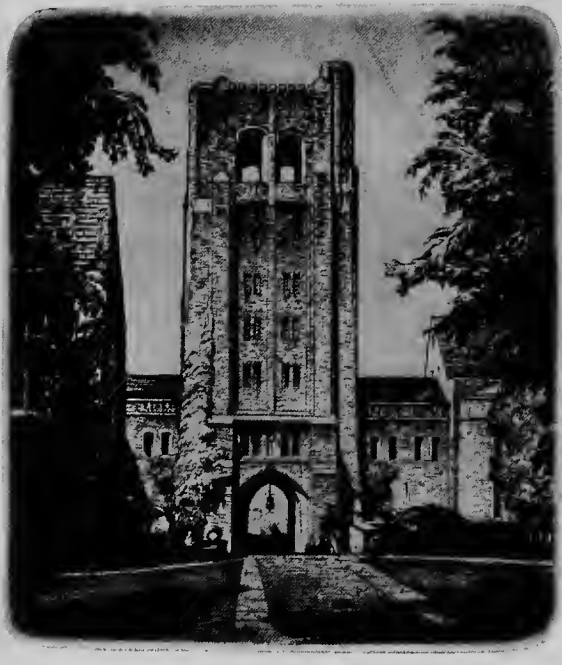

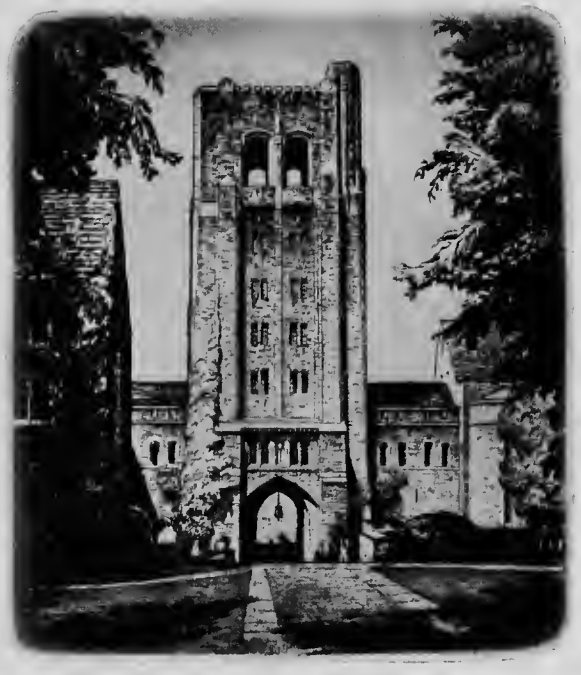

A

COMPENDIUM

OF

MERCANTILE LAW

BY

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LATE OF THE INNER TEMPLE, ESQUIRE, BARRISTER-AT-LAW.

TENTH EDITION

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PREFACE

TO THE TENTH EDITION.

THE best, perhaps the only satisfactory, Editor of a law book is its Author. Only he can decide with complete freedom what should be added or changed, and how and where the original plan should be modified.

This difficulty is especially great in regard to "Smith's Compendium of Mercantile Law." From no other text book of modern times have judges oftener avowedly taken expositions of the law. Still more frequent are the instances in which important passages in judgments are paraphrases of this "Compendium." How can the desire to preserve the text be reconciled with the fact that since 1843, the date of the last Edition which Mr. J. W. Smith supervised, there has been a multitude of decisions affecting every chapter of the work, and many statutes altering or consolidating large portions of the *lex mercatoria*, have been passed? Three solutions were possible: to leave the text intact, and to state in notes or appendices that it no longer expresses the law; to insert in the text within brackets matter modifying it; to endeavour to alter the work according to the plan of the Author. For the two first modes much may be said, and they may be applicable to certain treatises: they seemed to me to be totally unsuited to a work whole chapters of

which had been rendered obsolete by legislation. I have chosen the third mode, with a strong sense of the difficulties attending it, and of my inability to entirely overcome them.

The Author did not attempt to include all the authorities in the necessarily few pages in which he treated vast subjects; he inserted, as a rule, references to important cases only. I have done the same.

The preparation of this Edition has occupied considerable time. I have been prevented by other occupations from giving it continuous attention. This has had at least one advantage. The book has been tested in my own practice, and in that of my friends at the Bar; many alterations have been made to remove shortcomings or clear up obscure points thus disclosed.

To this Edition has been prefixed a short account of the history of Mercantile Law. Though brief, it may give information not readily procurable elsewhere.

In the Appendix will be found, it is believed, the chief statutes relative to Mercantile Law; and reference is made to some statutes of less importance.

I have received much valuable assistance from Mr. George Humphreys, Barrister-at-law, of the South Eastern Circuit. If this Edition has any merits, they are very largely due to him.

The chapter upon Bankruptcy is in the main the work of Mr. E. W. Hansell, Barrister-at-Law, of the South Eastern Circuit.

J. M.

February, 1890.

ADVERTISEMENT

TO THE

FIRST EDITION.

THE idea of this work was suggested by Mr. Burton's Compendium of the Law of Real Property. The acknowledged utility of that book induced the Author to believe, that an attempt to compress the chief doctrines of an equally important branch of law into a Treatise of similar dimensions, might not prove altogether useless. The Mercantile Law is, is one respect, better adapted to such compression than the Law of Real Property; inasmuch as the reasons upon which the former is based can be explained more shortly than those which support the latter. The reasons upon which our Law of Real Property is founded are, generally speaking, historical; and part of history must, therefore, be recounted, in order to explain them clearly and philosophically; while the Mercantile Law is deduced from considerations of utility, the force of which the mind perceives as soon as they are pointed out to it. For instance, if a writer were desirous of explaining why a rent-service cannot be reserved in a conveyance by a subject of lands in fee simple, he would be obliged to show the feudal relations that existed between landlord and tenant, the nature of subinfeudations, and how the lord was injured by them in such his relation to his tenant;

how the statute *Quia emptores* was enacted to prevent the injury, in consequence of which statute, a tenure, without which no rent-service exists, cannot be raised by a conveyance from one subject to another in fee simple. In like manner, the explanation of a recovery, of a fine, of a copyhold, of an estate in ancient demesne, of a use, of a trust, would require a process of historical deduction. But when the reader is told that the drawer of a bill of exchange is discharged if timely notice be not given him of its dishonour, because, without such notice, he might lose the assets he has placed to meet it in the drawee's hands; or, that if A. holds himself out as B.'s partner, he will be liable as such, because he might else enable B. to defraud persons who had trusted him upon the faith of the apparent partnership and joint responsibility: when these reasons, and such as these, are given, every man at once perceives their cogency, and needs not to be told *how*, that he may know *why*, the law was settled on its present footing. The fitness of this subject for compression is, therefore, hardly questionable. The difficulty of compressing it is, however, extreme; the Author who attempts to do so, must continually keep in view a triple object, must aspire at once to clearness, brevity and accuracy; a combination so difficult, that its difficulty may, it is hoped, be fairly pleaded in excuse for some of the deficiencies and imperfections which the reader may discover in the following pages, and which would have been still more numerous but for the kind assistance of friends, to whom the Author takes this opportunity of returning his sincere acknowledgments.

30*th July*, 1834.

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INTRODUCTION.

WRITING in the seventeenth century of mercantile law, Sir John Davies said, "This learning is not common in our books" (*a*). Modern writers have said the same. In his treatise on the Law of Sale, Lord Blackburn observes, "There is no part of the history of English law more obscure than that connected with the common maxim, that the law merchant is part of the law of the land" (*b*). In this introduction an attempt is made to elucidate only a few of the difficulties surrounding the subject: only the outlines of it are presented. Most of the authorities made use of are mentioned in the notes; but aid has been derived from Endemann, Goldschmidt, Lastig, Gandolfo, and other writers on the history of mercantile law.

About the exact limits of mercantile law there is much difference of opinion; the division between it and other parts of the law of contract must necessarily be somewhat arbitrary. The French *Code de Commerce* includes *commerce en général*, comprising a miscellaneous group of subjects, such as partnership, commercial agency, bills of exchange, the contract of affreightment, insurance, general average, *faillites et banqueroutes*, and commercial jurisdiction; and the Italian *Codice di Commercio* and the German *Handelsgesetzbuch* contain similar matter. In this treatise mercantile law is understood to comprise partnership, the law of joint stock companies, agency, bills of exchange, contracts with carriers, the contract of affreightment, insurance, sale, bottomry and respondentia, debt, guaranty, stoppage in transitu, lien and bankruptcy.

(*a*) Concerning Impositions, c. 3 (1656.) (*b*) 1st ed. p. 207.

In many ancient, and even in some modern, authorities, the *lex mercatoria* is spoken of as a form of private international law. This language was once correct. The statement made by early writers, and repeated by Malynes, Molloy, and Blackstone, that "the law merchant is a branch of the law of nations," sometimes meant no more than that it was free from certain technical rules of the common law. But it also recorded the fact that mercantile law grew in great degree out of the transactions between different nations, and that it was, to a large extent, the earliest form of private international law. When *Buller*, J., spoke in *Master* v. *Miller* (*a*) of the *lex mercatoria* as "a system of equity, founded on the rules of equity, and governed, in all its parts, by plain justice and good faith;" when it was said that it was impossible that "the maritime laws of any one realm should be sufficient for the ordering of affairs and traffic of merchants" (*b*); that the law merchant is a law "whereof all nations do take special knowledge" (*c*); or that a merchant "is not bound to sue according to the law of the land, to abide the trial of twelve men" (*d*), there was not merely a reference to the absence of technicalities, but to the fact that the same rules of law were generally applied throughout civilized Europe. "The law merchant," says Sir John Davies, in the tract quoted above, "as it is a part of the law of nature and nations, is universal and one and the same in all countries in the world; for, as Cicero sayeth of the law of nations, *Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et omnes gentes et omni tempore una lex eademque; perpetua continebit*, &c., &c. (*e*). So may we say of the law merchant, there is not one law in England, another in France, another in Spain, another in Germany, but the same rules of reason and the like proceedings of the law merchant are observed in every nation." How far, and in what sense, the *lex mercatoria* is now recognized by Courts to be a species of private international law is not clear. Some judges appeal to it as if it were such, and use language similar to that cited. Others

(*a*) Smith's L. C. 9th ed. i. 856.
(*b*) Blackstone, i. 273.
(*c*) Viner's Abridgment, "Merchants."
(*d*) Y. B. 13 Edw. 4, 9.
(*e*) See remarks of *Mansfield*, C. J., as to the maritime law, *Luke* v. *Lyde*, 2 Bur. 887.

dispute the existence of any such law. When it was contended, in *Lloyd* v. *Guibert* (*f*), that the contract of affreightment ought to be construed with reference to "the general maritime law," *Willes*, J., delivering the judgment of the Exchequer Chamber, said:—

"We can understand this term in the sense of the general maritime law as administered in the English Courts, that being in truth nothing more than English law, though dealt out in somewhat different measures in the Common Law and Chancery Courts, and in the peculiar jurisdiction of the Admiralty (*g*); but as to any other general maritime law by which we ought to adjudicate upon the rights of a subject of a country which, by the hypothesis, does not recognise its alleged rule, we were not informed what might be its authority, its limits, or its sanction. . . . . In truth any general, much more any universal, maritime law, binding upon all nations using the highway of the sea in time of peace, except when limited as administered in some Court, is easier longed for than found."

Undoubtedly, however, there was a time when the *lex mercatoria*, though the law of England, was also the law of other nations, and was the law of England because it was the law of other nations. Undoubtedly, too, it was administered in a manner different from that in which the common law was administered—in a manner similar to that in which the *Prætor Peregrinus* administered the *jus gentium*.

The history of the *lex mercatoria* explains this peculiarity. Some parts of it were undoubtedly borrowed from the Roman law; but when, by whom, and in what circumstances it is not always possible to say. Never the law of this country, the Roman law was often referred to as a general body of doctrine, suited to supply the deficiencies of the law of every civilized country. The writers on mercantile law, here and on the Continent, sought in Roman law solutions for difficult and novel problems, and often found them. Lord Holt introduced into English law in *Coggs* v. *Bernard* (*h*) the whole Roman law of bailments; what he did on a large scale has often been done indirectly and less extensively. The four kinds of contract

(*f*) L. R. 1 Q. B. 115.

(*g*) As to the law merchant not being fixed or stereotyped, see *Cockburn*, C. J., in *Goodwin* v. *Roberts*, L. R. 10 Ex. p. 346. Compare *Crouch* v. *Crédit Foncier*, L. R. 8 Q. B. p. 386.

(*h*) Smith's L. C. 9th ed. i. 201.

which might be formed by consent alone—sale, hiring, partnership, and mandate—cover the greater part of mercantile law. Some of the chief doctrines of partnership are to be found in Roman law. Whether dormant partners were recognized is uncertain; and the rule of English law, that each partner is the agent of the rest, seems to have been unknown. One class of partnerships—*societates vectigales*—to some extent resembled joint stock companies. But such associations were unknown. Their object was attained by giving to a slave a *peculium*, or making him an *institor* or *magister navis*. The relation of principal and agent was not unknown; the *magister navis*, for example, had large authority, as representing the owner. But few of the rules of agency hereafter explained are to be found in the Institutes or Digest. The law of *locatio-conductio* covers the whole subject of the contract of affreightment (*h*). The principle of general average was well understood; it is stated in the Digest in language which still holds good (*i*). Contracts of bottomry and respondentia were known; substantially the same rules as are now recognised were enforced (*k*). The modern law of salvage is substantially an application of the Roman law as to the taking possession of abandoned property.

A more important source of the *lex mercatoria* consisted of the collections of maritime usages and customs, or *coutumiers*, which were drawn up for the use of merchants and lawyers, and which acquired in the fourteenth or fifteenth centuries great authority throughout Europe. They fall into two groups—those apparently compiled in some of the chief Mediterranean ports, and those compiled for the use of merchants trading in the north of Europe. Some of them were appealed to, not merely in the countries in which they originated, but also in our Admiralty Courts and other courts in which mercantile law was administered. What is the oldest of the collec-

(*h*) See D. 19. 2. 13; and as to the origin of the English law of carriers, see *Nugent* v. *Smith*, 1 C. P. D. 428; Holmes's Common Law, 180; Law Quarterly Review, June, 1889. The liability of carriers in English law is peculiar; it appears to have an origin wholly distinct from Roman law.

(*i*) D. 14. 2. 1.

(*k*) D. 22. 2. All the authorities are collected in Dr. Franck's work *De Bodmeria*, 341.

tions is uncertain; the data necessary to determine with certainty their age do not exist. M. Pardessus argues in favour of the greater antiquity of the laws of Trani, a city on the Adriatic Sea, which, he contends, date from the eleventh century (*l*). The laws of Oleron, an island situated near Bordeaux, on the west coast of France, were undoubtedly very early compiled—in the view of some authorities as early as the eleventh century—and were applied in this country (*m*). The maritime laws of Wisby, in Gothland, are also of an early date, though the reference in them to the contract of marine insurance indicates a somewhat later origin. A more elaborate treatise is the *Consolato del Mare*. Its date and origin are obscure. Azuni and several other writers argue that it was compiled in Pisa; but the most plausible theory is that it was prepared for the use of the consuls of the sea at Barcelona some time before 1400 (*n*). Of perhaps greater antiquity is the *Tabula*

(*l*) Collection des Droits Maritimes, 5. 217.

(*m*) See the learned judgment of *Story*, J., in *De Lovio* v. *Boit*, 2 Gall. 398.

(*n*) Story's Miscellaneous Writings, p. 100. In the introduction to the first and subsequent editions of this work, the Consolato del Mare is described "as the first modern code of marine jurisprudence," and in a note it is said:—"This is a collection of the maritime laws of Barcelona. There is an excellent translation by M. le Professeur Boucher, published in 1808. In calling it the *earliest* modern code, I have followed Lord *Tenterden*. Mr. Justice *Park*, however, describes it as a compilation from the laws of Venice, Pisa, Genoa, Barcelona, Marseilles, and Amalfi, which last he states to have been published in the eleventh century, and to be the earliest modern system of marine law. See the Consolato del Mare, cited and relied on by *Tindal*, L. C. J., in *Gould* v. *Oliver*, 4 Bing. N. C. 134. There is an edition of the Consolato in the Inner Temple Library, which is the earliest I have seen, and which belonged to the celebrated Daines Barrington. It is a translation from Catalonian into Castilian, for the use of the people of Valencia, printed in 1539, and containing, by way of supplement, a charter granted to the merchants of Valencia by Ferdinand of Arragon. This charter regulates the election of consuls, and contains provisions regarding the payment of losses upon policies, which prove the system of marine insurance to have been then well understood at Valencia. The book concludes—'En honor y gloria de Dios todo poderoso, y de la sacratissima Virgen Maria madre cuya abogadora de los pecadores, y de los ben aventurados Santos Sant' Elmo, San Clemente, San Nicolas, San Antonio, y de las ben aventuradas Santas Santa Tecla, Santa Ursola, Santa Barbara, Santa Clara, patronos y abogados de todos los navegantes, haze fin el presente libro llamado Consolato del Mare, nuveamente traduzido de la lengua Catalana en nostro vulgar Castellano impresso en la metropolitana Cuidad de Valencia, por Francisco Diaz Romano a undias de mes de Enero anno 1539.'" It is printed with a French translation in Pardessus's Collection des Lois Maritimes, ii. 49.

Amalfitana, consisting of ordinances as to the duties of owners and managing owners of ships, and part owners. The ship is presumed to be worked by persons having a joint interest. The master takes goods on board to sell them on commission under the contract known as *commenda*. The practice of jettison is described (A. 48), "The master ought to take counsel with the merchants, and with their factors (*fattori*) if the merchants are not there personally, and with any other person who represents any of the merchants." If there be no such persons, he is to consult the greater part of the ship's company; and if the merchants oppose, he is to proceed to jettison after having held a council. The artificers' lien in building ships is recognised (A. 61.) Barratry is punished (A. 3.) There is a Court which deals with mercantile disputes (*o*). More elaborate treatises, based on these early collections, were subsequently compiled. The *Guidon de la Mer*, prepared in the sixteenth century by an unknown writer; *Le Grand Routier de la Mer*, the Ordinances of Louis XIV., published in 1673—1681, and commentaries on them—in particular those of Valin, Cleirac's *Us et Coutumes de la Mer*, 1647—Casaregis's *Discursus Legales*, and Pothier's treatise on Maritime Contracts of Hiring, had considerable influence in forming the *Jus Maritimum*. English writers, such as Molloy and Wellwood, drew largely from these foreign sources. They have been recognised as high authorities by English Courts.

Similar was the growth of marine insurance. The Ordinances of the Magistrates of Barcelona as to insurance belong to the middle of the fifteenth century. Introduced into England by the Lombards, the practice of insuring became pretty general about the close of that century. No reported decision in England is to be found before

(*o*) The chief evidence on the subject of the antiquity of the above-named sea laws appears to be as follows:—The prevalence of a belief that, though the Wisby laws were very ancient, the Rules of Oleron were still more so (Pardessus, Lois Maritimes, i. 428); that the *Hogheste Waterrecht* is subsequent to the *Stadtlag* of Wisby; that Wisby was not before 1266 a walled city, and, as Selden argues, of little maritime consequence before that date; that whereas the Rules of Oleron indicate only commerce with and along the west coast of France, articles in the Wisby laws indicate trade which did not come into existence until the fourteenth century; that some of the articles of the Wisby laws seem borrowed from other codes or collections; that the laws of Oleron were in force in the Admiralty in England in the thirteenth century.

the reign of Elizabeth (*p*). Merchants disposed of such disputes in their own Courts or in some domestic forum. In order to determine such questions by a specially qualified Court, Parliament established, by 43 Eliz. c. 12, a Court or commission, consisting of the recorder, two doctors of civil law, two common lawyers, and eight "grave and discreet merchants," with full power to hear and determine all assurance cases, "in a brief and summary course, as to their discretion shall seem meet, without formalities of pleadings or proceedings." In other words, they were to administer mercantile law in the summary method peculiar to it. The Court proved of little use. The tendency of the superior Courts to draw to themselves all lucrative business was too strong. A blow at the utility of the commission was struck by the decision in *Came* v. *Moye* (*q*), that a judgment by the commissioners was no bar to an action at law. Prohibitions to restrain them were issued, and the Court fell into disuse. Writing in 1787, *Park*, J., observes that no commission had issued for many years (*r*).

There is another explanation of the international character of the *lex mercatoria*. Very much of the commerce of the Middle Ages was carried on by means of great fairs (*s*). In fact, by means of them almost all foreign trade was for centuries conducted. In the fairs of Champagne, the oldest of them, Besançon and Lyons in France—long the greatest of them all—Antwerp in the Low Countries, and, not least, in the fairs of Winchester and Stourbridge, in England, goods were bought and sold; orders were given and taken there; outstanding payments were made there; and there obligations to be discharged at future fairs were contracted. To these gatherings, which lasted for several days, flocked merchants from all parts of Europe. The dealings of the merchants necessitated the

(*p*) See *Dowdale's case*, 6 Co. 48.

(*q*) 2 Sid. 121.

(*r*) For that matter, few cases of insurance came before the ordinary Courts. "I am sure," says *Park*, J., "I rather go beyond bounds if I assert that in all our reporters, from the reign of Queen Elizabeth to the year 1756, when Lord Mansfield became Chief Justice of the King's Bench, there are sixty cases upon matters of insurance." Park on Marine Insurance, i. xliii.

(*s*) Endemann's Studien in der Romanisch Kanonistichen Wirthschafts- und Rechtslehre, i. s. 6; and Academie des Inscriptions, Mémoire, 2nd ser. t. 5.

use of simple rules; no technical jurisprudence peculiar to any country would have been satisfactory to traders coming from many different countries. It was necessary that there should be expeditious settlements of disputes, and summary executions to enforce decisions between buyers and sellers, who were strangers to each other, and who dispersed to distant places when their transactions were over. Hence arose the market law, to which reference is often made; expanded and modified, it became a principal part of the *lex mercatoria*. No market could be established without the permission of the king (*t*); and to every market was attached, as a matter of course, a *Piepoudre* Court, for the purpose of swiftly deciding disputes as to contracts concluded or broken within the market. Not in England only, but in Germany, France and Italy special market courts were established. The French fairs, and particularly the *foires de Champagne*, had acquired by royal ordinances important privileges. *The maîtres des foires* and *custodes nundinarum* exercised jurisdiction over all the business of the fairs. Debts contracted there were privileged, in the summary character of the proceedings and execution, in preference to other debts, and the exemption from ecclesiastical prohibition of usury. Ecclesiastical censures notwithstanding, usury might be openly practised in these fairs; it need not be disguised as a sale or mortgage (*u*). Few of the references to the market courts state

(*t*) Marquardus (*De Jure Mercotarum*, l. i. c. 5) collects a mass of authorities to show that the maxim, *Soll man keinen Marckt aufrichten ohne Verwilligung des Königs*, was generally recognized.

(*u*) In the history of bills of exchange, the influence of markets is visible. Devised by Italian bankers, who were embarrassed by the difficulty in transporting coin, and by the differences in coinage, they were used for the purpose of transmitting money or settling claims at the close of the international fairs; and there many rules as to bills of exchange arose. Bills payable at subsequent dates, or, strictly speaking, promissory notes, were given in settlement of balances due; and there is authority for believing that the periods for which bills are commonly drawn were determined by the intervals between the great fairs. That the lawful holder of a bill of exchange was entitled to summary execution is one of the oldest features of bills of exchange. It has come down from the time of the Italian *Campsores*, who, passing from fair to fair, necessarily required expeditious fulfilment of obligations. Marquardus, one of the earliest writers of mercantile law, thus states the law: "*Habent hæ literæ effectum sententiæ et rei judicatæ, quin imo et pleniorem quam ipsa sententia, qui post tres dies post quam fuit recognita, fieri potest executio realis*

the actual law administered in them. It was, we know, the *lex mercatoria*, which was, in case of doubt, determined by merchants.

et personalis." (L. 2 c. xii.)

The well-known exception to the ordinary law, that sale in market overt passes the property even in stolen goods, is obviously suitable to business transacted in fairs. The restrictions mentioned by Coke (5 Rep. 167) give emphasis to this. "If the sale," he says, "had been openly in a goldsmith's shop in London, so that anyone who stood or passed by the shop might see it, there it would change the property. But if the sale be in the shop of a goldsmith, either behind a hanging or behind a cupboard upon which his plate stands, so that one that stood or passed by the shop could not see it, it would not change the property, &c., for that is not in market overt, and none would search there for his goods."

Manifestly these restrictions were due to the fact that at a fair goods were sold at stalls, or in booths, open to the public gaze. In such circumstances the rightful owner had an opportunity of regaining his property. The judges, who in *Hartop* v. *Hoare* (Strange, 1187) decided that pawning in market overt was not protected, assigned the technical, if not absurd, reason that sale in market overt is encouraged because it is circulation of property; pawning is locking it up. The more probable explanation is, that the one transaction belonged to the ordinary business of fairs, while the other did not. The convenience of merchants attending fairs, requiring prompt delivery, with no time to make enquiries as to title, necessitated that property should, in market overt, follow possession. Causes similar to those which in modern times led to the passing of the Factors Acts—the impossibility in the hurry of commerce of always examining the title of possessors of goods or documents of title—were in operation in early times. Reasonable as to chattels, the rule is still more obviously so with respect to money and negotiable instruments which were treated as the equivalent of it. Called upon in *Master* v. *Miller* (Smith's L. C. 9th ed. i. 825) to explain the negotiability of bank notes, the judges laid stress on their being part of the circulation. If an explanation of anything, this expresses the fact that the necessities of business often make impossible inquiries into title. For a very long time it was uncertain whether on the sale of a chattel is implied a warranty of title. In *Morley* v. *Attenborough*, 3 Ex. 500, *Parke*, B., gave it as his opinion that, according to the old authorities, "there is by the law of England no warranty of title in the actual contract of sale any more than there is a warranty of quality." This decision has been questioned, and, as is pointed out in the Chapter on Sale, it can no longer be regarded as good law. But Baron *Parke's* statement of the effect of the early cases is correct, and there is force in his suggestion, that "it may be that, as in the earlier times, the chief transactions of purchase and sale were in markets and fairs, where the *bonâ fide* purchaser without notice obtained a good title as against all except the Crown (and afterwards a prosecutor, to whom restitution is ordered by the 21 Hen. VIII. c. 11), the common law did not annex a warranty to any contract of sale." Sale by sample has been recognized only in very modern times. Though an obvious and convenient mode of selling corn or hops, it would have been at variance with the requirements of sale in market overt. There the bulk, not merely a part of it, would be exposed to view. Nor would such a mode of selling be to the interest of the lord of the manor or other superior of the market, who, by tolerating it, might lose tolls or his dues. It might be plausibly contended—in fact, in *Hill* v. *Smith*, 4 Taunt. 520, it was so contended—that such sale is distinctly adverse to the market laws of the country. "All the doctrine of sales in market overt," said

What were its rules—whether it was other than merchants' view of what was fair and customary—is not clear. Few reports of the cases are extant (*x*). It is expressly stated by Fleta (*y*) that the law as to sale among merchants differed from that stated by Bracton; on receipt of the *arra*, or earnest money, the seller could not withdraw from the agreement without forfeiture of a penal sum in damages. In those courts the evidence received was different from that elsewhere. Marquardus, in his chapter *de probationibus mercatorum, quæ fiunt per libros, litteras, et signa* (*z*) shows that, in disregard of all technical rules to the contrary, the best evidence procurable in the circumstances, without loss of time or expense, was admissible. Among merchants tallies were a usual mode of proof (*a*). "And if it happen," say the customs of the City of London, "that between merchant and merchant, or citizen and citizen, there is a dispute as to a debt, and a tally is produced by one party, and such tally is disowned, then shall the party bringing such tally have his proof according to the law merchant: provided that such proof is made by citizens and merchants or other good and lawful men, and not by ribald persons" (*b*).

A peculiarity of those courts was the summary nature of their proceedings. "For contracts and injuries done concerning the fair or market," says Coke (*c*), "there shall be as speedy justice done for the

Sir James Mansfield, "militates against any idea of a sale by sample, for a sale in market overt requires that the commodity should be openly sold and delivered in the market."

The law of market overt may perhaps go back to a still more remote origin. The laws of Ina and Edgar require merchants to sell before witnesses, or to declare their dealings. Merewether's History of Boroughs, i. pp. 16 and 40; so, too, the so-called laws of William the Conqueror, p. 61. It was a general principle that "no one shall buy without the borough or vill without witnesses," p. 66.

(*x*) Marquardus (*de Jure Mercatorum*), the author of the first scientific treatise on the subject, enjoins judges in mercantile cases to take as their first guide equity—to decide what is fair and reasonable—and next to follow mercantile usages. In Rastall's Entries, 168, is an account of the proceedings in the Piepoudre Court of Hereford. See also Maitland's Select Pleas of Manorial Courts, 130, 134; Manning's Sergeant's Case, 195.

(*y*) P. 127.

(*z*) L. 3, c. 9.

(*a*) Fleta, p. 137; Sartorius, *Geschichte des Hanseatischen Bundes*, 269; Madox, 259; Doomsday Book of Ipswich, 127; Johnson's Ancient Customs of Hereford, p. 33.

(*b*) Riley, 255.

(*c*) 4 Institutes, 272.

advancement of trade and traffic as the dust can fall from the foot, the proceedings there being '*de hora in horam.*'"

Mercantile law was also administered in the staple courts. The complete history of the staple has yet to be written. The motives, chiefly political, which led to the establishing of it are explained in Professor Schanz's *Englische Handelspolitik;* the actual proceedings of the staple court are almost entirely unknown (*d*). The general nature of the staple is best understood from the Statute of the Staple (27 Edw. III. st. 2), which directs that the staples for wool, woolsell, leather, and lead should be confined to a few towns in England—Newcastle, York, Lincoln, Norwich, Westminster, Canterbury, Chichester, Winchester, Exeter, and Bristol. The King's justices were directed not to take cognizance of things belonging to the staple. (c. 5.) Mayors were to have jurisdiction over causes connected with it; speedy and ready process was to be made from day to day and from hour to hour, according to the law of the staple,—not at common law. "No merchant," it was enacted, "shall be impleaded or impeached for another's debt, whereof he is not debtor, pledge, nor mainpernour." An alien merchant might sue in the staple courts or the Courts of common law, as he preferred (*e*).

One of the effects of the growth of the staple courts was to bring about an alteration in regard to levying execution. If unable to alienate his estate, or to charge it with debts, a landowner in feudal times could offer to his creditors, as security, only his chattels, generally few and of little value (*f*). This was altered by the Statute of *Acton Burnel de Mercatoribus* (*g*); and further changes were made by the Statute *de Mercatoribus* (*h*), and the Statute of the Staple (*i*). The effect of these enactments was to provide a summary and effective execution in mercantile cases. If a debtor acknowledged his debt, and entered into his recognizances before the mayor, his chattels and devisable burgages, to the amount of the debt, might, in the event of

(*d*) Marquardus, l. 2, c. 5.

(*e*) 36 Edw. 3, c. 7. See Palmer's edition of Johnson's Great Yarmouth, i. 248.

(*f*) Digby's History of the Law of Real Property, 2nd ed. 238; Cruise, 2, 38.

(*g*) 11 Edw. 1.

(*h*) 13 Edw. 1, st. 3, c. 1.

(*i*) 27 Edw. 3, st. 2.

failure to pay, be forthwith sold. The preamble of the statute refers to the hardships of merchants; the operative words extend to all persons, except Jews. When the staple was established by Edward III. it was thought proper to give merchants connected with the staple the same security as that furnished by statute merchant. Hence the well-known security of statute staple, consisting of recognizance taken before the mayor of the staple (*k*). In course of time persons who had nothing to do with the staple availed themselves of this useful security. This was prohibited by the 23 Henry VIII.; but a similar statutory security, known as recognizance in the nature of a statute staple, was created (*l*). The Statute of Staples made provisions for the trial of disputes to which foreign merchants were parties. Among them was one to the effect that if the parties were aliens, the inquest was to be tried by aliens; if both parties denizens, by denizens. If the one party were a denizen and the other an alien, the jury was to consist half of denizens and half of aliens: the origin, it may be observed, of mixed juries (*m*).

The importance of the presence of foreign merchants, in particular the Teutonic Hanse Guild, is not to be lost sight of. They obtained many privileges from English kings, who protected them against the hatred and jealousy of the City (*n*). The statute book and many charters bear testimony to their importance. The *Carta Mercatoria* of the reign of Edward I. granted as a favour to foreign merchants that "every contract between said merchants and any persons, whensoever they may come, touching any kind of merchandise, shall be firm and stable, so that neither of the said merchants shall be able to retract or resile from the said contract when once the God's penny shall have been given and received between the parties to the contract;" and, similar words, it is pointed out,

(*k*) 27 Edw. 3, st. 2; Cruise, 2, 41.

(*l*) Cruise's Digest, 2, 41.

(*m*) 27 Edw. 3, st. 2, c. 8.

(*n*) Sartorius, *Geschichte des Hanseatischen Bundes*, i. 87, 276; Schanz, *Englische Handelspolitik*. For an account of the position of the Italian merchants in England in the 13th century, see Frost's History of Hull, and Pauli's *Der Gang der Internationalen Beziehungen zwischen Deutschland und England*, p. 14.

are found in the custom of Avignon (*o*). "*Item, volumus et concedimus,*" proceeds this charter, "*quod aliquis certus homo fidelis et discretus London. residens assignetur Justiciarius Mercatoribus memoratis, coram quo valeant specialiter placitare et debita sua recuperare celeriter, si vicecomites et majores eis non facerent de die in diem celeris justiciæ complementum; et inde fiat commissio extra cartam presentem concessa mercatoribus antedictis, scilicet de hiis quæ sunt inter mercatores et mercatores, secundum legem mercatoriam, deducenda* (*p*).

Prynne (*q*) mentions commissions of a still earlier date, to inquire into depredations and robberies of merchants on sea, and to afford them redress according to the *lex mercatoria* or the *lex maritima*. Jews, too, had their special justiciaries, with jurisdiction over pleas as to contracts affecting their lands or chattels; they, too, appear to have acted independently of the common law (*r*). Where and when foreign merchants first obtained such privileges is unknown. Miltiz, in his *Manuel des Consuls*, says, that the first traces of such a special magistracy are to be found in the laws of the Visigoths, which provide for the disputes of foreign merchants being tried before their *telonarii*, the equivalents of the *prætor peregrinus* (*s*). Whether that is correct may be doubted; but it is certain that as early as the twelfth century, in Italy, France, Spain, Germany, and, in fact, wherever commerce flourished, special Courts existed for the trial of mercantile cases (*t*).

(*o*) Maitland's Select Pleas of Manorial Courts, 133. See also the following extract from the Customs of the City of London (13 Edw. 1; Riley, 257):—"And whereas the king doth will that no foreign merchant shall be delayed by a long series of pleadings, the king doth command that the warden or sheriffs shall hear daily the pleas of such foreigners as shall wish to make plaint or cases in which others shall wish to make plaint against foreigners, and that speedy redress shall be given unto them."

(*p*) Prynne's Animadversions, 23.

(*q*) Ibid.

(*r*) Madox, c. vii.

(*s*) i. 161.

(*t*) Prynne (Animadversions, 175) observes (referring to the Court of the Mayor of the Staple):—There "is strong evidence that the common law and judges never had any ancient lawful jurisdiction of charter-parties or contracts made between merchants or mariners, for merchandise, staple commodities, or freights beyond the sea, since they had no ancient legal jurisdiction over such charter-parties and contracts, though made in staple towns or fairs within the realm." *Story*, J., states in *De Lovio* v. *Boit*, 2 Gall. 466, as the result of his examination of the authorities as to the jurisdiction

The Admiralty Court, too, administered mercantile law. An ordinance made at Hastings by Edward I. declared that any contract made between merchants or mariners beyond seas or within the flood mark should be tried before the Admiral, and not elsewhere (*t*). To such matters the Admiralty Court applied, not the common law, but the principles of the civil law and such of the sea laws, the rude codes of the time, as seemed in point. When a contract made abroad was the subject of dispute, the Court offered many advantages. Not only were charter parties construed in the light of laws which accorded with the customs of the litigants, the remedies *in rem* which the Court granted were useful. It admitted in evidence copies of instruments, a point obviously of importance when the originals happened to be abroad and could not be produced. It possessed powers unknown to the common law of granting commissions; powers particularly valuable in disputes as to policies of insurance, over which the Admiralty claimed jurisdiction. Causes were determined expeditiously, not from term to term, but after the fashion of the *lex mercatoria*, from day to day and tide to tide; and the Court sat, in case of necessity, on Sundays and feast days. "Nothing," says Sir Leoline Jenkyns, "can be more pernicious to seafaring and trading men than delay in their law suits, and therefore every maritime country in Christendom had a separate jurisdiction for differences among merchants and seafaring men: so had we once. We had a law merchant, and by it the proceedings were *de die in diem*. We have yet left the form of a Court of Admiralty, and are wont by it to proceed not only *de die in diem*, or as summary as a judgment *de jure gentium* can be, but from tide to tide" (*u*).

This jurisdiction was not acquiesced in, and its extent fluctuated from time to time accordingly. The admiral and his officers held

of the Admiralty:—"(1) That the jurisdiction of the Admiralty until the statutes of Richard II. extended to all maritime contracts, whether executed at home or abroad, and to all torts, injuries, and offences, on the high seas, and in ports and havens, as far as the ebb and flow of the tide. (2) That the common law interpretation of these statutes abridges this jurisdiction to things wholly and exclusively done upon the sea."

(*t*) See the history of the jurisdiction of the Admiralty Court in the judgment of *Story*, J., in *De Lovio* v. *Boit*, 2 Gall. 398.

(*u*) Life of Sir L. Jenkyns, l. lxxx. 1.

pleas of contracts arising not merely on the sea, but within the bodies of counties, and as to matters not strictly maritime; an exercise of jurisdiction which was resented. The history of the conflict between the Admiralty Court and the Courts of Common Law in Coke's time is well known. From time to time statutes were passed to restrain the encroachments of the former. A formal agreement come to in 1575, between the common law judges and the Admiralty Court, brought about a pause in the struggle; another agreement was come to in 1633. By Lord Hobart's decision in *Bridgman's case* (*u*) the cognizance of contracts made at sea, but not for or in respect of maritime matters, was withdrawn from the Admiralty Court. By fictitious allegations that contracts really made at sea were made at the Royal Exchange, actions on charter-parties were brought within the purview of the Courts of Common Law. The charters of several towns granted as a special favour exemption from the jurisdiction of the Admiralty. In the treaties between England and the Hanseatic Towns it was specially stipulated that no sailor or merchant of the Hanse should be expected to endure Admiralty jurisdiction.

Thus the saying that the *lex mercatoria* was a part of the *jus gentium* was in a sense true. Even in the thirteenth and fourteenth century it was in force. A part of it existed in the form of codes or collections of laws generally observed; separate Courts administered it. In England some of these Courts fell into disuse. They were subject to the prohibitions issued by the Superior Courts. The fact that in the *Piepoudre* Courts plaintiffs must swear that the cause of action arose within their jurisdiction, seriously impaired their power (*v*).

In the Year Books and earliest reports are to be found a considerable number of cases relating to customs. They increase in the reports of the times of Elizabeth and James I. The term "custom" is misleading. It really meant often the laws of local Courts. What the superior Courts treated as "customs," the local Courts administered as the *lex mercatoria*. Rejecting some local laws, affirming others, condemning some as unreasonable, approving others, the King's

(*u*) Hob. 11.

(*v*) 17 Edw. 4, c. 2.

Courts *par excellence* did much to put an end to the diversity of usages. Viewed as customs, local laws were subjected to certain tests which were not always satisfied; *e. g.*, the test whether they were reasonable, certain, and not arbitrary. Some of these customs stood this test, and survived. Molloy (*x*), enumerating in 1682 the peculiar rights of merchants, mentions the right of survivorship in the case of partners (*jus accrescendi non inter mercatores*), the right of suing upon negotiable instruments, and the right to trade marks (*y*). Sir John Davies, writing about the same time (*z*), enumerates the following differences between the law merchant and the common law:—If two merchants were joint owners or partners in merchandize acquired by a joint contract, the one might have an action of account against the other; the *jus accrescendi* did not hold good as to mercantile transactions; the goods of ecclesiastical persons, which by the common law were discharged of tolls, were subject to them; an English merchant spoiled of his merchandize upon the seas or beyond the sea by the subject of the foreign king might have a writ of reprisal against all the subjects of that nation; in an action for debt upon a simple contract the defendant might not urge his law, that is, bar the plaintiff by taking an oath that he does not owe the debt or any part of it; and "lastly, in a sute at the common law no man's writings can be pleaded against him as his act and deed, unless the same be sealed and delivered; but in a sute between merchants, bills of lading, bills of exchange, being but tickets without seals, letters of advice and credences, policies of assurance, assignations of debt, all which are of no force at the common law, are of good credit and force by the law merchant."

Some of these rules are still in force; others have been pronounced illegal and invalid.

One or two illustrations of this sifting process may be given. It was the custom in many towns—indeed, it seems the survival

(*x*) iii. c. 7.

(*y*) "After the close of the fourteenth century the merchants of England began to adopt the practice of using marks to be placed on their goods." Johnson's Yarmouth, Palmer's ed. ii. 94. See Marquardus, l. 3, c. 9.

(*z*) Concerning Impositions, c. 3.

of an old law, at one time universal, of *burgschaft* or frankpledge—to hold inhabitants of the same town or country liable for the debts of their fellow townsmen or fellow countrymen (*a*). Independently of any contract, they were regarded as sureties for each other. If one of them failed to pay a debt, the mayor of the town in which he had contracted it wrote to the mayor of the debtor's town requesting the municipal authorities to procure satisfaction. If it were not given, the goods of any person belonging to the latter town, or which might happen to come within the jurisdiction of the inferior courts, were seized. It was convenient where trade was carried on by foreign guilds. It was altered by the Statute of Westminster so far as English merchants were concerned (*b*). In treaties it was common to stipulate that this custom should be excluded (*c*). But it was revived in the case of the Lombard merchants in the reign of Edward III., and it lingered as a custom in many towns. Foreign attachment, such as lately existed in the Lord Mayor's Court, was the survival of an institution once important. In *Paramore* v. *Verrall* (*cc*), the validity of a somewhat similar custom at Sandwich was disputed. It differed from the custom above described chiefly in the fact that the corporation of Sandwich might retain the body of any "foreigner" until satisfaction was made. The validity of the practice having been solemnly argued, it was disallowed by the Courts (*d*).

Another singular custom disappeared. It is clear from many authorities that there existed a well-recognized custom by which any person might claim the profits of a bargain made in his presence.

(*a*) See Maitland's Select Pleas of Manorial Courts, 135.

(*b*) Reeves, ii. 27, 279; Fleta, p. 136; 2 Coke, Ins. 204; 3 Rot. Parl. 28.

(*c*) See the treaty between Philip of Burgundy, on the one part, and the merchants of England, Calais, and Ireland, of the other, in Appendix E. to Rymer's Fœdera, p. 67 (A.D. 1446).

(*cc*) 2 Anderson, 151.

(*d*) See, as to thie practice, Palmer's edition of Johnson's Great Yarmouth, p. 80, n. "It was enforced by the Yarmouth bailiffs in the reigns of Edward I., II., and III." See also *Hales* v. *Walker*, 1 Roll. Abridg. 554; *Bowser* v. *Collins*, 22; Davies, Concerning Impositione, c. 3; *Remembrancia* of the City of London, p. 439, where is a letter from the Earl of Southampton, Lord Warden of the Cinque Ports, to the Lord Mayor of London, remonstrating with the freemen of London for trying to dispute the validity of the custom of withernam—a custom which had been decided sixteen years before against the Cinque Ports as to the body of a debtor, and in their favour as to his goods.

"The freemen of Rye," says the custumal of that town, "were wont or ought to be partners in all manner of merchandise where they are in presence at the buying or selling of it, if they will claim any part, unless the buyer or seller can allege sufficient cause why he that so claimeth to have part in the said merchandise is not worthy to have part" (*e*).

But for this sifting process, destructive to much of the old mercantile law, we might have had in England *pays coutumier*, or districts subject to customary laws, such as existed in France before the Revolution. By accident is due the survival of such peculiarities as the partnership or company law administered in the Stannaries Courts (*f*).

Another influence must be here named. Before the close of the fourteenth century there were no English writers on mercantile law, and few, if any, such writers appear in the fifteenth century. On the Continent, especially in Italy, it was different. In France and Germany the usages of merchants early formed the subject of a large literature. Pegolotti's *Practica della Mercatura* dates from 1343; Uzzano's work, bearing the same title, from 1442. In the sixteenth and seventeenth centuries such works abound (*g*). Benvenutus Straccha (*de Mercatura* about 1550), Sigismundus Scaccia (1618), the *Patronus Mercatorum*, as he was called, Raphael de Turri (1661), Marquardus (1662), and many other writers, composed elaborate treatises on all branches of mercantile usages and law, when, so far as the existing reports enable us to judge, there were no English decisions on the subject. Especially complete was the Continental literature relating to bills of exchange. Translations or adaptations of some of these treatises were published in England in the seventeenth century; a large number of works, partly devoted to the description of usages of merchants, partly to the solution of legal problems, were then published. The works of Malynes, Marius, Molloy and Beawes, published in the seventeenth century, are adaptations, in

(*e*) Article 51; Holloway's Rye, 154; Maitland's Select Pleas, 137.

(*f*) Tapping on the Cost Book, 4.

(*g*) See Endemann's *Handbuch*, i. 20; Heineccius' de Jure Principis circa Commercia, s. 1.

parts little more than translations, of the writings of Italian and German writers. All of these writers insist that the *lex mercatoria* is a universal law. "I have entitled the book," said Malynes in the preface (1622) to his *Lex Mercatoria*, "according to the ancient name of *lex mercatoria*, and not *jus mercatorum*, because it is a customary law, approved by the authority of all kingdoms and commonwealths, and not a law established by the sovereignty of any prince, either in the first foundations, or by continuance of time." All of these writers regard merchants as a class apart, subject to a separate law; a true *kaufmannsstand* exists. A lawyer of the reign of Edward III., and one of the reign of Elizabeth or Charles II., would have admitted that the law of merchants is part of the law of the land. But they would not have understood the maxim in the same sense. Neither of them would have understood it in the sense in which it is now used. If always true, that maxim has not always been true in the same sense.

This may be illustrated by reference to bills of exchange. The books contain decisions that in suing upon a bill of exchange it was once necessary to allege that the acceptor or drawer was a merchant. As late as the reign of William and Mary the Court of King's Bench, in an action against the drawer of a bill of exchange, upheld a special plea that he was a "gentleman," and not a trader. This was reversed in the Exchequer Chamber (*g*). By the end of the 17th century it was settled that proof of trading was not necessary. The existence of a transition stage is indicated in the remarks made in certain judgments, that a person who drew a bill of exchange "made himself a merchant within the custom." In *Bromwich* v. *Loyd* (*h*), Treby, C. J., thus describes the fluctuating course of

(*g*) *Sarsfield* v. *Witherly*, Carthew, 82.

(*h*) 2 Lut. 1582. See the history of the decisions in *Goodwin* v. *Robarts*, L. R. 10 Ex. p. 348. The following cases show the changing language of the Courts in regard to mercantile law. In *Pierson* v. *Pounteys*, Yelverton, 135 (1609), the Court says, "The judges ought to take notice of that which is used among merchants." In *Vanheath* v. *Turner*, Winch's Reports, 24 (1622), *Hobart*, C. J., says, "The custom of merchants is part of the common law of the kingdom, of which judges ought to take notice: and if any doubts arise to them about their customs, they may send for the merchants to know their customs." There was considerable controversy whether the custom of merchants

decisions:—"Bills of exchange at first were extended only to merchant strangers trafficking with English merchants, and afterwards to inland bills between merchants trafficking with one another here in England, and then to all persons trafficking, and subsequently to all persons trafficking or not." Even in comparatively modern times it was customary in actions on bills of exchange to allege in the declaration that the plaintiff sued "according to the custom," and that the parties were "residing, trading, and using commerce within this kingdom" (*i*).

The history of mercantile law may be roughly divided into three periods: First, a time when mercantile law, so far as it existed, was administered in special Courts, and for the purpose of settling the disputes of a special class, subject to peculiar duties and possessed of peculiar rights; a second period, in which mercantile law chiefly consisted of a body of customs, to be proved, in case of doubt, as facts, and binding only upon a special class; a third period, in which these customs are incorporated in the general law, and are binding upon all, whether merchants or not (*j*). Another division may be suggested. The first period extends to the appointment of Coke as Chief Justice; the second, from that event to the appointment of Lord Mansfield as Chief Justice, in May, 1756; and the last, from that date to the present time (*k*).

Lord Mansfield made a great change in regard to commercial law. Some of his chief services related to procedure. The use of the consolidation rule in insurance cases, a limitation of the practice of giving general verdicts in commercial cases, and of reserving cases, the abandonment of the practice of hearing two arguments, and, above all,

applied to mercantile contracts not made between merchants: *Oaste* v. *Taylor*, Cro. Jac. 306 (1613); *Eaglechilde's case*, Hetley, 167 (1631); *Woodward* v. *Rowe*, 2 Keble, 105 (1666).

(*i*) Wentworth's Pleadings, i. 226 (ed. 1797).

(*j*) See *Goodwin* v. *Robarts*, L. R. 10 Ex. 337.

(*k*) It may be objected that the above divisions slur over the great services to commercial law of Holt. In the Introduction to former editions of this treatise, it is said, "I have no hesitation in saying that Lord Holt alone accomplished more for English mercantile law than the whole body of the English judges prior to his elevation;" and in a note it is observed, "The present law with regard to bills of lading seems to have originated with Lord Holt": see *Evans* v. *Martlett*, 1 Ld. Raym. 271.

the introduction of the habit of separating in the charge to the jury the law from the facts, were solid improvements. "Before Lord Mansfield's time," says Buller, J., in *Lickbarrow* v. *Mason* (*l*), in a well-known passage in his judgment, "we find that in the courts of law all the evidence in mercantile law were thrown together; they were left generally to a jury, and they produced no established principle. More than anyone else Lord Mansfield helped to bring about in this a change." The language of the Courts was still uncertain; judges were not agreed as to whether they took the law from skilled merchants, or gave it to them. But, speaking broadly, mercantile law was proved as foreign law now is; it was a question of fact; merchants spoke to the existence of their customs as foreign lawyers speak to the existence of laws abroad. When so proved, a custom was part of the law of the realm. Lord Mansfield went in one respect back to old usage; he may be said to have re-established the connection between English law and the mercantile law of the continent. In *Luke* v. *Lyde* (*m*) Lord Mansfield, in deciding the question what freight was due for carriage of goods which were lost before the voyage was finished, cited the Pandects, the *Consolato del Mare*, the laws of Oleron, the laws of Wisby, Cleirac's *Us et Coutumes*, the Ordinances of Louis XIV., *Roccus de Navibus*, Molloy and Malynes. When Lord Mansfield said, "The maritime law is not the law of a particular country, but the general law of nations" (*n*), he repeated language familiar to early writers.

With the subsequent history of mercantile law it is unnecessary to deal. The decisions of the Courts have done much to develop mercantile law, especially in regard to agency, insurance, and sale. Much more has been effected by legislation: the law of joint stock companies, trade marks, merchant shipping, bankruptcy, is almost entirely of statutory origin. The Acts printed in the Appendix to this work approach nearer to a complete mercantile code than the so called *Codes de Commerce* of other countries.

(*l*) 2 T. R. 63; Smith's L. C. 9th ed. i. 737. Compare remarks of *Story*, J., Miscellaneous Writings (2nd ed.) 278.

(*m*) 2 Bur. 883.

(*n*) *Ib.* at p. 887.

ADDENDA.

Page 5, note (*d*)—*Valentini* v. *Canali* is now reported 24 Q. B. D. 166.

Page 7, note (*l*), *add*—*Leak* v. *Driffield*, 24 Q. B. D. 98.

Page 101, note (*q*), *add*—A person who has obtained a garnishee order absolute attaching a debt due by a company to his debtor is not a "creditor" of the company within Clause I. of the section: *In re Combined Weighing and Advertising Machine Co.*, 43 Ch. D. 99 (C. A.).

Page 216, note (*n*), *add*—It is no answer to a charge under sect. 2 of the Merchandise Marks Act, 1887, that the goods sold are equal in quality to the goods intended to be purchased, or that the seller has no intent to defraud the purchaser: *Starey* v. *Chilworth Gunpowder Co.*, 24 Q. B. D. 90; *Wood* v. *Burgess*, *ib.* 162. It is sufficient to constitute the offence of falsely applying a trade-mark that an article is intended to be supplied of a different description from that which the buyer intends to purchase, and believes he is purchasing: *Starey* v. *Chilworth Gunpowder Co.*, *supra*.

Page 327, line 18, *after* "contained 400," *insert*—In *Carnegie* v. *Conner*, 24 Q. B. D. 45, *Huddleston*, B., and *Mathew*, J., held that a guaranty "ship to carry at least about 90,000 cubic feet, or 1500 tons dead weight of cargo," was merely a warranty of the carrying capacity of the ship, and not a guaranty that she should be able to carry about 90,000 cubic feet of the particular description of cargo which by the charter-party the shipper was entitled to tender.

Page 333, line 24, *add*—In *Pyman Brothers* v. *Dreyfus Brothers & Co.*, 24 Q. B. D. 152, the charter-party provided that the vessel should "proceed to Odessa, or so near thereto as she might safely get," and there load a cargo, twelve running days (Sundays excepted) to be allowed for loading and discharging, and ten days on demurrage over and above the lay days. Odessa contains an outer and inner harbour. Owing to the port being crowded there was much delay before the vessel could take her place at the quay in the inner harbour where the cargo was stored. Held, by *Huddleston*, B., and *Mathew*, J., that the lay days were to be computed from the arrival of the vessel at the *outer* harbour at a point as near as she might safely get to a loading berth.

Page 563, note (*q*), *add*—*De Francesco* v. *Barnum*, 43 Ch. D. 165.

Page 721, note (*l*), *add*—Furnished rooms, on two floors of a house in London, occupied exclusively by the debtor, a Frenchman, here for the purposes of a law suit, together with his wife and two servants, for three months, have been held to be a dwelling-house in England: *Ex parte Hecquard*, 24 Q. B. D. 71 (C. A.).

Page 724, note (*g*), *add*—Though the petition is inadvertently presented in a wrong Court, that Court may make a receiving order, and the proceedings can afterwards be transferred to the proper Court: *Ex parte French*, 24 Q. B. D. 63 (C. A.).

Page 759, note (*g*), *add*—Consequently, a resolution by a committee of inspection that the remuneration of a trustee, who was a solicitor, should be "his proper professional charges as a solicitor," has been held to be invalid: *In re Wayman*, 24 Q. B. D. 68.

A

COMPENDIUM OF MERCANTILE LAW.

BOOK THE FIRST.

OF MERCANTILE PERSONS.

TRADE may be carried on by *Individuals*, *Partnerships*, or *Companies*, and their respective *Agents*. As it will, therefore, be necessary to devote some space to each of the above classes of the mercantile community, this Book will be divided into four chapters, the first, treating of *Sole Traders;* the second, of *Partnerships* ordinarily so called; the third, of those peculiar and extensive partnerships denominated *Companies;* the fourth, of persons occupying the relation of *Principal and Agent.*

CHAPTER I.

OF SOLE TRADERS.

Sole traders.

THE word "trader" had once, in English law, a technical meaning: it was the description of a person subject to the *lex mercatoria*. When that ceased to be a distinct branch of law, binding only a certain class of persons, those who did any act regulated by that law were said to be traders *quoad* that act. Thus, it is laid down in books of authority that if a man draw a bill of exchange he is, for the purposes of the bill, a merchant (*a*). The words "trader" and "trading" were used

(*a*) Com. Dig. "Merchant" A. I. *Bramwell*, B., in *Josselyn* v. *Parson*, L. R. 7 Ex. at p. 129, defines a merchant as "one who buys and sells" an article or articles. The French Commercial Code thus defines traders: *Sont commerçans ceux qui exercent des actes de commerce, et qui en font leur profession habituelle:* l. I. t. 1. a. I. The definition in the German Commercial Code is (s. 4.)—*Als Kaufmann in Sinne dieses Gesetzbuchs ist anzusehen wer ge-*

Sole traders.

before the present Bankruptcy Act in a definite and peculiar sense (*b*); and in ascertaining the authority of partners to bind their firms by drawing, accepting or indorsing negotiable instruments, it is still necessary to distinguish between trading and non-trading partnerships (*c*).

Every agreement by which any one is restrained from carrying on a lawful profession, trade, or business, is (subject to the exceptions hereafter stated) to that extent void.

"Restraint of trade, according to a general principle of the Common Law, is unlawful" (*d*).

"Accordingly, a bond or other contract by which a person binds himself *generally* not to exercise his trade or business in this country is presumptively void" (*e*). All contracts in general restraint of trade would appear to be void. This opinion was adopted recently by a majority of the judges of the Court of Appeal (*f*), who declined to assent to the opinion expressed by *Kekewich*, J., that a contract in restraint of trade, unlimited as to space, may be valid, provided the limitation be reasonably required by the person stipulating for it (*g*). A contract in partial restraint of trade will be enforced if it is reasonable in its nature and extent, and founded on a lawful (not necessarily an adequate) consideration (*h*). The reason-

werbemässig Handelsgeschäfte betreibt: Endemann's Handbuch des Deutschen Handelsrechts, i. 53, 135.

(*b*) Ses sect. 44 of the Bankruptcy Act, 1883, Appendix, and p. 773, note (*f*), infra.

(*c*) Infra, Chapter II. s. 5.

(*d*) Sir W. Erle's Law relating to Trades Unions, p. 5; see also pp. 9, 10; and Lord *Esher*, M. R., in *Mogul Steamship Co.* v. *McGregor*, 23 Q. B. D. 598, where there is an exhaustive statement of the law.

(*e*) *Mitchel* v. *Reynolds*, 1 P. Wms. 181; 1 Sm. L. C. 430; *Homer* v. *Ashford*, 3 Bing. 328; *Mallan* v. *May*, 11 M. & W. 653; Lord *Esher*, M. R., in *Mogul Steamship Co.* v. *McGregor*, 37 W. R. p. 757.

(*f*) *Davies* v. *Davies*, 36 Ch. D. 359, *Fry*, L. J., doubting.

(*g*) Expressions in *Wallis* v. *Day*, 2 M. & W. 273; *Leather Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 345; and *Rousillon* v. *Rousillon*, 14 Ch. D. 351, seem to show that covenants unlimited as to space may be held binding. None of these expressions, in view of the decision of the Court of Appeal in *Davies* v. *Davies*, 36 Ch. D. 359, are free from doubt.

(*h*) *Mitchel* v. *Reynolds*, ubi supra; *Elves* v. *Croft*, 10 C. B. 24; *Leather Cloth Co.* v. *Lorsont*, 9 Eq. 345; *Collins* v. *Locke*, L. R. 3 App. Cas. 674; *Mogul Steamship Co.* v. *McGregor*, 57 L. J. Q. B. 541.

ableness of the contract is to be determined with reference to the nature of the business, and the protection required (*i*). Contracts in restraint of trade may be divisible as regards time or space; they may be valid only in part. Thus, in the case of a covenant not to carry on a business in London, or in any of certain specified towns, the Court, while refusing to give effect to the last part of the covenant, may enforce the contract in regard to London (*k*). It has been said that "all restraints of trade, though only partial, if nothing more appears, are presumed to be bad" (*l*). But this presumption does not appear to exist; in the case of a partial restraint of trade it is apparently a question for the Court whether it is in the circumstances reasonable (*m*).

Contracts by which employers agreed not to employ workmen, or by which the latter agreed not to work, according as a majority might determine, were, for similar reasons, declared invalid; whether such combinations were indictable offences was doubtful (*n*). By the Trades Union Act, 1871 (34 & 35 Vict. c. 31), ss. 2, 3, contracts are not unlawful by reason merely that they are in restraint of trade (*o*). In a recently-decided case, *The Mineral Water Bottle Exchange Society* v. *Booth* (*p*), the Court

(*i*) *Hitchcock* v. *Coker*, 6 A. & E. 438; *Baines* v. *Geary*, 35 Ch. D. 154; *Davies* v. *Davies*, 36 Ch. D. 359.

(*k*) *Mallan* v. *May*, 11 M. & W. 853; *Baines* v. *Geary*, ubi supra.

(*l*) *Parke*, B., in *Mallan* v. *May*, 11 M. & W. 604.

(*m*) *Campbell*, C. J., in *Tallis* v. *Tallis*, 1 E. & B. at p. 411; *Cotton*, L. J., in *Davies* v. *Davies*, 36 Ch. D. p. 383. Many of the older authorities were obviously affected by the circumstance that a prolonged apprenticeship and other conditions were necessary preliminaries to the practising of most trades. Some of the reasons given for the rule of Common Law in Lord *Macclesfield's* judgment in *Mitchel* v. *Reynolds* have little weight at a time when entering into a contract in restriction of the practice of one trade may furnish a man with the capital necessary to start a new business.

(*n*) See *Campbell*, C. J., in *Hilton* v. *Eckersley*, 6 E. & B. at p. 62. And Lord *Esher*, M. R. in *Mogul Steamship Co.* v. *McGregor*, 23 Q. B. D. 598, at p. 606; and contra, *Fry*, L. J., at p. 628.

(*o*) *Rigby* v. *Connol*, 14 Ch. D. 482; *Wolfe* v. *Matthews*, 21 Ch. D. 194.

(*p*) 36 Ch. D. 465. See also *Mogul Steamship Co.* v. *McGregor*, 15 Q. B. D. 476; (C. A.) 23 Q. B. D. 598. A combination among shippers, by which they agreed to allow a rebate to those shippers who shipped their goods on vessels belonging to members of the combination, was held not to be in restraint of trade. Lord *Esher*, M. R., dissenting, in the Court of Appeal. "It seems to me it was no more in restraint of trade, as the phrase

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of Appeal refused, at the instance of the society, to enforce against a member a stipulation in articles of association to the following effect: "No member shall employ any traveller who has left the service of another member, without the consent in writing of his late employer, until after the expiration of two years from his leaving the service." This was held to be a contract in restraint of trade, and not protected by the Trades Union Act or enforceable.

Certain classes of persons are incapacitated from engaging in commercial pursuits. An *alien* ranks either under the head of *alien friend* or that of *alien enemy*, *i. e.*, the nation to which he belongs is either at peace or war with this kingdom. In the former case, he may trade in this country as freely as any British subject: indeed, his safety while doing so is the subject of a special clause in Magna Charta. In order to enable him to trade with more ease and advantage, he was permitted to hold a lease for years of a house, for "without habitation he cannot merchandise or trade" (*q*). And though there was an ancient statute (32 Hen. 8, c. 16) which avoided leases (*r*) of houses and shops granted to alien *artificers* and *handicraftsmen*, yet it was very strictly construed (*s*). Now (*t*) an *alien* may take, acquire, hold and dispose of real and personal property, except British ships, in all respects as a natural born subject. But an *alien enemy*, or a British subject adhering to the Queen's enemies, is incapable of trading here, except by the Queen's licence (*u*), which must, if granted,

is used for the purpose of avoiding contracts, than if two tailors in a village agreed to give their customers five per cent. off their bills at Christmas, on the condition of those customers dealing with them, and with them only": Lord *Coleridge*, C. J., in *Mogul Steamship Co.* v. *McGregor & Co.*, 57 L. J. Q. B. 541, at p. 545; 21 Q. B. D. 544. "Competition, however severe and egotistical, if unattended by circumstances of dishonesty, intimidation, molestation, or such illegalities as I have above referred to, gives rise to no cause of action at common law:" *Bowen*, L. J., 23 Q. B. D. 598, at p. 620.

(*q*) Co. Litt. 2 b.

(*r*) *Lapierre* v. *M'Intosh*, 9 A. & E. 857.

(*s*) See *Jevens* v. *Harridge*, 1 Wms. Saund. 7, and notes; *Pilkington* v. *Peach*, 2 Shower, 135; *Wootton* v. *Steffenoni*, 12 M. & W. 129.

(*t*) 33 & 34 Vict. c. 14, ss. 2, 14; *Sharp* v. *St. Sauveur*, L. R. 7 Ch. 343. By sect. 8 of 33 & 34 Vict. c. 23, a convict is disqualified from suing or alienating or charging his property while subject to the operation of the Act: *Ex parte Graves*, 19 Ch. D. 1.

(*u*) See *Kensington* v. *Inglis*, 8 East,

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be very strictly pursued (*v*). On the conclusion of peace, however, he may recover on a contract executed before the war (*x*).

Infants are incapable of absolutely binding themselves by any contract which is not for necessaries. An infant cannot even state an account or give a cognovit (*y*). No action can be maintained against him upon any promise made after full age to pay a debt contracted during infancy, or upon any ratification after full age of a promise or contract made during infancy (*z*). Of course, therefore, he cannot support the character of a *sole trader* (*a*). Nor can he, if he has traded, in the absence of proof of express representation that he was of age, be made a bankrupt (*b*). An infant entering into a contract of partnership incurs no liability for the debts of the firm; but if he does not within a reasonable time after coming of age repudiate the contract, he will be held liable as a partner for acts done after that event (*c*). If he has obtained advantages under a contract, *e. g.*, received goods, and cannot place the person contracting with him in the same position as before the contract, he cannot recover money which he has paid (*d*).

273; *Clementson* v. *Blessig*, 11 Exch. 135, and note, at p. 141; *De Wahl* v. *Braune*, 25 L. J. Ex. 343 (*Pollock*, C. B., expresses a doubt whether the contract is avoided); *Esposito* v. *Bowden*, 4 E. & B. 963. As to a British subject adhering to the Queen's enemies, see *Roberts* v. *Hardy*, 3 M. & S. 533. See Tudor's Leading Cases on Mercantile Law as to the effect of an outbreak of war on a partnership between an English subject and an alien (3rd ed.), 523.

(*v*) See *Vandyck* v. *Whitmore*, 1 East, 475.

(*x*) *Clementson* v. *Blessig*, 11 Ex. 145.

(*y*) *Oliver* v. *Woodroffe*, 4 M. & W. 650; 37 & 38 Vict. c. 62, s. 1.

(*z*) The Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), s. 2. *Ex parte Kibble*, L. R. 10 Ch. 373. A contract for necessaries is not comprised in this category. As to what are such, *Ryder* v. *Wombwell*, L. R. 4 Ex. 32; *Barnes* v. *Toye*, 13 Q. B. D. 410; *Johnstone* v. *Marks*, 19 Q. B. D. 509.

(*a*) *Ex parte Kibble*, ubi sup.

(*b*) *Ex parte Jones*, 18 Ch. D. 109, overruling *Ex parte Lynch*, 2 Ch. D. 227.

(*c*) *Goode* v. *Harrison*, 5 B. & Ald. 147.

(*d*) See Anson on Contract, 5th ed. 111, and *Valentini* v. *Canali*, Law Times, Dec. 14, 1889. The contracts of infants appear to differ from other voidable contracts in at least one respect. If a person be induced to take shares by a fraudulent prospectus, such a contract is voidable; but after the commencement of winding up the right to rescind is gone: *Tennent* v. *Glasgow Bank*, 4 App. Cas. 615. On the other hand, an infant who takes shares is not bound by the winding-up order. Even if he come of age after the winding up, his status

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Married women are, at common law, incapable of binding themselves personally by contracts (*e*). By the custom of the City of London a married woman may be *there a sole trader* (*f*); and when a woman's husband is civilly (*g*), although not physically, dead, or she has been deserted by him and obtained an order, which is in force, for protection of her earnings and property (*h*), or she is living apart from him under a sentence of judicial separation (*i*), she may carry on trade as if she were a *feme sole*, for her own support, and in either of these cases may become a bankrupt (*j*). By the Married Women's Property Acts (33 & 34 Vict. c. 93; 37 & 38 Vict. c. 50; and 45 & 46 Vict. c. 75), the Common Law has been materially altered. The following are some of the chief provisions of the Act of 1882, which repeals the two previous Acts and consolidates the law:—

"Sect. I.—(1.) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee.

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

is unaffected: *Symons' case*, 5 Ch. 298. See also *Lemprière* v. *Lange*, 12 Ch. D. 675; Lindley's Company Law, 5th ed. 810; and infra, chap. 2.

(*e*) A clear statement of a married woman's rights at common law will be found in Lord *Selborne's* judgment in *Cahill* v. *Cahill*, 8 App. Cas. 420, 425.

(*f*) See a full account of this custom in *Beard* v. *Webb*, 2 B. & P. 93.

(*g*) See per *Parke*, B., in *Barden* v. *De Keverberg*, 2 M. & W. 61, at p. 64.

(*h*) 20 & 21 Vict. c. 85, s. 21; and see *Thomas* v. *Head*, 2 F. & F. 88; and *Ramsden* v. *Brearley*, L. R. 10 Q.B. 147.

(*i*) 20 & 21 Vict. c. 85, s. 25.

(*j*) See post, Book 4, c. 3, s. 1; and *In re Armstrong*, 17 Q. B. D. 521. See, also, 21 Q. B. D. 264.

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(3.) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown.

(4.) Every contract entered into by a married woman with respect to and to bind her separate property, shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.

(5.) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws, in the same way as if she were a *feme sole*.

"Sect. II. Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid, all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic or scientific skill."

Section 1 has the effect only of binding a married woman's separate estate. Consequently, if she has, at the time of a judgment against her, no separate estate, the judgment cannot be enforced under sect. 5 of the Debtors Act (*k*). Nor can she, by a contract entered into at a time when she has no separate estate, bind property which she may afterwards acquire (*l*). The expression "separate property," in section 1, includes only that which would, if the woman were unmarried, be her "property." It does not, therefore, include a general power of appointment by deed or will of which she is donee, but which she has not exercised; and a married woman who has become bankrupt cannot be compelled to exercise such power in favour of the trustee in bankruptcy (*m*).

Section 6 enacts that all shares which stand in the name of a married woman are to be deemed, unless or until the contrary

(*k*) *Scott* v. *Morley*, 20 Q. B. D. 120; *In re Armstrong*, 21 Q. B. D. 264. As to debts contracted before marriage, see *Axford* v. *Reid*, 22 Q. B. D. 551.

(*l*) *Palliser* v. *Gurney*, 19 Q. B. D. 519.

(*m*) *In re Armstrong*, 17 Q. B. D. 521.

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is shown, her separate property (*n*). The effect of the Act appears to be that, as regards shares standing in the name of the married woman at the commencement of the Act, her husband is liable as a contributory under sect. 78 of the Companies Act, 1862, and that her separate estate is liable to contribute (*o*); as to shares placed on the register in her name after the commencement of the Act, her separate estate alone is liable.

Clergymen holding any cathedral preferment, benefice, curacy, or lectureship, or licensed, or allowed to perform the duties of any ecclesiastical office, are prohibited from carrying on, in person, any trade or dealing for gain or profit, or dealing in goods, wares or merchandise. Neither can this be done by any one for their use, unless in the case of a partnership of more than six, or where the interest has devolved upon them by will, descent, marriage, or bankruptcy, and in those cases they must not act as directors or managing partners. There is an exception in the case of schoolmasters and tutors supplying their pupils, or in disposing of books or other works through a publisher or bookseller (*p*).

There were formerly numerous disabilities imposed by statutes, which forbade the exercise of certain trades to all persons who had not previously served an apprenticeship thereto (*q*): and there were other disabilities, imposed by the customs and laws of corporate towns, which prohibited the exercise of particular trades by strangers within the territories of the respective corporations (*r*). The former class is, however, repealed by statute 54 Geo. 3, c. 96, and the latter is in great part repealed by sect. 247 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), which re-enacts sect. 14 of the Municipal Corporations Act, 1835.

(*n*) See also sects. 6, 13, 14.

(*o*) *Mrs. Matthewman's Case*, L. R. 3 Eq. 781; *In re West of England Bank*, 12 Ch. D. 284.

(*p*) See 1 & 2 Vict. c. 106, ss. 28, 29, 30, 31, in Appendix; and 4 & 5 Vict. c. 14. See *Lewis* v. *Bright*, 4 E. & B. 917.

(*q*) See *R.* v. *Kilderby*, 1 Wms. Saund. 309, and notes.

(*r*) See *Shaw* v. *Poynter*, 2 Ad. & E. 312; *Mayor of Leicester* v. *Burgess*, 5 B. & Ad. 246.

CHAPTER II.

OF PARTNERS.

SECT. 1. *Partnership—what.*
2. *How formed.*
3. *How dissolved.*
4. *Rights and Liabilities of Partners among themselves.*
5. *Rights of Third Persons against Partners.*
6. *Rights of Partners against Third Persons.*

SECTION I.—*Partnership—what.*

Partnership—what.

PARTNERSHIP is the result of a contract, whereby two or more persons agree to combine property or labour, for the purpose of a common undertaking, and the acquisition of a common profit (*a*). There may be a partnership in one transaction as well as in a continuing business, and between persons out of trade as well as in trade; since, in either case, there may be a combination of property or labour, in order to carry on a common undertaking and for a common profit (*b*).

One partner may stipulate to be free from *loss*, and the stipu-

(*a*) The above definition is retained, though, perhaps, it is open to the objection that it includes cases of joint ownership: *e.g.*, *French* v. *Styring*, 2 C. B. N. S. 357. In the Partnership Bill (1889), s. 6, partnership is defined as "the relation which subsists between persons who have agreed to carry on business and share profits some way in common"—a definition probably unexceptionable. Compare the Indian Contract Act, s. 239: remarks of *Jessel*, M. R., in *Pooley* v. *Driver*, L. R. 5 Ch. D. at p. 470; *Mollwo* v. *Court of Wards*, L. R. 4 P. C. p. 436; *Pawsey* v. *Armstrong*, 18 Ch. D. 698; *Ex parte Tennant*, 6 Ch. D. 303; *Steel* v. *Lester*, 3 C. P. D. 121; and *Walker* v. *Hirsch*, 27 Ch. D. 460.

(*b*) *Ex parte Gellar*, 1 Rose, 297; *Salomons* v. *Nissen*, 2 T. R. 674. Societatem coire solemus aut totorum bonorum, quam Græci specialiter κοινοπραξίαν appellant, aut unius alicujus negotiationis: Inst. 3, 25.

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lation will hold good as between himself and his companions (*c*), though it will not diminish his liability to strangers (*d*). So, too, one partner may contribute all the money, all the stock, or all the labour necessary for the purposes of the firm.

There is no partnership without a community of profits (*e*). The right to participate in profits is not conclusive—it is not by itself a presumption—of the existence of a partnership: it is strong evidence of such existence (*f*). That is a question to be determined by the whole agreement between the parties, their acts, and conduct. "What we have to consider, when we are considering questions as between the parties themselves," said *Cotton*, L. J., in *Walker* v. *Hirsch* (*g*),—a case in which a servant paid partly by a share of profits claimed to be a partner,—"and not as between strangers and one of the parties, or all of them, is really this: What rights had the contract entered into in fact given one of the parties against the other? . . . What we really have to consider is this, What, on the contract between the parties, are the rights which that contract has, *inter se*, given to one as against the other?" (*h*).

Partnership may approximate to joint ownership. A. and B. agree together to contribute each a sum of money, for the purchase of a lot of goods, which they intend afterwards to divide; in this case, after the purchase of the goods and before the division, they are joint owners thereof, not partners, unless, indeed, such was their intention (*i*). If, instead of dividing, they sell

(*c*) *Fereday* v. *Hordern*, Jac. 144; *Gilpin* v. *Enderbey*, 5 B. & Ald. 954; *Bond* v. *Pittard*, 3 M. & W. 357; and see *Ex parte Langdale*, 18 Ves. 300.

(*d*) *Waugh* v. *Carver*, 2 H. Bl. 235, 1 Smith's L. C. 877; *Fereday* v. *Hordern*, Jac. 147, per Lord *Eldon*; *Wheatcroft* v. *Hickman*, 9 C. B. N. S. 47, per Lord *Cranworth*, p. 92; *S. C.*, 8 H. L. Cas. 268; *Bullen* v. *Sharp*, L. R. 1 C. P. 86.

(*e*) See Lindley, Bk. I. Chap. I.

(*f*) *Ross* v. *Parkyns*, L. R. 20 Eq. at p. 335.

(*g*) 27 Ch. D. 460, at p. 468.

(*h*) See also judgment of *James*, L. J., in *Ex parte Tennant*, 6 Ch. D. 303; and *Adam* v. *Newbigging*, 13 App. Cas. 315.

(*i*) See *London Financial Association* v. *Kelk*, 26 Ch. D. 107, p. 143, for a discussion of the distinction.

The following passage from the judgment of *Bacon*, V.-C., in *London Financial Association* v. *Kelk*, ubi supra, illustrates the distinction:—"One of the charges pressed by the plaintiffs was that the directors, by entering into the agreement of August, 1865, had committed the association to a partnership with Mr. Rodocanachi and Messrs. Kelk & Lucas, and that

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them again, and divide the gain accruing upon the re-sale, they become, in the legal sense of that word, *partners*. Though the profit of partners must be joint, they may, if they think fit, arrange that it shall be unequally divided (*l*).

The working of a mine, colliery, or other real property of that description, is looked on to some extent as a trade; and where several persons, having a common interest in such property, work it in common, and sell the produce for their benefit, they become partners (*m*). Part owners of a ship are not necessarily partners; they are usually tenants in common; they have not

they had, in this respect, violated and exceeded the terms of the memoraudum, and had exposed the assets of the association to the risks attendant upon a partnership. It does not appear to me that either in law or in fact any kind of partnership was created. *Each of the three parties was entitled under the contract to an undivided share in the subject. Each paid for that share with individual separate money.* The three had, no doubt, in a sense, a common interest in the subject; but no one of the essential elements of a partnership was found to exist in the case, for *no one of them could interfere with either of the others in whatever* disposition the others might make of their separate shares; nor *could the death or bankruptcy or transfer or devolution of the shares of any one of the parties affect the rights of the others;* neither of them could *object to the introduction of any* other person, *or be liable* in respect of any debt or engagement of the others." Pothier thus defines the difference (Traité du Contrat de Société, 600):—"(2) La principale différence entre la société et cette espèce de communauté, c'est que la société est un contrat, et que la communauté qui en résulte, est formée par la volonté et le consentement des parties. Au contraire, cette espèce de communauté n'est pas un contrat, et elle se forme sans le consentement et la volonte des parties . . . On peut encore apporter cette différence, que la communauté que forme la société est toujours formée par un seul et même titre, qui est contrat de société; au lieu que cette espèce de communauté sans société peut se former ou par un même titre, ou par différents titres."

(*l*) Per Lord *Loughborough*, *Coope* v. *Eyre*, 1 H. Bl. 49; *Fromont* v. *Coupland*, 2 Bing. 170; *Ex parte Langdale*, 18 Ves. 300. Si nihil de partibus lucri et damni nominatim convenerit, æquales scilicet partes et in lucro et in damno spectantur; quod si expressæ fuerint partes, hæ servari debent: Inst. 3, tit. 25, s. 1. And see *Stewart* v. *Forbes*, 1 Mac. & G. 137, post, n. (*y*), p. 24. It is not necessary that a partner's share should be ascertained; but its not being so is a circumstance tending to show the non-existence of the partnership: per *Bosanquet*, J., in *Howell* v. *Brodie*, 6 Bing. N. C. 50. And see *Ex parte Marquis of Abercorn*, 31 L. J. Ch. 828.

(*m*) *Crawshay* v. *Maule*, 1 Swanst. 495; *Jefferys* v. *Smith*, 1 J. & W. 298; *Hawken* v. *Bourne*, 8 M. & W. 703; *Tredwen* v. *Bourne*, 6 M. & W. 461; *Ralph* v. *Harvey*, 1 Q. B. 845; *Peel* v. *Thomas*, 15 C. B. 714; see 2 Atk. 630. Compare *Steward* v. *Blakeway*, L. R. 4 Ch. 603.

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authority as owners to bind each other; and they usually appoint a ship's husband, who alone has authority to bind them (*n*).

Many societies, such, for instance, as clubs, resemble in some respects partnerships (*o*). But they are not true partnerships; the object is not the acquisition of a common profit; changes in their members do not affect their existence.

A similar remark is applicable to persons who become members of a provisional committee for the purpose of promoting a railway or other enterprise, though the end which they propose to themselves may be individual profit. By simply consenting to become members of such a committee, and to the publication of their names, they do not authorise the managing committee or the officers to bind them by contracts, even for necessaries, to prosecute the project (*p*).

The right to participate in profits is not conclusive of the existence of a partnership (*q*). The inference may be rebutted by other facts; it may appear, for example, that the relationship is that of debtor and creditor, or master and servant (*r*). The remarks on this point of Sir *Montague Smith*, in delivering the judgment of the Judicial Committee of the Privy Council, in *Mollwo, March & Co.* v. *Court of Wards* (*s*), have so often been repeated by other judges, that they may be here cited:

"It appears to be now established, that although a right to participate in the profits of trade is a strong test of partnership, and that there may be cases where from such perception alone it may, as a presumption not of law but of fact, be inferred, yet that whether that relation does or does not exist must depend on the real intention and contract of the parties. It is certainly difficult to understand the principle on which a man, who is neither a real nor ostensible partner, can be held liable to a creditor of the firm.

(*n*) *Brodie* v. *Howard*, 17 C. B. 109; *Frazer* v. *Cuthbertson*, 6 Q. B. D. 93.

(*o*) *Todd* v. *Emly*, 7 M. & W. 427; 8 M. & W. 505; Lord *St. Leonards'* judgment in *Re St. James's Club*, 2 De G. M. & G. 383; *Smith* v. *Anderson*, 15 Ch. D. at p. 273. See *R.* v. *Robson*, 16 Q. B. D. 137.

(*p*) *Reynell* v. *Lewis*, 15 M. & W. 517; *Bright* v. *Hutton*, 3 H. L. 341.

(*q*) *Mollwo, March & Co.* v. *Court of Wards*, L. R. 4 P. C. 419.

(*r*) *Baddeley* v. *Consolidated Bank*, 38 Ch. D. 238.

(*s*) L. R. 4 P. C. 419, at pp. 435, 438.

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The reason given in *Grace* v. *Smith* (*t*), that by taking part of the profits he takes part of the fund which is the proper security of the creditors, is now admitted to be unsound and insufficient to support it; for of course the same consequences might follow in a far greater degree from the mortgage of the common property of the firm, which certainly would not of itself make the mortgagee a partner. Where a man holds himself out as a partner, or allows others to do it, the case is wholly different. He is then properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by estoppel. Again, wherever the agreement between parties creates a relation which is, in substance, a partnership, no mere words or declarations to the contrary will prevent, as regards third persons, the consequences following from the real contract. . . . If cases should occur where any persons, under the guise of such an arrangement, are really trading as principals, they must not hope by such devices to escape liability; for the law, in cases of this kind, will look at the body and substance of the arrangements, and fasten responsibility on the parties according to their true or real character" (*u*).

The older authorities laid down a number of tests of partnerships, which are now either of doubtful value or are merely illustrations of a wider rule. Thus to constitute a community of profits as would make a partnership, a partner, it was said, must not only share in profits, but must share in them *as a principal* (*v*). Undoubtedly he must not be a mere agent, factor, or servant, receiving, in lieu of wages, a sum proportioned to the profit gained by his employers (*x*), or a certain portion of a fund which includes the profits, but is not dependent on them for existence. Still when a servant, agent, or other person, either upon an advance to the person carrying on a trade, or as representing a deceased partner, or selling the goodwill of a business, stipulated for a share *in the profits*, and so entitled himself to an account of

(*t*) 2 W. Bl. 998.

(*u*) See *Baddeley* v. *Consolidated Bank*, 38 Ch. D. 238, at pp. 248 and 262, as to criticism of the doctrine that participation in profit raises a presumption of partnership.

(*v*) See *Easterbrook* v. *Barker*, L. R. 6 C. P. 1; *Kilshaw* v. *Jukes*, 3 B. & S. 847.

(*x*) *Harrington* v. *Churchward*, 29 L. J. Ch. 521; *Ross* v. *Parkyns*, L. R. 20 Eq. 331; *Moore* v. *Davis*, 11 Ch. D. 261. So a person receiving a percentage on sales effected through his influence is not liable as a partner: *Pott* v. *Eyton*, 3 C. B. 32.

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them, it was held that he became, *as to third persons*, a partner (*y*).

By the Act to amend the Law of Partnership (*z*), it is provided that the receipt, by a third person, of a portion of the profits of a trade from the person carrying it on, on the advance of money to him by way of interest under a written contract, or by a servant or agent as his remuneration, or being the widow or child of a deceased partner, by way of annuity, or by a person who has sold the goodwill of the business, as the consideration of such sale, shall not *of itself* constitute the recipient a partner, or render him responsible as such. The Act appears to have been drawn under a misconception. The previous authorities did not make participation in profits decisive of the existence of partnership. The cases cited below show that the Act applies only when the relation of debtor and creditor exists; that an unsigned contract for an advance, though admissible as evidence of the terms upon which the advance was made, is not "a contract in writing" within the meaning of the Act (*a*); and that it does not deprive a creditor of any security which he may have or which he seeks to retain. Thus it does not deprive a mortgagee of the right to foreclose; though sect. 5 expressly states that the lender (*b*) "shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan," it has been held that the statute does not apply to an action to enforce a security. Though the statement of claim, in one case decided since the Act, asked for a declaration that the plaintiff was entitled to a first charge upon debenture stock about to be issued, &c., the action was held to be in substance an action for foreclosure.

In every question respecting the contract of partnership, if

(*y*) *Smith* v. *Watson*, 2 B. & C. at p. 407; *Ex parte Rowlandson*, 1 Rose, 91; *Ex parte Langdale*, 18 Ves. 300; *Green* v. *Beesley*, 2 Bing. N. C. 108.

(*z*) 28 & 29 Vict. c. 86. See Appendix.

(*a*) *Re Tew*, L. R. 8 Ch. 569; *Pooley* v. *Driver*, 5 Ch. D. 458; *Syers* v. *Syers*, 1 App. Cas. 174; *Ex parte Tennant*, 6 Ch. D. 303; *Ex parte Delhasse*, 7 Ch. D. 511; *Ex parte Taylor*, 12 Ch. D. 366; *Pawsey* v. *Armstrong*, 18 Ch. D. 698; *Walker* v. *Hirsch*, 27 Ch. D. 460; *Kelly* v. *Scotto*, 49 L. J. Ch. 383; *In re Stone*, 33 Ch. D. 541; *Ex parte Sheil*, 4 Ch. D. 789; *Baddeley* v. *Consolidated Bank*, 34 Ch. D. 536, p. 547; 38 Ch. D. 238 (C. A.).

(*b*) *Jessel*, M. R., in *Ex parte Sheil*, 4 Ch. D. 789; *Baddeley* v. *Consolidated Bank*, 38 Ch. D. 238.

Partnership—what.

the Legislature have dictated no particular course, and the law adopted no peculiar regulation, founded on the nature of the subject, we must be guided by those principles which govern contracts in general. Thus, each of the parties to it must be competent. Therefore the contract of partnership, if attempted to be concluded by an infant, will be voidable at his full age (*c*), and void, if by an alien enemy (*d*). So, if the undertaking be illegal, the contract, upon ordinary principles of law, is void, and that, whether it be to do a thing improper in itself, or rendered so by the positive prohibition of the Legislature (*e*).

So much as to the rights between the parties themselves. As regards the rights of third persons, "the question generally, almost always, is, whether a man is liable on a contract not entered into by himself, nor under any express authority given by him, but alleged by the plaintiff to have been entered into under an implied authority given by one of the parties to another to transact all matters of business relating to the partnership, and to bind his partners by any contract entered into with reference to it. It is a question really whether what the defendant in fact had done had made the person who actually entered into the contract his agent for the purpose of entering into that particular contract" (*f*). The law of England is, that he who lends his name and credit to a

(*c*) *The Newry and Enniskillen Rail. Co.* v. *Coombe*, 3 Exch. 565; *North Western Rail. Co.* v. *M'Michael*, 5 Exch. 114. He must elect to avoid within a reasonable time after his full age: *Mitchell's case*, L. R. 9 Eq. 363; *Ebbett's case*, L. R. 5 Ch. 302; and he should likewise give notice thereof to the world, otherwise he will be liable on partnership contracts made after his attaining twenty-one: *Goode* v. *Harrison*, 5 B. & Ald. 147; but not on those made during his non-age: 37 & 38 Vict. c. 62, s. 2. Nor can he as against his co-partners insist that on taking the partnership account he shall be credited with profits and not be debited with losses. "The infant partner must either repudiate or abide by the agreement, under which alone he is entitled to any share of the profits": Lindley on Partnership, 5th ed. 75; and the judgment of *Parke*, B., in *North Western Rail. Co.* v. *M'Michael*, 5 Ex. 123.

(*d*) Since the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), a married woman may enter into a partnership, either with her husband or any other person.

(*e*) *Duvergier* v. *Fellows*, 10 B. & C. 826; *Armstrong* v. *Lewis*, 2 C. & M. 274; *Hall* v. *Franklin*, 3 M. & W. 259; *Gordon* v. *Howden*, 12 Cl. & Fin. 237; but see *Sharp* v. *Taylor*, 2 Phil. 801.

(*f*) *Cotton*, L. J., in *Walker* v. *Hirsch*, 27 Ch. D. at p. 468.

Partnership—what.

firm, or suffers his name to be used by it, and, as the phrase is, "holds himself out to the world" as a partner therein, is liable for its engagements, and that, whether he have any real interest in the firm or not. It would be highly prejudicial to commerce to allow a wealthy man, by the loan of his name, to give other persons a factitious credit in the world, and then refuse to satisfy creditors who had made their advances upon the faith of his apparent responsibility (*f*). Such a man is usually called a *nominal partner*, a *quasi*-partner, or a partner by estoppel. It has been said to make no difference in his liability, that the creditor of the firm who seeks to charge him was not aware of such holding out at the time that he made his advance (*g*). But this is incorrect; there is no duty to the creditor unless the "holding out" was with his knowledge (*h*). In order to fix a person with responsibility of this description, no particular mode of holding himself out to the world as a partner is required. If he do acts, no matter of what kind, sufficient to induce others to believe that he is a partner, he will be chargeable as such: *ex. gr.*, if he accept bills drawn on the firm (*i*), or describe himself as having a joint interest in its property (*k*). But a man who describes himself as partner with another in a particular kind of transaction, *ex. gr.*, in discounting bills, does not thereby hold himself out as his general partner in any other business which he may happen to profess (*l*); and if the acts relied on as constituting a holding out were done without the knowledge or default of the person thereby represented as a partner, or if

(*f*) *Guidon* v. *Robson*, 2 Camp. 302; *Waugh* v. *Carver*, 2 H. Bl. 235; 1 Sm. L. C. 877; *Mollwo* v. *Court of Wards*, L. R. 4 P. C. 419.

(*g*) *Young* v. *Axtel*, cited 2 H. Bl. 242; 1 Sm. L. C. 887.

(*h*) See the expressions of *Parke*, J., in *Dickinson* v. *Valpy*, 10 B. & C. at p. 140. "If it could have been proved that the defendant had held himself out to be a partner, not *to the world*, for that is a loose expression, but *to the plaintiff himself*, or under such circumstances of publicity as to satisfy a jury that the plaintiff *knew of it, and believed him to be a partner*, he would be liable": *Pott* v. *Eyton*, 3 C. B. 32; *Martyn* v. *Gray*, 14 C. B. N. S. 824; *Carr* v. *L. & N. W. Rail. Co.*, L. R. 10 C. P. p. 316.

(*i*) *Spencer* v. *Billing*, 3 Camp. 310; see *Dickinson* v. *Valpy*, supra.

(*k*) *Parker* v. *Barker*, 1 B. & B. 9; 3 Moore, 226; *Goode* v. *Harrison*, 5 B. & A. 147; *Swan* v. *Steele*, 7 East, 210; *Mollwo* v. *Court of Wards*, L. R. 4 P. C. 419.

(*l*) *De Berkom* v. *Smith*, 1 Esp. 29; *Ridgway* v. *Philip and Broadhurst*, 1 C. M. & R. 415.

it can be proved that the party seeking to charge him had notice of the real circumstances of the case, he will not be answerable (*m*). Partnership—what.

Section II.—*How formed.*

A partnership must be formed by the intervention of all the persons to be bound by it. One partner may, as we shall see, bind another for many purposes without his knowledge. But there must be consent of every individual member of the firm to authorize the introduction of a new one (*n*); nor can the partners expel one of their members, unless such a power is expressly provided (*o*). So necessary is this consent, that the executors of a deceased partner are not allowed to occupy his place (*p*), unless there be a stipulation in the contract of partnership that they shall do so, in which case *modus et conventio vincunt legem.* But if there be in the articles of partnership an express provision, or in the nature and constitution of the partnership anything which renders it impossible that the members could have expected or intended the consent of the whole body to be applied for upon the occasion of each change, such consent would be unnecessary (*q*). Even where there is no such consent, expressly or impliedly given, the transfer will not be inoperative. A partner may assign or mortgage his share (*r*); and an action may be maintained on an agreement for the sale of it. The sale may be to a co-partner. How formed.

"Is there any authority which says that the beneficial interest of one partner in a partnership, apart from a special contract or stipulation, may not be given or sold by him to another of the co-partners? The authorities which were cited have no tendency to

(*m*) *Fox* v. *Clifton*, 6 Bing. 776; 9 Bing. at p. 118; *Alderson* v. *Pope*, 1 Camp. 403, 404, n.; *Minnit* v. *Whinery*, 5 Bro. P. C. 489; *Mollwo, &c.* v. *Court of Wards*, L. R. 4 P. C. p. 419.

(*n*) *Watney* v. *Trist*, 45 L. J. Ch. D. 412; *Ex parte Barrow*, 2 Rose, 252; *M'Neill* v. *Reid*, 9 Bing. 68; *Kelly* v. *Hutton*, L. R. 3 Ch. 703.

(*o*) *Wood* v. *Woad*, L. R. 9 Ex. 190.

(*p*) *Pearce* v. *Chamberlain*, 2 Ves. senr. 33.

(*q*) *Lovegrove* v. *Nelson*, 3 M. & K. 20; Lindley, 5th ed. 365.

(*r*) *Bray* v. *Fromont*, 6 Madd. 5; *Jefferys* v. *Smith*, 3 Russ. 158; *Kelly* v. *Hutton*, L. R. 3 Ch. 703; *Tempest* v. *Kilner*, 2 C. B. 300.

Partnership—how formed.

establish such a principle. They relate to dealings by a partner, during the continuance of the partnership, with either present or future partnership assets or liabilities. A man obtaining his *locus standi*, and his opportunity for making such arrangements, by the position he occupies as a partner, is bound by his obligations to his co-partners in such dealings not to separate his interest from theirs, but if he acquires any benefit to communicate it to them. I should be sorry to see the day when the principle of such cases as *Featherstonhaugh* v. *Fenwick* (*s*) could be disturbed or called in question.... If that or any other bargain, made by a partner with another partner, being concealed, were used for unfair or illegitimate purposes in the subsequent part of the partnership concern, and if when the facts became known it should appear that wrong had been done, and damage sustained by means of any such secret arrangement between two partners, redress suitable to the nature of the injury and the circumstances of the case, might probably be found. But that would depend, not on the agreement by one partner to give a beneficial interest in his share to another, but upon the use assumed to have been made of that agreement in an illegitimate way to the prejudice of a third partner, and upon proof of actual damage having occurred" (*t*).

Respecting the formation of the contract of partnership, it need only further be observed, that it is not one of those which the law requires to be in writing, and it may therefore either be concluded or varied by mere words, or inferred from the acts of the parties (*u*).

The Companies Act, 1862, has imposed a restriction, unknown at common law, upon the number of partners. A partnership may consist of any number not exceeding ten in the case of a banking partnership, and in the case of any other partnership twenty (*x*). A partnership in excess of these limits must be registered under the Companies Act, 1862, or formed in accordance with an Act of Parliament, charter, or letters patent, or be

(*s*) 17 Ves. 298.

(*t*) Lord *Selborne*, L. C., in *Cassels* v. *Stewart*, 6 App. Cas. at pp. 73, 75.

(*u*) *Peacock* v. *Peacock*, 16 Ves. 49; *Alderson* v. *Clay*, 1 Stark. 405; *Dale* v. *Hamilton*, 5 Hare, 369, affirmed 2 Ph. 266.

(*x*) 25 & 26 Vict. c. 89, s. 4, in Appendix. As to the difference between a company and partnership, *Smith* v. *Anderson*, L. R. 15 Ch. D. 247; 50 L. J. Ch. 39. As to what associations must be registered, *Re Padstow Assurance Association*, 20 Ch. D. 137; *In re Siddall*, 29 Ch. D. 1.

within the Stannaries Acts. Any partnership carrying on business without complying with this proviso is illegal; and a person dealing with them with notice of the illegality cannot enforce his claim (*y*). Partnership—how formed.

The name of the firm need not be that of any member of it; partners are free to carry on business under any designation which they think fit to adopt. The designation, however, must not be calculated to deceive the public (*z*). "It is a fraud," said *Gifford*, L. J., in *Lee* v. *Haley* (*a*), "on a person who has established a trade, and carries it on under a given name, that some other person should assume the same name, or the same name with a slight alteration in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name." Hence the members of a partnership may restrain a joint stock company from being registered under a name so much alike as to mislead people into believing that they were dealing with the former (*b*). The name of a firm may be registered as a trade mark for particular goods or classes of goods (*c*).

Section III.—*How dissolved.*

Three cases have to be considered; (1) when the contract of partnership provides for the dissolution; (2) when the dissolution of the partnership takes place by order of the Court; (3) when the dissolution takes place by operation of law without the aid of the Court. How dissolved.

It often happens that at the time of the formation of a contract of partnership the parties expressly agree that it shall endure but for a stated period. There may also happen cases in which, though there be no express provision, an implied con-

(*y*) 25 & 26 Vict. c. 89, s. 4, in Appendix; *Sykes* v. *Beadon*, 11 Ch. D. 569; *Shaw* v. *Benson*, 11 Q. B. D. 563.

(*z*) *Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. D. 748; *Merchant Banking Co. of London* v. *Merchants' Joint Stock Co.*, 9 Ch. D. 560; and 25 & 26 Vict. c. 89, s. 20. See *Levy* v. *Walker*, 10 Ch. D. at p. 445.

(*a*) L. R. 5 Ch. 155, at p. 161; *Massam* v. *Thorley's Cattle Food*, 14 Ch. D. 748; *Singer's Manufacturing Co.* v. *Loog*, 8 App. Cas. 15.

(*b*) *Hendriks* v. *Montagu*, 17 Ch. D. 638.

(*c*) 46 & 47 Vict. c. 57, ss. 65, 66. See Appendix.

Partnership—how dissolved.

tract as to its duration may arise: for instance, partners may purchase leasehold interests of such a description as to raise a fair presumption that they intended to continue the partnership as long as those leases should endure (*c*), though such a circumstance is by no means conclusive. If a limit to the term of partnership be thus prefixed, the contract will, of course, dissolve on its arrival. It may likewise be dissolved by mutual consent.

The Chancery Division (*d*) has power to put an end to it by its decrees; a power which it will exercise if the partnership have been brought about by misrepresentation (*e*); or in case the partnership undertaking turn out impracticable (*f*), or hopelessly embarrassed (*g*), or one of the partners become an incurable lunatic (*h*), or be guilty of gross misconduct, such as refusing to account for his receipts, or to submit his dealings to the examination of his companions (*i*), or because he has rendered himself liable to a criminal prosecution (*j*). The Court may order a return of premium, or do otherwise what is equitable between the parties (*k*). But to induce the Court to interfere in this manner there must be some serious reason given; the existence of comparatively unimportant disputes and squabbles will not be sufficient (*l*).

It will be seen in the chapter on joint stock companies,

(*c*) *Crawshay* v. *Maule*, 1 Swanst. at p. 521; *Miller* v. *Walker*, 3 Sc. Sess. Cas. (4th Ser.) 242.

(*d*) 36 & 37 Vict. c. 66, s. 34 (3).

(*e*) *Rawling* v. *Wickham*, 1 Giff. 355; 3 De G. & J. 304; *Jauncey* v. *Knowles*, 29 L. J. Ch. 95; *Venezuela Rail. Co.* v. *Kisch*, L. R. 2 H. L. 99; *Redgrave* v. *Hurd*, 20 Ch. D. 1; *Adam* v. *Newbigging*, 13 App. Cas. 308; 57 L. J. Ch. 1066.

(*f*) *Baring* v. *Dix*, 1 Cox, 213. See *Waters* v. *Taylor*, 2 V. & B. 299; *Jennings* v. *Baddeley*, 3 Kay & J. 78; *Wilson* v. *Church*, 13 Ch. D. 1; 5 App. Cas. 176.

(*g*) *Bailey* v. *Ford*, 13 Sim. 495.

(*h*) *Jones* v. *Lloyd*, L. R. 18 Eq. 265; *Kirby* v. *Carr*, 3 Y. & C. 184. Lunacy of a partner is not ipso facto a dissolution, but only ground upon which the Court will decree one: *Jones* v. *Noy*, 2 My. & K. 125; *Besch* v. *Frolich*, 1 Ph. 172; *Anon.*, 2 K. & J. 441; *Jones* v. *Lloyd*, supra; and if the articles provide that the partnership may be dissolved upon notice, such notice, if given to the lunatic, will be effectual: *Robertson* v. *Lockie*, 15 Sim. 285.

(*i*) See *Goodman* v. *Whitcomb*, 1 Jac. & Walk. 592; *Chapman* v. *Beach*, Id. 594; *Marshall* v. *Colman*, 2 Jac. & Walk. 266; *Harrison* v. *Tennant*, 21 Beav. 482; *Wood* v. *Woad*, L. R. 9 Ex. 190.

(*j*) *Essell* v. *Hayward*, 30 Beav. 158; 29 L. J. Ch. 806.

(*k*) *Yates* v. *Cousins*, 60 L. T. N. S. 535.

(*l*) *Wray* v. *Hutchinson*, 2 My. & K. 235; *Atwood* v. *Maude*, L. R. 3 Ch. 369.

Partnership—how dissolved.

that a shareholder who has been induced to become such by fraud or misrepresentation cannot obtain a rescission of the contract when the company is insolvent (*m*). This is not so in the case of an ordinary partnership. A partner who has been deceived by fraudulent representation may have the contract set aside, even if the partnership is insolvent, and is entitled to a lien on the surplus of the partnership assets after satisfying liabilities (*n*); whether he may require the partners who have deceived him to indemnify him against the outstanding debts of the firm is uncertain (*o*).

If no limit to the partnership was originally fixed, it is called a *partnership at will*, and may be dissolved at the individual pleasure of either party at even a moment's notice (*p*); though, of course, subsisting engagements must be provided for (*q*). The notice must be explicit, and given to all the partners (*r*).

In all cases a partnership is dissolved, without application to the Court, by the bankruptcy of any one of the partners followed by adjudication (*s*), by his outlawry, or attainder of treason or

(*m*) *Tennent* v. *City of Glasgow Bank*, 4 App. Cas. 615.

(*n*) *Mycock* v. *Beatson*, 13 Ch. D. 384.

(*o*) *Adam* v. *Newbigging*, 13 App. Cas. 308.

(*p*) *Nerot* v. *Burnand*, 4 Russ. at p. 260; *Peacock* v. *Peacock*, 16 Ves. 49; *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298; *Heath* v. *Evans*, 4 B. & Ad. at p. 175, per *Parke*, J.; *Holland* v. *King*, 6 C. B. 727; *Lyon* v. *Tweddell*, 17 Ch. D. 529 (as to date from which dissolution ordered).

(*q*) In Scotland it has been held the "dissolution must not be fraudulent, nor at such a time as to injure the other partners": Bell, 2. 322; Lindley, 571; Lord *Watson*, in *Neilson* v. *Mossend Iron Co.*, 11 App. Cas. at p. 309.

(*r*) Lindley, 571; *Syers* v. *Syers*, 1 App. Cas. 174. The Indian Contract Act, s. 254 (which substantially repeats the effect of the English decisions), enumerates the following cases in which the Court may dissolve the partnership:—

(1) When a partner becomes of unsound mind;

(2) When a partner, other than the partner suing, has been adjudicated an insolvent under any law relating to insolvent debtors;

(3) When a partner, other than the partner suing, has done an act by which the whole interest of such partner is legally transferred to a third person;

(4) When any partner becomes incapable of performing his part of the partnership contract;

(5) When a partner, other than the partner suing, is guilty of gross misconduct in the affairs of the partnership or towards his partners;

(6) When the business of the partnership can only be carried on at a loss.

(*s*) *Fox* v. *Hanbury*, Cowp. 445; *Ex parte Smith*, 5 Ves. 295; *Crawshay* v. *Maule*, 1 Swanst. 507, n.

Partnership—how dissolved.

felony; for the first of these disqualifies him for the duties of a partner, and the others strip him of all civil capacity (*r*). It has been thought that a sale of the common stock under a separate execution against one of the partners would amount to a dissolution of the partnership (*s*). In effect this happens when a stranger is the purchaser of the interest. "What the sheriff has got to sell," said *Lindley*, L. J., in *Helmore* v. *Smith* (*t*), "is not the share and interest of the execution debtor in the partnership, but the share and interest of the execution debtor in such of the chattels of the partnership as are seizable under a *fi. fa.* The unfortunate purchaser from the sheriff has to find out what he has really had assigned to him, and that he can only do by a partnership account; there is no other method of proceeding. That does involve practically a dissolution of the whole concern."

The death of one of the partners operates, of course, as a dissolution, since we have seen that his executors cannot represent him (*u*). Formerly this was also the effect of the marriage of a female partner (*x*); but since the passing of the Married Women's Property Act, 1882, this appears to be no longer the case.

Whenever any of the above circumstances happen, the entire firm, though it consists of ever so many, is dissolved, unless the contrary have been in express terms provided for (*y*); though the remaining partners may, of course, come to a new agreement to carry on the business upon the old terms. And herein our law adopts the maxim of the civilians: *cum aliquis renunciaverit societati solvitur societas;* the reason of which is thus ex-

(*r*) Publicatione quoque distrahi societatem manifestum est; scilicet, si universa bona socii publicentur: nam, cum in ejus locum alius succedat, pro mortuo habetur: Inst. 3. 25, 7; Lindley, 74, 583.

(*s*) *Waters* v. *Taylor*, 2 V. & B. 299; Lindley, 583.

(*t*) 35 Ch. D. 436, at p. 447.

(*u*) Si consensu plurium societas contracta sit; morte unius socii solvitur, etsi plures supersint: Inst. 3. 25, 5. *Bank of Scotland* v. *Christie*, 8 Cl. & F. 214.

(*x*) *Nerot* v. *Burnand*, 4 Russ. 247, at p. 260.

(*y*) *Crawshay* v. *Collins*, 15 Ves. 228; *Kinder* v. *Taylor*, Gow, Part. 240; *Crawshay* v. *Maule*, 1 Swanst. 509, in notis. Si quis ex sociis mole debiti prægravatus, bonis suis cesserit, et ideo propter publica aut privata debita substantia ejus veneat, solvitur societas: Inst. 3. 25, 8. As to expulsion of partners under stipulations in articles of partnership, see *Cooper* v. *Page*, 34 L. T. N. S. 90.

pressed by M. Pothier, "*Traité du Contrat de Société*," cap. 8, § 3: "*La raison est que les qualités personnelles de chacun des associés entrent en considération dans le contrat de société*"—a reason upon which the law of England sometimes acts in pronouncing other contracts dissolved on the secession of a party whose personal qualifications may have been the chief inducement to enter into them (*z*). When the term of partnership agreed upon has expired, and it is continued, the partnership will be taken to be continued on the old terms, so far as they are not inconsistent with the implied terms of a partnership at will (*a*). Partnership—how dissolved.

A partner may, with the consent of the other partners, retire from the firm without its being dissolved; he may, for instance, sell his interest to them (*b*). Such a transaction, converting joint into separate estate, will bind the trustee in bankruptcy if the contract be made *bonâ fide* and carried into effect before the commission of an act of bankruptcy. If merely executory, it will not bind the trustee (*c*).

The above are the modes in which a partnership may be determined *as between the partners themselves*. Those who desire to end it *as to strangers*, should give notice to the world of its dissolution, otherwise they hold themselves out as being still in conjunction with their late partners, and will continue to be bound by their engagements (*d*). The mode of giving this notice will be hereafter described, when we come to speak of the time at which the liability of partners to third persons determines.

(*z*) *Robson* v. *Drummond*, 2 B. & Ad. 303; *Griffiths* v. *Griffiths*, 2 Hare, 587, where *Wigram*, V.-C., held that the retirement of one member of a firm of attorneys discharged their retainer by a client: *Rawlinson* v. *Moss*, 30 L. J. Ch. 797; and see *Tasker* v. *Shepherd*, 6 H. & N. 575; *Farrow* v. *Wilson*, L. R. 4 C. P. 744.

(*a*) *Cox* v. *Willoughby*, 13 Ch. D. 863; *Clarke* v. *Leach*, 1 De G. J. & S. 409; *Neilson* v. *Mossend Iron Co.*, L. R. 11 App. Cas. 298.

(*b*) Lindley, 573.

(*c*) *Re Simpson*, L. R. 9 Ch. 572; *Ex parte Wood*, 10 Ch. D. 554.

(*d*) *Parke*, B., in *Freeman* v. *Cooke*, 2 Ex. 654, at pp. 663, 664; *Parkins* v. *Carruthers*, 3 Esp. 248; *Graham* v. *Hope*, Peake, 154.

Section IV.—*Rights and Liabilities of Partners among themselves.*

Rights and liabilities of partners among themselves.

Partners are jointly, and, in the absence of evidence (*y*) to the contrary, are taken to be equally (*z*), interested in the partnership stock and effects, subject to the application of a maxim which will hereafter be discussed, viz., "*Jus accrescendi inter mercatores locum non habet*" (*a*). But equity, which exercises a peculiar jurisdiction over the accounts of partners, has always looked on the right of each in the joint stock as subject to the state of those accounts; so that, as between himself and his companions, his valuable interest may amount to little or nothing. Nay, he may be indebted to the concern of which he is a member. A partnership is held in equity so far distinct from the individuals composing it, that each of them may buy or borrow from the firm, and the firm from him *vice versâ* (*b*). Although each partner, acting as such, can, as we shall hereafter see, bind the joint stock by dealing with strangers in the name of the firm, yet he cannot do so by any act on his own individual account, to a larger extent than his own interest. Thus, though the goods may be taken, and *his share* therein sold for his own private debt, yet the purchaser from the sheriff buys only that to which the defendant is (as between himself and his companions) justly entitled (*c*); and the rule is the same if he become individually a bankrupt (*d*).

(*y*) *Stewart* v. *Forbes*, 1 Mac. & G. 137; 1 H. & T. 401.

(*z*) *Brown* v. *Dale*, 9 Ch. D. 78; *Robinson* v. *Anderson*, 20 Beav. 98; 7 De G. M. & G. 239. In the absence of agreement, a partner's right seems like that of other joint-owners: if there be two, an undivided moiety; if three, a third; and so on: *Farrar* v. *Beswick*, 1 M. & Rob. 527; *Mayhew* v. *Herrick*, 7 C. B. 229; *Stewart* v. *Forbes*, ubi sup.; Lindley, 5th ed. 349, 568; and see the rule of the civil law, ante, p. 11, n.

(*a*) Vide Book II. As to the relationship between surviving partners and the representatives of a deceased partner, see *Knox* v. *Gye*, L. R. 5 H. L. 656.

(*b*) But pending the partnership, and before any settlement of *accounts*, the advances are not treated as debts; they are only items in the account between the partners. See Lord *Cottenham*, C., *Richardson* v. *Bank of England*, 4 My. & Cr. at p. 172.

(*c*) *Chapman* v. *Koops*, 3 B. & P. 289; *Farquhar* v. *Hadden*, L. R. 7 Ch. 1; *Johnson* v. *Evans*, 7 M. & G. 240. As to the rights and powers of the purchaser, under such circumstances, see *Fraser* v. *Kershaw*, 2 Kay & J. 496; *Helmore* v. *Smith*, 35 Ch. D. 436.

(*d*) *West* v. *Skip*, 1 Ves. sen. 242;

Rights and liabilities of partners among themselves.

To ascertain each partner's share in the joint stock, it is primarily important to know what property is comprehended within that denomination. Now it by no means follows that, because property has been used or risked for the service of the firm, it is therefore partnership property. It may be the sole property of any one of the partners. Thus, if A., being the owner of a parcel of goods, propose to B. that they should exert themselves jointly in selling them, and divide the profit, B., although a partner in the profits, is not so in the goods, nor are they any part of the joint stock, but the sole property of A., risked by him for the service of the partnership (*e*). But partnerships may, and do, exist in which all the capital is contributed by one, and nothing but his labour by the other, who, nevertheless, is entitled to consider the capital as joint stock, and claim an equal share of it or its produce (*f*). The law in all these cases moulds itself to the intention of the parties when that can be ascertained, and is conformable in this respect to the doctrine laid down by continental jurists (*g*).

Land which has become partnership property is treated as between the partners and their representatives as personal property, unless the contrary is agreed upon, or an intention to the contrary may be collected from the contract of the parties. Thus, as personalty, it is subject to probate duty (*h*).

In the conduct of partners towards each other, the most scrupulous fidelity must be observed, and its observance is enforced by Courts. Thus, one is not allowed to obtain any private advantage at the expense of the rest; if he do, he will be prevented from enjoying it, or compelled to hold it as

Holderness v. *Shackles*, 8 B. & C. 612. There are several peculiar rules adapted to the case of a bankrupt partner: these will be treated of in the Fourth Book, under the head of "Bankruptcy."

(*e*) *Smith* v. *Watson*, 2 B. & C. 401; *Meyer* v. *Sharpe*, 5 Taunt. 74; *Burdon* v. *Barkus*, 3 Giff. 412. See *Ex parte Hamper*, 17 Ves. 404; *Wedderburn* v. *Wedderburn*, 4 My. & Cr. 41, 1st point; *Waterer* v. *Waterer*, L. R. 15 Eq. 402.

(*f*) *Reid* v. *Hollinshead*, 4 B. & C. 867; *Fromont* v. *Coupland*, 2 Bing. 170; *Robinson* v. *Ashton*, L. R. 20 Eq. 25; *Kenny's Patent Button Holeing Co.* v. *Somervell*, 38 L. T. N. S. 878.

(*g*) See Pothier, "Contrat de Société," c. 2, s. 1, Art. 1, § 1.

(*h*) *Att.-Gen.* v. *Hubbuck*, 10 Q. B. D. 488; *Darby* v. *Darby*, 3 Drew. 495; *Waterer* v. *Waterer*, L. R. 15 Eq. 402; *Steward* v. *Blakeway*, L. R. 4 Ch. 603.

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a trustee for their benefit (*i*). "It is clear," said Sir *William Grant*, M. R., "that one partner cannot treat privately, and behind the backs of his co-partners, for a lease of the premises, where the joint trade is carried on, for his own individual benefit; if he does so treat, and obtains a lease in his own name, it is a trust for the partnership" (*k*). In like manner, if he carries on a business which competes with that of which he is a partner, or if he sells goods to his firm without informing his fellow partners that he is the vendor, or obtains advantages from the employment of partnership property, he will be bound to account for the profits (*l*). A partner must not place himself in a situation likely to give him an interest, or even a bias, against the discharge of his duty (*m*); all which results from that broad principle of equity, that, from every person standing in a situation of trust and confidence with respect to another, a conduct marked with the most scrupulous good faith shall be required. It is almost superfluous to observe, that, in the case of partnership, *good faith* dictates not merely abstinence from all deceit and injury, but zealous co-operation in the objects of the concern, honourable exactness in keeping accounts, and readiness to submit them to inspection. Surely, considering that each partner is the accredited agent of the rest, and has power to bind them to all contracts within the scope of the joint trade, no one can blame the strictness with which this *good faith* is required by Courts, which will even declare the partnership dissolved, in case of any very flagrant breach thereof (*n*). This is, however,

(*i*) *Russell* v. *Austwick*, 1 Sim. 52; *Maddeford* v. *Austwick*, Id. 89; and see *Somerville* v. *Mackay*, 16 Ves. 382; *Fawcett* v. *Whitehouse*, 1 Russ. & My. 132; *Liquidators of Imperial Merc. Credit Co.* v. *Coleman*, L. R. 6 H. L. 189.

(*k*) *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298, 311; 2 Hov. Suppl. 478; *Clegg* v. *Fishwick*, 1 Mac. & G. 294; 1 H. & T. 390; see *Clegg* v. *Edmondson*, 26 L. J. Ch. 673; *Bourdon* v. *Barkus*, 4 De G. F. & S. 42; *Wedderburn* v. *Wedderburn*, 22 Beav. at p. 104; *Cassels* v. *Stewart*, 6 App. Cas. 64, 74. The civil law went even further: Plane, si quis callide in hoc renunciaverit societati, ut obveniens aliquod lucrum solus habeat . . . cogetur hoc lucrum communicare: Inst. 3. 25, 4.

(*l*) *Hancock* v. *Heaton*, 30 L. T. 592; *Dean* v. *Macdowell*, 8 Ch. D. 345; *Bentley* v. *Craven*, 18 Beav. 75.

(*m*) *Glassington* v. *Thwaites*, 1 Sim. & Stu. 133; *Burton* v. *Wookey*, 6 Madd. 367.

(*n*) See *Wray* v. *Hutchinson*, 2 Myl. & K. 235, at p. 238.

done with great reluctance; and the contract of partnership has been, not unaptly, compared by an eminent judge to that of marriage; since the parties to each take one another for better and for worse, and must not call at every turn upon the law to rectify the consequence of their own want of foresight.

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While subject to the *duties* of agents, partners possess *rights* as such, and they are entitled to be indemnified in respect of expenses incurred or contracts entered into in respect of partnership business (*o*).

It has been already observed that a partnership is often contracted in writing; such an agreement usually goes by the name of Articles of Partnership. Where these exist, they must, of course, as far as they go, be acted on, for *modus et conventio vincunt legem.* Their terms, however, are explained, and their deficiencies supplied, by reference to the above principles, which they themselves, indeed, in many parts, do little other than express (*p*). They generally declare the objects of the partnership; the time at which it is to commence, which, if no other be specified, is from the date of the articles (*q*); that at which it is to end; the amount of capital, and the proportions in which it is to be advanced by, and in which the profits of the trade are to be distributed among, the partners, who stipulate therein for the due performance of their respective duties. It is sometimes also provided that differences among them shall be ended by the vote of the majority, and in the absence of any agreement to the contrary it will be assumed that, as to matters incidental to the proper business of the partnership, the opinion of the majority must prevail (*r*). Almost always it is provided that an account shall be taken annually of the debts and effects of the partnership, and a particular mode of winding up affairs pursued upon its dissolution, in general, either by turning all the effects into money, and dividing them, which is the course pursued (*r*) by Courts if there be no stipulation on the sub-

(*o*) *Burden* v. *Burden*, 1 V. & B. 172; *Curtis* v. *Barclay*, 5 B. & C. 141; Lindley on Partnership, 5th ed., pp. 370, 382.

(*p*) See as to partnership articles, Davidson's Precedents in Conveyancing, 5, Part II. 303; 2 Key & Elphinstone, 2nd ed. 291.

(*q*) *Williams* v. *Jones*, 5 B. & C. 108.

(*r*) *Levy* v. *Walker*, 10 Ch. D. 436; Lindley on Partnership, 5th ed. 313.

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ject, or by the transfer of one partner's share to the other at a valuation. Sometimes, also, it is agreed, that the executor or other person appointed in the will of a partner shall succeed him. Where there is such a clause, its general effect appears to be to give the executor, or appointee, his option whether he will remain a member of the firm, or have its affairs wound up, and his share ascertained and paid to him (*s*). And he will be entitled to a reasonable time, and an inspection of the partnership accounts to assist him in his election (*t*). Yet upon principle it seems, and probably would be decided that, if the testator intended him to have no option, he must either conform and carry on the trade, or relinquish his claim to any benefit under the will appointing him (*u*); and it behoves him to consider very warily, for if he once become a member of the firm, though but in trust for others, he will be liable, like any other partner, for its engagements, both in person and property, and may even become bankrupt (*x*). It has been usual to stipulate that disputes between partners shall be referred to arbitration; and the Court or a Judge has a discretionary power to compel a reference in such a case (*y*).

In construing these instruments, the Courts look mainly to the intention of the parties as evidenced by their conduct, and if they find that some of the provisions have been purposely and uniformly disregarded by all the partners or with their consent, the Courts will even consider them totally dispensed with.

"There would," said Lord *Eldon*, in the case of *Jackson* v. *Sedgwick* (*z*), "be no difficulty in applying the articles to the particular business with reference to which they were framed. But if the

(*s*) *Kershaw* v. *Matthews*, 1 Russ. 361; 2 Russ. 62; *Madgwick* v. *Wimble*, 6 Beav. 495.

(*t*) *Pigott* v. *Bayley*, M'Cl. & Y. 569; but see, where there is a specified time, *Holland* v. *King*, 6 C. B. 727; as to lien on partnership assets, *Ex parte Wood*, 10 Ch. D. 554; as to rights of deceased partner's estate when his capital is left in the business, *Vyse* v. *Foster*, L. R. 7 H. L. 318, at p. 329.

(*u*) See Lord *Eldon's* observations in *Crawshay* v. *Maule*, 1 Swanst. 512.

(*x*) *Wightman* v. *Townroe*, 1 M. & S. 412; *Ex parte Richardson*, Buck. 202; *The Liverpool Bank* v. *Walker*, 4 De G. & J. 24.

(*y*) 17 & 18 Vict. c. 125, s. 11. See *Law* v. *Garrell*, 8 Ch. D. 26; *Russell* v. *Russell*, 14 Ch. D. 471.

(*z*) 1 Swanst. 460; *England* v. *Curling*, 8 Beav. 129; *Const* v. *Harris*, 1 T. & R. 523; *Ex parte Barber*, L. R. 5 Ch. 687.

parties engage in business in which their application would work injustice, then, I say, that these articles, though they contain a general reference to other business, are not such as would have been prepared with relation to that specific business, and that engaging in that business affords a reason for not performing the stipulations."

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By section 34 of the Judicature Act, 1873, is assigned to the Chancery Division, among other matters, "the dissolution of partnerships or the taking of partnerships or other accounts." But, subject to this, proceedings relative to partnerships may be taken in either the Chancery or Queen's Bench Division. Actions cannot now be defeated by misjoinder or nonjoinder of parties; pleas in abatement are abolished; and it is now competent for a partner to sue or be sued by a firm, or for two firms having a common partner to sue each other (*a*).

If there be so flagrant a violation of any covenant contained in articles of partnership as to call for a dissolution of the entire contract, the Court will enforce that dissolution by its order; but where there is a covenant, and therefore another adequate remedy, it has a strong disinclination to interfere in any case of less importance (*b*); unless, perhaps, under circumstances of peculiar aggravation and hardship (*c*); especially if the remedy were inadequate to compensate the party injured.

The Court will also examine and adjust the accounts of partners between themselves, but whether a partner can pray for an account without a dissolution of the partnership has been questioned. Lord *Eldon* seems to have thought, and Sir *L. Shadwell* decided, that he could not (*d*); but Sir *John Leach* sustained the contrary opinion (*e*), which, from Lord *Cottenham's*

(*a*) Lindley on Partnership, 5th ed. p. 267.

(*b*) *Marshall* v. *Colman*, 2 Jac. & W. 266.

(*c*) Ibid.

(*d*) *Forman* v. *Homfray*, 2 Ves. & Bea. 329; *Loscombe* v. *Russell*, 4 Sim. 10; see also *Knebell* v. *White*, 2 Y. & C. 16; and *Richardson* v. *Bank of England*, 4 My. & C. 170.

(*e*) *Harrison* v. *Armitage*, 4 Madd. 143; *Richards* v. *Davies*, 2 Russ. & My. 347; *Sheppard* v. *Oxenford*, 1 K. & J. 491; and see Lord *Cottenham's* judgment in *Wallworth* v. *Holt*, 4 My. & C. 619; *Richardson* v. *Hastings*, 7 Beav. 323: *Decks* v. *Stanhope*, 14 Sim. 57; *Harvey* v. *Bignold*, 8 Beav. 343.

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judgment in *Wallworth* v. *Holt* (*f*), seems to be the better one, at all events where the account is not sought with the mere object of a division of profits. Therefore, when one partner is violating the partnership contract for the fraudulent purpose of compelling a dissolution, and has excluded his co-partner from the books, and refused to give any account, the Court will entertain an action which has for its object the enabling of the latter to have the benefit of the articles without a dissolution, and will grant him relief, and some account as incidental to it (*g*). And if, in a continuing partnership, a few have an interest in a particular subject-matter adverse to the rest, and claim the benefit of that interest for themselves, an action may be maintained against those few by one or more of the other parties on behalf of himself and all the rest, praying an account respecting it, without praying even a general account (*h*).

On decreeing a dissolution and taking the account, the Court has power to order a sale of the partnership effects and goodwill and a division of the produce (*i*), in the proportion to which it considers each partner entitled. It may decide as to the use of the old name. It may also order any premium, or part of it, to be repaid. In fixing the proportion (*k*) to be repaid, the Court takes into consideration, not merely the balance upon all transactions completed at the period of the dissolution, but also such as were at that time pending, and from which profit or loss has since resulted (*l*). Nay, if one partner die, or become

(*f*) 4 My & C. 619. See *Pole* v. *Masterman*, 21 Beav. 61; *Bromley* v. *Williams*, 32 Beav. 177; *Watney* v. *Trist*, 45 L. J. Ch. D. 412.

(*g*) *Fairthorne* v. *Weston*, 3 Hare, 387.

(*h*) *Richardson* v. *Hastings*, ubi sup., per Lord *Langdale*, M. R.; *Harvey* v. *Bignold*, 8 Beav. 343.

(*i*) *Crawshay* v. *Collins*, 15 Ves. 218; *Wilson* v. *Greenwood*, 1 Swanst. 471; *Class* v. *Marshall*, 33 W. R. 409; *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298; *Darby* v. *Darby*, 3 Drew. 303; *Levy* v. *Walker*, 10 Ch. 436; *Reynolds* v. *Bullock*, 47 L. J. Ch. 773.

(*k*) *Bluck* v. *Capstick*, 12 Ch. D. 863.

(*l*) *Jackson* v. *Sedgwick*, 1 Swanst. 468; *Burdon* v. *Barkus*, 3 Giff. 412; *M'Lean* v. *Kennard*, L. R. 9 Ch. 336. In certain cases it will also give him a proportion of a premium paid by him on entering the firm: *Astle* v. *Wright*, 23 Beav. 77; *Atwood* v. *Maude*, L. R. 3 Ch. 369; *Bluck* v. *Capstick*, 12 Ch. D. 863; *Wilson* v. *Johnstone*, L. R. 16 Eq. 606; *Lyon* v. *Tweddell*, 17 Ch. D. 529. The authorities are not agreed as to whether the rule applies to premature dissolution by the parties as well as to premature dissolution by the Court. The matter appears to be

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bankrupt, which, we have seen, causes the immediate dissolution of the concern, and the remaining partners continue to trade with the joint stock, the representatives of their late partner will be entitled to a portion of the profits, since his property was made use of in order to acquire them, and was thus exposed to the risks of bankruptcy (*m*). But the executors incur no liability merely from the circumstance that business is carried on by the surviving partners in the old name of the firm (*n*). They will be personally liable if they carry on the business, accept bills, &c., in their own names or in the name of their testator's firm (*o*). The claim of representatives of a deceased partner against a surviving partner is of the nature of a simple contract debt. Hence, in *Knox* v. *Gye* (*p*), it was decided by the House of Lords that a suit for an account by the representatives of a deceased partner against a surviving partner was barred by the lapse of six years from the partner's death.

In cases of misconduct the Court will sometimes interfere, by restraining by injunction the offender from a repetition of his ill-behaviour. In some cases, too, where one partner seeks to exclude another from that share of the concern to which he is entitled, and the partnership concern is in danger (*q*), the Court will appoint a receiver of the partnership stock (*r*), but with reluctance, since such a step can scarcely be taken without injury to the trade (*s*).

discretionary: *Lyon* v. *Tweddell*, 17 Ch. D. 529; *Edmonds* v. *Robinson*, 29 Ch. D. 170 (where an unsuccessful attempt was made to obtain a return of the premium after judgment in an action for dissolution of partnership).

(*m*) *Crawshay* v. *Collins*, 15 Ves. 218; 2 Russ. 325; see *Brown* v. *De Tastet*, Jac. 292; *Wedderburn* v. *Wedderburn*, 4 My. & C. 47; 22 Beav. 84; *Vyse* v. *Foster*, L. R. 7 H. L. 318; *Yates* v. *Finn*, L. R. 13 Ch. D. 839; *Straker* v. *Wilson*, L. R. 6 Ch. 503; *Ewing* v. *Ewing*, 8 App. Cas. 822; *Beresford* v. *Browning*, 1 Ch. D. 30.

(*n*) Lindley on Partnership, 5th ed. 590, 604.

(*o*) Lindley on Partnership, 5th ed. 604; *Lucas* v. *Williams*, 3 Giff. 150.

(*p*) L. R. 5 H. L. 656.

(*q*) *Hall* v. *Hall*, 20 L. J. Ch. 585; and in general a receiver and manager will only be appointed as ancillary to a dissolution: Ib. But see *Medwin* v. *Ditcham*, 47 L. T. 250; *Roberts* v. *Eberhardt*, Kay, 148; *Taylor* v. *Neate*, 39 Ch. D. 538.

(*r*) *Wilson* v. *Greenwood*, 1 Swanst. 471; *Peacock* v. *Peacock*, 16 Ves. 49.

(*s*) *Goodman* v. *Whitcomb*, 1 Jac. & Walk. 589; *Oliver* v. *Hamilton*, 2 Anst. 453; *Richards* v. *Davies*, 2 Russ. & M. 347; *Madgwick* v. *Wimble*, 6 Beav. 495; *Hall* v. *Hall*, ubi supra.

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Formerly criminal proceedings could not be taken by his partners against a member of the firm who misappropriated its effects; but now, if he steals or embezzles them, he may be punished as if he had not been a partner (*t*).

Section V.—*Rights of Third Persons against Partners.*

Rights of third persons against partners.

Next, as to the rights of third persons against the partnership. It is a general rule, that *each partner is the accredited agent of the rest, and has authority as such to bind them, either by contracts respecting the goods or usual business of the firm, or by negotiable instruments circulated in its behalf, to any person dealing bonâ fide* (*u*).

Although it may have been agreed among themselves that a partner shall have no such authority (*x*), they will be bound, unless the party dealing with him have notice of the arrangement (*y*). And in order to engage the firm, it is not necessary that all its members should be specified; for a partnership comprising several, as A., and B., and C., may carry on trade in the name of one, as A., or in the name of "A. and C.," or even in a fictitious name, or that of a mere stranger; and when any of these methods is adopted, the pledge of the partnership's name binds the whole firm (*z*). Nay, to such an extent is this

(*t*) 31 & 32 Vict. c. 116.

(*u*) *Vere* v. *Ashby*, 10 B. & C. 288; *Bond* v. *Gibson*, 1 Camp. 185; *Wintle* v. *Crowther*, 1 C. & J. 316; *Thicknesse* v. *Bromilow*, 2 C. & J. 425; *Wheatcroft* v. *Hickman*, 8 H. L. Ca. 268; *Hasleham* v. *Young*, 5 Q. B. 833; 13 L. J. Q. B. 205. The text of former editions added after "agent of the rest," the words "whether they be active, nominal or dormant." But if a dormant partner has, in fact, no authority, and he is not known to be a partner, it seems that he cannot bind the other partners. "If, indeed, a mere dormant partner were known to be a partner, and the limitation of his authority were not known, he might be able to draw bills and give orders for goods, which would bind his co-partners; but in the ordinary case this could not be so, and he would not in the slightest degree be in the position of an agent for them": *Cleasby*, B., in *Holme* v. *Hammond*, L. R. 7 Ex. at p. 233; Lindley on Partnership, 5th ed. 125.

(*x*) *South Carolina Bank* v. *Case*, 8 B. & C. 427.

(*y*) *Hawken* v. *Bourne*, 8 M. & W. 703; *Grout* v. *Enthoven*, 1 Exch. 382; and see *Edmunds* v. *Bushell*, L. R. 1 Q. B. 97; and Lindley, 181.

(*z*) *Wintle* v. *Crowther*, 1 C. & J. 316; *Edmunds* v. *Bushell*, L. R. 1 Q. B. 97. But see *Nicholson* v. *Ricketts*, 2 E. & E. 497.

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rule carried, that where two firms have a common partner and a common name, each one can bind the other to the payment of negotiable securities, drawn, indorsed, or accepted in that common name (*a*). For the same reason, if two firms have a common partner notice to the one is deemed notice to the other (*b*).

A partner may bind the rest *by simple contracts;* he cannot, it is said, bind his co-partners *by deed* unless he have express authority *by deed* for that purpose, not even though the contract of partnership were under seal, if it do not contain a specific power to that effect (*c*); nor, it has been said, though the others afterwards acknowledge his authority (*d*); and if he execute such instruments, he will himself be bound, though they will not (*e*). These observations, however, do not apply to cases where the deed is in the nature of a grant. It would seem that one partner can effectually *release* by deed in the name of the firm a debt or claim which they have; and this distinction appears conformable to general principles of law (*f*), since it is clearly

(*a*) *Swan* v. *Steele*, 7 East, 210; *Baker* v. *Charlton*, 1 Peake, 80; see *Lloyd* v. *Ashby*, 2 B. & Ad. 23; *Mollwo, March & Co.* v. *Court of Wards*, L. R. 4 P. C. 419.

(*b*) *Steele* v. *Stuart*, L. R. 2 Eq. 84.

(*c*) *Harrison* v. *Jackson*, 7 T. R. 207; *Hall* v. *Bainbridge*, 1 M. & G. 42; but see *Hall* v. *Dunsterville*, 4 T. R. 313, where it was held that if both partners are present, and one seals, it is sufficient.

(*d*) *Sleiglitz* v. *Eggington*, Holt, N. P. C. 141. *Gibbs*, C. J., gives no reason for his dictum; and it appears to be in conflict with *Tupper* v. *Foulkes*, 9 C. B. N. S. 797.

(*e*) *Elliott* v. *Davies*, 2 B. & P. 338. The reasons given for the above rule by *Kenyon*, C. J., in *Harrison* v. *Jackson*, 7 T. R. at p. 210, are that such a power was unknown to the law merchant, and that it would be productive of inconvenience. "It would extend to the case of mortgages, and would enable a partner to give to a favourite creditor a real lien on the estates of other partners." But such consequences would not result if the partner had not authority, express or implied; and if he had, the inconvenience is not obvious. In general, the ordinary course of business does not require partners to execute deeds. But if it were the business of a partnership to perform acts necessarily and usually requiring the execution of deeds, it is conceived that it would be within the scope of authority of a partner to execute instruments under seal required for the purpose of the partnership. See 2 Moore, Ind. App. 487, where a mortgage executed by some partners was held binding on the others; and article in American Law Review, March 1888, p. 253.

(*f*) 1 Roll. Abr. 410; *Bayley* v. *Lloyd*, 7 Mod. 250; *Ruddock's case*, 6 Co. 252; *Aspinall* v. *London and N. W. Rail. Co.*, 11 Hare, 325; *Hawkshaw* v. *Parkins*, 2 Swanst. 544.

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settled that, "if a party by his own act be barred from recovery in an action, he cannot, by joining other persons as plaintiffs, undo his own act and acquire a right to recover" (*g*). It must be observed, also, that though one partner cannot, unless authorised by deed, bind the remaining members of the firm by deed, so as to render them liable in covenant or as obligors, yet there may be cases in which the deed may bind their *interest* as a writing, in the same manner as the deed of an agent, not himself authorised by deed, has been held to bind his principal as an instrument in writing (*h*).

Moreover, the contract must be *respecting the partnership business.*

"In partnerships, both parties are authorised to treat for each other in everything that concerns or properly belongs to the joint trade, and will bind each other in transactions with every one who is not distinctly informed of any particular circumstances which may vary the case. On the other hand, if the transaction has no apparent relation to the partnership, then the presumption is the other way, and the partnership will not be bound by the acts of one of the partners without special circumstances" (*i*).

Such is the general rule, but it is not easy to draw the exact line, and say what matters are and what are not sufficiently akin to the partnership business. "It has," said *Abbott*, C. J., "undoubtedly been held, that in a matter wholly unconnected with the partnership, one partner cannot bind the other. But the true construction of the rule is this, that the act and assurance of one partner, made *with reference to business transacted by the firm*, will bind all the partners" (*k*); and in that case, a navy

(*g*) *Wallace* v. *Kelsall*, 7 M. & W. 264; *Teed* v. *Johnson*, 11 Exch. 840. But a covenant by one partner not to sue could not be pleaded as a release in an action by both: *Walmsley* v. *Cooper*, 11 A. & E. 216.

(*h*) *Hunter* v. *Parker*, 7 M. & W. 322; *Ex parte Bosanquet*, 1 De G. 432.

(*i*) Per *Eyre*, C. J., in *Ex parte Agace*, 2 Cox, 312, at p. 316; *Armitage* v. *Winterbottom*, 1 M. & G. 130; *St. Aubyn* v. *Smart*, L. R. 5 Eq. 183; 3 Ch. 646.

(*k*) *Sandilands* v. *Marsh*, 2 B. & Ald. 673. That case, however, proceeded on the ground of a recognition and adoption. The Court thought that the defendant must have known or ought to have known the transaction from the partnership books. See *Brettel* v. *Williams*, 4 Ex. 623 (no power in the absence of usage to bind firm by

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agent, whose business is not to deal in annuities, was held to bind his firm, by guaranteeing the payment of an annuity which he had purchased *for a customer*. On the other hand, one partner cannot bind another by submission to arbitration, without some authority beyond that which flows from the general relation of partnership, or unless the other partner assents in some way to the arbitration proceedings (*l*). Nor would the partnership be liable in respect of a banking account opened by one of the partners in his own name.

Sometimes it is said that in order to be authorised an act must not merely relate to the business of the partnership; it must be necessary or apparently necessary in ordinary circumstances. "The act of one partner to bind the firm," it is said, in *Lindley on Partnership*, with reference to *Hawtayne* v. *Bourne* (*m*), "must be *necessary* for the carrying on of its business; if all that can be said of it was that it was convenient, or that it facilitated the transaction of the business of the firm, that is not sufficient in the absence of evidence of sanction by the other partners. Nor, it seems, will necessity itself be sufficient if it be an extraordinary necessity. What is necessary for carrying on the business of the firm under ordinary circumstances, and in the usual way is the test" (*n*).

Co-partners cannot be bound by any contract made with their partner as an individual and on his own account, and not as agent of the firm, though he may afterwards impart to them the benefit derived from it (*o*). Thus a several note or accept-

guarantee); *Hasleham* v. *Young*, 5 Q. B. 833; *Hooper* v. *Lusby*, 4 Camp. 66; *Marsh* v. *Keating*, 1 Bing. N. C. 198; *Bank of Australasia* v. *Breillat*, 6 Moore, P. C. at p. 193.

(*l*) *Stead* v. *Salt*, 3 Bing. 101; *Adams* v. *Bankhart*, 1 C. M. & R. 681. See *Armitage* v. *Winterbottom*, 1 M. & G. 130; also *Hambridge* v. *De la Crouée*, 3 C. B. 742; *Hatton* v. *Royle*, 3 H. & N. 500; *Thomas* v. *Atherton*, 10 Ch. D. 185; *Piercy* v. *Fynney*, L. R. 12 Eq. 69.

(*m*) 7 M. & W. 595.

(*n*) Lindley on Partnership, 5th ed. 126, quoted by *North*, J., in *Simpson's Claim*, 36 Ch. D. at p. 538. But see p. 33, supra.

(*o*) *Beckham* v. *Knight*, 4 Bing. N. C. 243; and in error, 1 M. & G. 738. *Beckham* v. *Drake* does not shake the proposition in the text, though it does the authority in the decision of *Beckham* v. *Knight*, which is overruled. In *Latch* v. *Wedlake*, 11 A. & E. 959, A., B. and C. being in partnership, A. and B. signed a contract purporting to be made between the three nomi-

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ance by, or a several loan to, one of a partnership will never charge the rest, though their companion may have applied to the use of the firm the money which he obtained by the discount or advance (*p*). A good example of this is to be found in the contract under which books are frequently published, known to the trade by the name of the *half-profits'* contract, by which the author agrees to furnish the manuscript, and the publisher to print and publish it at his own risk and expense, and to account to the author for one-half of the net profits. In such a case, the author would not, unless he had held himself out as being so, be liable in respect of the printing and materials furnished to the bookseller (*q*). But it would be different, if the contracting partner were really empowered to treat, and did treat, on account of the firm (*r*), while he described himself as treating in his individual capacity; in such a case, although the partnership could not be sued on any security of a several nature given by him, still if the transaction had been such as a loan of money or a purchase of goods, the creditor would have a right to charge it, on subsequently discovering the transaction to have been on its account (*s*). And further, it is apprehended that the very nature and consideration of the debt may be such as to raise a presumption, in the absence of direct evidence, that it was incurred under the authority of the firm. Thus, if a member purchase goods, such as the firm deals in, and apply them when so purchased to its use, a strong presumption seems to arise that he was dealing in its behalf; though, had he borrowed money and contributed that to the firm, such a pre-

natim and D., it was held, that, even assuming them to have authority to bind the firm, it was a question of fact for the jury whether they intended to exercise it till the signature of C. had been added. This point seems susceptible of much controversy.

(*p*) *Smith* v. *Craven*, 1 C. & J. 500; *Bevan* v. *Lewis*, 1 Sim. 376; *Leverson* v. *Lane*, 13 C. B. N. S. 278; *Ex parte M'Kenna*, 30 L. J. (Bank.) 40; *Alliance Bank* v. *Kearsley*, L. R. 6 C. P. 433 (account was opened in partner's separate name; money used for purposes of firm). And such is the general rule between principal and agent. See *Thacker* v. *Moates*, 1 M. & Rob. 79.

(*q*) *Wilson* v. *Whithead*, 10 M. & W. 503; *Venables* v. *Wood*, 3 Ross, L. C. 529; *Reade* v. *Bentley*, 4 K. & J. 656; Lindley on Partnership, 5th ed. 141.

(*r*) See *Hutton* v. *Bulloch*, L. R. 8 Q. B. 331; 9 Q. B. 572.

(*s*) *Robinson* v. *Gleadow*, 2 Bing. N. C. 156. See *Brown* v. *Gibbins*, 5 Bro. P. C. 491; *Denton* v. *Rodie*, 3 Camp. 493; *Beckham* v. *Drake*, 9 M. & W. 79; 11 M. & W. 315.

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sumption might not have arisen. For when the firm desires a partner to procure goods, which they cannot but know he must obtain by purchase, the inference is, that they authorize him to purchase, and so contract through him with the vendor (*t*). But when they call on him for a contribution of money, the inference is, that they intend to receive it from himself, not to empower him to borrow for them from a third person; and therefore in such a case, where A. had lent money to B., who had advanced it to the firm of which he was a member, Lord *Hardwicke* said, "Here are plainly *two* contracts, one between A. and B., the other between B. and his partner" (*u*).

There is, of course, no doubt that a third party may contract with the whole firm, and take the several bill, note, bond, or other obligation of a co-partner, as his collateral security (*v*).

Provided the contract have a sufficient relation to the business of the firm, and the contractor have in other respects acted *bonâ fide*, it matters not much what may be its description, or how grievous the contracting partner's fraud and misconduct (*x*). "Each partner," said *James*, L. J., in *Baird's case* (*y*), "is the *unlimited* agent of every other in every matter connected with the partnership business, or which he represents as partnership business, and not being in its nature beyond the scope of the partnership." Thus the firm are liable, whether it be a loan for his expenses while engaged in the partnership business (*z*), or for a purchase of goods such as might be used therein, but which he instantly converts to his own benefit (*a*). So they are bound

(*t*) See *Gouthwaite* v. *Duckworth*, 12 East, 421, which does not seem a case of partnership; *Bottomley* v. *Nuttall*, 5 C. B. N. S. 122.

(*u*) *Ex parte Hunter*, 1 Atk. 223. See *Ex parte Emly*, 1 Rose, 61; *Colley* v. *Smith*, 2 M. & Rob. 96.

(*v*) *Ex parte Brown*, cited 1 Atk. 225; *Denton* v. *Rodie*, 3 Camp. 493; *Bottomley* v. *Nuttall*, 5 C. B. N. S. 122.

(*x*) See *Willett* v. *Chambers*, Cowp. 814; *Rapp* v. *Latham*, 2 B. & A. 795; *Wilson* v. *Bailey*, 9 Dowl. 13, where the advance was partly before and partly after notice; *St. Aubyn* v. *Smart*, L. R. 5 Eq. 183; 3 Ch. 646.

(*y*) L. R. 5 Ch. 725, at p. 733.

(*z*) *Bishop* v. *Countess of Jersey*, 23 L. J. Ch. 483; *Thompson* v. *Bell*, 10 Ex. 10; *Bank of Australasia* v. *Breillat*, 6 Moo. P. C. at p. 193; *Rothwell* v. *Humphreys*, 1 Esp. 406.

(*a*) *Bond* v. *Gibson*, 1 Camp. 185. See *Cleather* v. *Twisden*, L. R. 28 Ch. D. 340.

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by his sale (*b*) or pledge (*c*) of the joint property or payment to him (*d*). So, though a partner has no right to guarantee a separate transaction in the name of the rest, he may give a guaranty for his partner in a matter relating to the partnership (*e*); and, if they afterwards adopt and recognise his act, they will be bound, whether the guaranty related to the business of the firm or not (*f*). So, too, acts done with the knowledge of the other partners, though outside the scope of the business, will bind them (*g*), *e.g.*, if a member of a firm of solicitors, with the knowledge of the rest of his partners, receive the money of a client to invest, and misappropriates it, the firm will be liable.

Again, if the business in ordinary course requires the use of negotiable instruments, one partner can bind the firm by *circulating negotiable instruments on its behalf*. This is quite clear (*h*), and may be done, as we have above seen, by negotiating them in the name, whatever that may be, in which the partnership trade is usually carried on. The rule is thus laid down, by *Cockburn*, C. J., in *Nicholson* v. *Ricketts* (*i*), "In ordinary cases of commercial partnership there is no need of express authority, the law implying an authority from the fact that the drawing and accepting of bills is part of the ordinary course of such a partnership. So, again, in partnerships not strictly commercial, if it is obvious from the nature of the partnership, or from the particular purposes to which the bills are to be applied, that the drawing of bills is essential, there also the law implies an authority to each partner to draw them." These are, however, only

(*b*) *Lambert's case*, Godb.

(*c*) *Raba* v. *Ryland*, Gow. N. P. C. 132; *Tupper* v. *Haythorn*, Id. 135; *Reid* v. *Hollinshead*, 4 B. & C. 687. In these cases the defendants were ignorant that they were dealing with a partner; but the decisions in all proceeded on the ground that the pledgor's right as partner was sufficient to sustain the pledge.

(*d*) *St. Aubyn* v. *Smart*, L. R. 3 Ch. 646.

(*e*) *Ex parte Nolte*, 2 G. & J. 306; but see *Haslehan* v. *Young*, 5 Q. B. 833; *Brettel* v. *Williams*, 4 Exch. 623.

(*f*) Ibid.; *Sandilands* v. *Marsh*, 2 B. & Ald. 673; *Crawford* v. *Stirling*, 4 Esp. 207; *Payne* v. *Ives*, 3 D. & R. 664.

(*g*) *Cleather* v. *Twisden*, 28 Ch. D. 340.

(*h*) *Sutton* v. *Gregory*, 2 Peake, 150; *Wintle* v. *Crowther*, 1 C. & J. 316; *Thicknesse* v. *Bromilow*, 2 C. & J. 425; *In re Riches*, 4 De G. J. & S. 581.

(*i*) 2 E. & E. 497, at p. 524.

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illustrations of the general rule above stated. The practice as to borrowing, or using in lieu of money negotiable instruments, has changed, and is changing; and negotiable instruments are now used in businesses in which they were once unknown. The question is, what is usual and necessary in each business (*h*). We may further remark that, if a bill be drawn upon the partnership in their usual style and firm, and accepted by one of the partners in his own name, it will bind them all; for he must be understood, in the absence of evidence to the contrary, to accept the bill according to the terms in which it is drawn (*i*). It has, however, been decided, that a partner cannot bind the rest by *drawing* a bill in any name except that of the firm (*j*), or by issuing acceptances in blank (*k*). A firm may use one distinct name for certain purposes, and another—that for instance of the managing partner—for the purpose of indorsing negotiable instruments (*l*). When a trade is carried on in the name of one partner, a question will arise, whether, in negotiating a bill or note, he meant to pledge the firm or himself only. The general rule on the subject is thus stated by *Thesiger*, L. J., in *Yorkshire Banking Co.* v. *Beatson* (*m*), where the authorities are reviewed: "Where a name is common to a firm and to an individual member of such firm, and the individual member carries on no business separate from that of the firm, there is a presumption that a bill of exchange drawn,

(*h*) *Cleather* v. *Twisden*, 28 Ch. D. 340; Lindley on Partnership, 5th ed. 127.

(*i*) *Mason* v. *Rumsey*, 1 Camp. 384; *Dolman* v. *Orchard*, 2 C. & P. 104; *Jenkins* v. *Morris*, 16 M. & W. 877; *Yorkshire Banking Co.* v. *Beatson*, L. R. 5 C. P. D. 109.

(*j*) In former editions some doubt was cast on *Kirk* v. *Blurton*, 9 M. & W. 284. But the principle is affirmed in *Miles' Claim*, L. R. 9 Ch. 635, and the earlier case of *Nicholson* v. *Ricketts*, 2 E. & E. 497, where *Crompton*, J., says, at p. 526, "Where A., B., and C. are in partnership, and arrange that C. shall draw bills in his own name on A. and B., I think that it is impossible to say that C.'s signature to such bills bind the others. The bills are drawn in the course of the partnership transactions, but the signature is not intended to be that of the partnership." See Lindley on Partnership, 5th ed. 185, note (*p*).

(*k*) *Hogarth* v. *Latham*, 3 Q. B. D. 643.

(*l*) *Williamson* v. *Johnson*, 1 B. & C. 146.

(*m*) 5 C. P. D. 109, at p. 121; *In re Adansonia Fibre Co.*, L. R. 9 Ch. 635; *Furze* v. *Sharwood*, 2 Q. B. 388.

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accepted, or indorsed in the common name, is a bill drawn, accepted, or indorsed for the partnership, and for which the partnership is liable, and it lies upon the defendants in an action against the partners upon such bill to get rid of the *primâ facie* case made against them" (*m*).

Further, to bind partners, these negotiable instruments must have been circulated *on behalf of the firm.* Now, it is clear that, when the purposes of the firm do not require that its members should pass negotiable instruments, it is not very likely that such should be circulated *on its behalf:* in such cases, therefore, the implied authority of a partner fails, and the firm will not be bound by his negotiation (*n*). Hence a solicitor cannot bind his partner by a note, though given for the debt of the firm (*o*); and it has been decided, that partners in a farming or mining concern have no such authority (*p*). From the observations of the Judges in the case last cited, it may be collected: *First*, that partners in a trade, strictly mercantile (*q*), have an authority implied by law to bind each other by bills or notes. *Secondly*, that partners in some particular businesses, such as farming and mining, have, *primâ facie*, no such authority. *Thirdly*, that this presumption against their authority may be rebutted, by showing, 1st, that the constitution and particular purposes of the firm are such as to render it, in their individual cases, necessary; or, 2ndly, that, though not necessary, it is, in other similar cases, usual; "for if it were necessary or usual, the law would imply it" (*r*).

Lastly, it is an essential portion of the rule, that the person to whom the firm is to be bound should have dealt *bonâ fide.* If he who seeks to charge the firm was himself privy to a fraud; if he knew, or even if there were circumstances sufficient to

(*m*) See Lindley on Partnership, 5th ed. 180.

(*n*) *Yates* v. *Dalton*, 28 L. J. Exch. 49.

(*o*) *Headley* v. *Bainbridge*, 3 Q. B. 316; *Garland* v. *Jacomb*, L. R. 8 Exch. 216; or a posted dated cheque: *Forster* v. *Mackreth*, L. R. 2 Ex. 163.

(*p*) *Greenslade* v. *Dower*, 7 B. & C. 635; *Brown* v. *Byers*, 16 M. & W. 252; *Dickinson* v. *Valpy*, 10 B. & C. 139.

(*q*) See *Harris* v. *Amery*, L. R. 1 C. P. at p. 154.

(*r*) Per *Littledale*, J., in *Dickinson* v. *Valpy*, 10 B. & C. at p. 139.

induce a man of moderate discernment to believe, that the partner, with whom he contracted, had no authority to bind the rest, innocent members will not be allowed to suffer by his weakness or stupidity. "There is no doubt," said Lord *Mansfield*, "but that the act of every single partner in a transaction relating to the partnership binds all the others. But there is no general rule which may not be infected by covin, or such gross negligence as may amount or be equivalent to covin; for covin is defined to be a contrivance between two to defraud or cheat a third" (*s*). With respect to negotiable instruments given in the name of the firm, the rule is, that they cannot be enforced by any party who was guilty of fraud in receiving them (*t*), or who took them, knowing that they had been so fraudulently received, or even without knowing it, unless he gave a valuable consideration for them (*u*); but that they may be enforced by any one who obtained them for value, and without fraud (*x*), or gave a valuable consideration for them without knowing that they had been frauduently obtained (*y*).

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The unexplained fact that a partnership security has been received from one of the partners in discharge of a separate claim against himself, is a badge of fraud, or of such palpable negligence as amounts to fraud (*z*), which it is incumbent on the party who so took the security to remove, by showing either that the partner from whom he received it acted under the

(*s*) *Hope* v. *Cust*, 1 East, 53, cited by *Lawrence*, J. from a note of *Buller*, J.; *Lloyd* v. *Freshfield*, 2 C. & P. 325; *Snaith* v. *Burridge*, 4 Taunt. 684; *In re Riches*, 4 De G. J. & S. 581; *Lord Galway* v. *Matthew*, 1 Camp. 403; *Willis* v. *Dyson*, 1 Stark. 164. In *Lord Galway* v. *Matthew*, a *circular*, in *Willis* v. *Dyson*, an *advertisement*, had given notice of the want of authority. See *Minnit* v. *Whinery*, 5 Bro. P. C. 489; *Vice* v. *Fleming*, 1 Y. & J. 227; *Garland* v. *Jacomb*, L. R. 8 Ex. 216.

(*t*) *Arden* v. *Sharpe*, 2 Esp. 524.

(*u*) See *Heath* v. *Sansom*, 2 B. & Ad. 291.

(*x*) See Bills of Exchange Act, s. 30, in Appendix; *Wintle* v. *Crowther*, 1 C. & J. 316; *Ex parte Bushell*, 3 Mont. D. & De G. 615; *May* v. *Chapman*, 16 M. & W. 355.

(*y*) *Swan* v. *Steele*, 7 East, 210; *Lacy* v. *Woolcot*, 2 D. & R. 458.

(*z*) See *Hope* v. *Cust*, 1 East, 53, cited by Mr. Justice *Lawrence*, from a note of *Buller*, J.; *Shereff* v. *Wilks*, 1 East, 48; *Green* v. *Deakin*, 2 Stark. 347. The other partners may sue for it: *Piercy* v. *Fynney*, L. R. 12 Eq. 69.

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authority of the rest, or at least that he himself had reason to believe so (*a*). Lord *Ellenborough* appears to have thought that, even in such a case, the onus of showing want of authority in the single partner would lie upon the firm, if it were, from the nature of the transaction, possible for them to procure direct testimony to that effect (*b*). But this seems to be erroneous. It is clear that unless the security was given or transferred *for a separate demand* no such presumption will arise (*c*); for, if it be in the ordinary course of commercial transactions, as upon discount, without any knowledge on the part of the transferee that it was a separate transaction, the firm will be bound, though the transferring partner may have converted the whole produce of the security to his own use (*d*). The *transfer* of a partnership security may be fraudulent in part, yet good for the residue (*e*). To hold the contrary would tend to shake all paper credit.

Though a transaction may be *primâ facie* fraudulent against the firm, yet it will bind them if they subsequently approve of it, for subsequent approbation raises an inference of previous positive authority (*f*). To constitute notification of an act done in excess of authority, there must be evidence of knowledge.

Besides the cases mentioned in the rule above laid down, the firm may in various other ways be bound by the conduct of a partner. Thus, his admission, his acknowledgment, or representation, is

(*a*) This statement of the law is adopted by *Keating* and *Byles*, JJ., in *Leverson* v. *Lane*, 13 C. B. N. S. 278; Lord *Westbury*, in *Ex parte Darlington Banking Co.*, 4 De G., J. & S. at p. 586; *Cockburn*, C. J., in *Kendal* v. *Wood*, L. R. 6 Ex. at p. 248. See Sir *J. Leach's* observations in *Frankland* v. *M'Gusty*, Knapp, P. C. C. 274; and Lord *Eldon's*, in *Ex parte Bonbonus*, 8 Ves. 540.

(*b*) *Ridley* v. *Taylor*, 13 East, 175. But see this observation explained, per *Keating*, J., in *Leverson* v. *Lane*, 13 C. B. N. S. 286.

(*c*) *Musgrave* v. *Drake*, 5 Q. B. 185. See *Hogg* v. *Skeen*, 18 C. B. N. S. 426.

(*d*) *Ex parte Bonbonus*, 8 Ves. 540; Bayley on Bills, 6th ed. p. 63.

(*e*) *Wintle* v. *Crowther*, 1 C. & J. 316; *Wilson* v. *Bailey*, 9 Dowl. 18. But quære, where the bill or note has been *accepted* or *made* partly for a partnership, and partly for a private debt, see *Ellston* v. *Deacon*, L. R. 2 C. P. 20.

(*f*) *Weikersheim's case*, L. R. 8 Ch. 831; *Ex parte Bonbonus*, 8 Ves. 540. See *Dunean* v. *Lowndes*, 3 Camp. 478; *Ex parte Nolte*, 2 G. & J. 306; *Crawford* v. *Stirling*, 4 Esp. 207; *Payne* v. *Ives*, 3 D. & R. 664.

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evidence against them (*g*) if the representations relate to the business of the firm (*h*). Before the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), an admission by one partner of a debt did not take it out of the Statute of Limitations (*i*). But it would seem that the effect of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97, s. 14) (*j*) is to make an acknowledgment signed by one partner equivalent to an acknowledgment signed by all the partners, and to make a part payment by one partner equivalent to a part payment by all (*k*). Notice by (*l*), or to (*m*), one partner is equivalent to notice by, or to, all. Moreover, as he is the accredited agent of the rest, it follows, upon grounds which we will examine more deliberately in Chapter IV., that they are liable for breaches of contract (*n*), and negligent wrongs (*o*) committed in such capacity. Nay, they have been held responsible for frauds (*p*) and breaches of the revenue laws committed by him in his management of the partnership business (*q*); and may even, in certain cases, be made criminally answerable for him (*r*). They are also liable for the acts of

(*g*) *Brogden* v. *Metropolitan Rail. Co.*, 2 App. Cas. 666; *Wickham* v. *Wickham*, 2 K. & J. 478; *Rapp* v. *Latham*, 2 B. & Ald. 795; *Wood* v. *Braddick*, 1 Taunt. 104.

(*h*) *Sandilands* v. *Marsh*, 2 B. & Ald. 673.

(*i*) Lindley on Partnership, 5th ed. 261.

(*j*) See Appendix, post.

(*k*) Lindley on Partnership, 5th ed. 263; *Godwin* v. *Parton*, 42 L. T. 568.

(*l*) *Mayhew* v. *Eames*, 1 C. & P. 550; *Hunt* v. *R. E. A. Co.*, 5 M. & S. 47.

(*m*) *Williamson* v. *Barbour*, 9 Ch. D. 529, at p. 535. This observation is not applicable to joint stock companies, as to which see *Thomson* v. *Speirs*, 13 Sim. 469; *Powles* v. *Page*, 3 C. B. 16.

(*n*) *Stone* v. *Marsh*, 6 B. & C. 551; Ry. & Moo. 364; *Marsh* v. *Keating*, 1 Bing. N. C. 199; *Sadler* v. *Lee*, 6 Beav. 324.

(*o*) *Moreton* v. *Harderne*, 4 B. & C. 223; *Ashworth* v. *Stanwix*, 3 E. & E. 701; *Blair* v. *Bromley*, 2 Ph. 354; *Cleather* v. *Twisden*, 54 L. J. Ch. 408; *Thomas* v. *Atherton*, 10 Ch. D. 185; *Burnard* v. *Aaron*, 31 L. J. C. P. 334.

(*p*) *Plumer* v. *Gregory*, L. R. 18 Eq. 621; *Marsh* v. *Keating*, 1 Bing. N. C. 199; *Wollet* v. *Chambers*, Cowp. 814; *Rapp* v. *Latham*, 2 B. & A. 795; *Sadler* v. *Leigh*, 6 Beav. 321; *Blair* v. *Bromley*, 5 Hare, 542; 2 Phill. 354; *Atkinson* v. *Mackreth*, L. R. 2 Eq. 570; *Biggs* v. *Bree*, 51 L. J. Ch. 263.

(*q*) *Att.-Gen.* v. *Stanniforth*, Bunb. 97; *Att.-Gen.* v. *Weeks*, Id. 223; *Att.-Gen.* v. *Burges*, Id. See *King* v. *Manning*, Comyn, 616; *Att.-Gen.* v. *Siddon*, 1 C. & J. 220; *Att.-Gen.* v. *Riddell*, 2 C. & J. 493.

(*r*) *R.* v. *Almon*, 5 Burr. 2686; *R.* v. *Pearce*, Peake, 75; *R.* v. *Topham*, 4 T. R. 126; *R.* v. *Gutch*, M. & M. 437. See further on this subject, post, Chap. V. Sect. 4.

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their servants or agents acting within the scope of their authority (*s*).

The liability of each partner to third persons in respect of the engagements of the others, commences with the commencement of his partnership, and is not postponed by postponing the execution of the deed, provided that the partnership have, in fact, commenced (*t*). He is not liable for contracts previously made (*u*). If, indeed, after his accession to the partnership he receive benefit from them and recognise their existence, he may become responsible by virtue of a new contract to the same effect as the old one, which his conduct will be evidence of his having entered into along with his partners (*v*). So, with the creditor's assent (*x*), the liability of the new firm may be substituted for that of the old; and, as Lord *Thurlow* observed (*y*), "If one man having debts takes another into partnership with him, a very little matter respecting those debts will make both liable."

A partner ceases to incur liability upon his dissolving the partnership, removing his name from the firm, and giving proper

(*s*) See Macdonell's Law of Master and Servant, p. 257.

(*t*) *Battley* v. *Lewis*, 1 M. & G. 155.

(*u*) *Catt* v. *Howard*, 3 Stark. 5; *Vere* v. *Ashby*, 10 B. & C. 289 (a strong case, since there the partnership was, by agreement, to have a retrospective operation). *Young* v. *Hunter*, 4 Taunt. 582; *Fox* v. *Frith*, 10 M. & W. 135; *Saville* v. *Robertson*, 4 T. R. 720; *Fox* v. *Clifton*, 6 Bing. 776; *Thomas* v. *Clark*, 18 C. B. 662; *Dickinson* v. *Valpy*, 10 B. & C. 142. See also *Howell* v. *Brodie*, 6 Bing. N. C. 44; *Barnett* v. *Lambert*, 15 M. & W. 489; *Gabriell* v. *Evill*, 9 M. & W. 297; *Hawken* v. *Bourne*, 8 M. & W. 703. He is not liable by relation: *Battley* v. *Lewis*, 1 M. & G. 155; nor for goods furnished *while* he is a member, under a contract made *before* he *became* one: *Whitehead* v. *Barron*, 2 M. & Rob. 243; *Beale* v. *Mouls*, 10 Q. B. 976.

(*v*) *Ex parte Jackson*, 1 Ves. Jun. 131; *Ex parte Peele*, 6 Ves. 602; *Helsby* v. *Mears*, 5 B. & C. 504; *Barker* v. *Birt*, 10 M. & W. 61; *Dyke* v. *Brewer*, 2 C. & K. 828; *Scarf* v. *Jardine*, 7 App. Cas. 345; *Rolfe, &c.* v. *Flower*, L. R. 1 P. C. 27.

(*x*) *Ex parte Williams*, Buck. 13. As to creditors by their conduct substituting the liability of a new firm for that of an old firm, and releasing the members of the latter, see *Bilborough* v. *Holmes*, 5 Ch. D. 255; *In re Family Endowment Society*, L. R. 5 Ch. 118, and infra.

(*y*) In *Ex parte Jackson*, 1 Ves. Jun. 131, at p. 132. See *Ex parte Peele*, 6 Ves. 602, at p. 604, per Lord *Eldon*. *Rolfe* v. *Flower*, L. R. 1 P. C. 27; *Re Family Endowment Society*, L. R. 5 Ch. 118.

notice of the dissolution (*z*); for, until the world is duly informed thereof he continues, as we have before remarked, to hold himself out as still in business with his late companions, and will be still responsible for their engagements (*a*); and, if he do not remove his name from the firm, he gives strangers cause to disbelieve his notice, though he may have promulgated one, and will, therefore, notwithstanding it, continue liable (*b*). But then this non-removal must, to produce this effect, be the result of his own negligence; for if his late partners wrongfully persevere in using his name that will not bind him (*c*). Notice of dissolution will not be necessary when the partnership is dissolved by death or bankruptcy (*d*). It is probable, too, that it is not necessary when the partnership is dissolved by operation of law, such as the decree of the Court, or the outbreak of war, making one or more of the partners alien enemies (*e*).

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To persons who have not dealt with the firm, notice of the dissolution in the *Gazette* will be sufficient (*f*), whether they have seen it or not. But the jury may be satisfied that the fact was brought to their knowledge by advertisement in any other newspaper, or otherwise (*g*). To persons who have so dealt express notice ought to be given (*h*); and this is usually

(*z*) On the question what amounts to dissolution, see ante, Sect. 3; *Heath* v. *Sansom*, 4 B. & Ad. 177; *Hall* v. *Hall*, 12 Beav. 414.

(*a*) *Scarf* v. *Jardine*, 7 App. Cas. 345, p. 357; *Parkin* v. *Carruthers*, 3 Esp. 248; *Graham* v. *Hope*, 1 Peake, 154. In *Jones* v. *Shears*, 4 A. & E. 832, it was held, that a retired partner, though he had not notified his retirement, was not bound by the admission of a subsequently appointed agent of the firm.

(*b*) *Williams* v. *Keats*, 2 Stark. 290; *Dolman* v. *Orchard*, 2 C. & P. 106. In some of the American decisions, *e.g.*, *Clapp* v. *Rogers*, 12 N. Y. 283, a distinction is drawn between persons dealing with the firm on credit and those dealing for cash. But it is not clear on principle why the latter should not be entitled to notice if their dealings led them to believe in the existence of partnership. The distinction receives no countenance from the English decisions.

(*c*) *Newsome* v. *Coles*, 2 Camp. 618.

(*d*) Lindley on Partnership, 5th ed. 211.

(*e*) *Griswold* v. *Waddington*, 15 John. 57.

(*f*) *Godfrey* v. *Turnbull*, 1 Esp. 371; *Wrightson* v. *Pullan*, 1 Stark. 375.

(*g*) Lindley on Partnership, 5th ed. 222.

(*h*) See *Kirwan* v. *Kirwan*, 2 C. & M. 617; *Graham* v. *Hope*, Peake, 208, and notes.

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done by circular letters (*i*). But if a fair presumption can be raised from other circumstances that the party had actual notice, that will be enough (*k*). Thus a change in the wording of cheques has been held notice to a creditor who receives them (*l*).

As to a dormant partner, as his name never appeared in the firm, of course it cannot be removed; and as the correspondents of the house never knew him to be a partner, they need not be informed of his ceasing to be such (*m*). Though many may have been aware that he was a partner, he will not be chargeable, except by individuals who knew it at the time of entering into their engagements with the firm (*n*); to such persons he will be liable, if he have not given a proper notice of retirement, or if they have not otherwise acquired knowledge (*o*), on the principle that a person, who gives to another an authority of a character such as would naturally last, will be estopped from denying the existence of the authority to the prejudice of those who have acted upon it, and who have had no notice of its revocation (*p*).

On his dissolving the partnership, removing his name from the firm, and duly promulgating notice of his withdrawal, all danger of his liability for the *future* acts of his companions is at an end (*q*).

For some purposes the agency of the partner continues after the dissolution. Thus, it has been held that a surviving partner may give a charge on partnership assets to further secure a debt incurred by the partnership in the lifetime of the deceased partner (*r*). So, too, when a partnership is dissolved by the

(*i*) *Newsome* v. *Coles*, 2 Camp. 617; *Jenkins* v. *Blizzard*, 1 Stark. 418.

(*k*) *M'Iver* v. *Humble*, 16 East, 169.

(*l*) *Barfoot* v. *Goodall*, 3 Camp. 147. See *Hart* v. *Alexander*, 2 M. & W. 484.

(*m*) *Evans* v. *Drummond*, 4 Esp. 89; *Brooke* v. *Enderby*, 2 B. & B. 71. See *Heath* v. *Sansom*, 4 B. & Ad. 177; *Carter* v. *Whalley*, 1 B. & Ad. 11.

(*n*) *Carter* v. *Whalley*, 1 B. & Ad. 11; *Edmundson* v. *Blakey*, 31 L. J. Exch. 207.

(*o*) *Evans* v. *Drummond*, 4 Esp. 89; *Farrar* v. *Deflinne*, 1 C. & K. 580.

(*p*) *Scarf* v. *Jardine*, 7 App. Cas. 345, at p. 357.

(*q*) *Pinder* v. *Wilks*, 5 Taunt. 612; *Abel* v. *Sutton*, 3 Esp. 108; *Wrightson* v. *Pullan*, 1 Stark. 375; *Heath* v. *Sansom*, 4 B. & Ad. 177.

(*r*) *In re Clough*, 31 Ch. D. 324; W. N. 1887, 40; *Butcher* v. *Dresser*, 4 D. M. & G. 542.

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bankruptcy of a partner, the solvent partner may "get in, and insist on getting in, the assets of the dissolved partnership" (*s*). Of course the retiring partner will be liable, if he allow the others to go on using his name, notwithstanding the dissolution (*t*). Lord *Kenyon* doubted whether a bill, indorsed by one partner in the name of the firm before dissolution, could be negotiated afterwards (*u*). The Court of Queen's Bench, however, subsequently held that a bill drawn by a partnership before the dissolution might be indorsed after the dissolution, to a person having notice of it (*v*). *Abel* v. *Sutton* (*u*) and *Smith* v. *Winter* (*t*) were not cited upon the argument of this case, which possibly may hereafter be thought open to review, since it may be argued that all *express* authority to indorse was put an end to by the dissolution, and all *implied* authority by the notice.

A retired partner, however, of course remains liable for contracts made by the firm while he continued to belong to it. Yet if the partnership be dissolved in consequence of his death, his personal representative stands in a very different situation. At Law he was completely exonerated from responsibility, the rule there being, that personal claims and liabilities survive. Equity, however, unwilling that this maxim should work injustice, considers the estate of the deceased partner as liable to the demands of the partnership creditors until the debts which affected him at the time of his decease have been fully discharged (*x*). In strict-

(*s*) *Cotton*, L. J., in *Ex parte Owen*, 13 Q. B. D. at p. 116.

(*t*) *Smith* v. *Winter*, 4 M. & W. 454; *Walford* v. *Griffin*, 1 F. & F. 145. It seems that the authority may be *express* or *implied* from the terms of the separation. But authority to *wind up* the partnership would not warrant the indorsement of a bill: Ib.

(*u*) *Abel* v. *Sutton*, 3 Esp. 108.

(*v*) *Lewis* v. *Reilly*, 1 Q. B. 349. See *Garland* v. *Jacomb*, L. R. 8 Ex. 220, where it is recognized. In Lindley on Partnership, 5th ed. at p. 219, the rule is stated thus:—"The doctrine now in question cannot be carried further than this, viz., that notwithstanding dissolution a partner has implied authority to bind the firm so far as may be necessary to settle and liquidate existing demands, and to complete transactions begun, but unfinished, at the time of the dissolution." See also Campbell on Sale and Agency, 492.

(*x*) *Kendall* v. *Hamilton*, 4 App. Cas. at p. 517; *Vulliamy* v. *Noble*, 3 Mer. 593. See the judgment in *Winter* v. *Innes*, 4 M. & Cr. 111; *In re Dixon*, L. R. 10 Ch. 160. The liability of the representatives of a deceased partner does not in general extend to torts; as to which the maxim Actio personalis moritur cum persona

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ness, partnership debts are only joint. This appears from *Kendall* v. *Hamilton* (*y*), where it was held that an action and a judgment against two persons who had borrowed money of the plaintiffs constituted a bar to another action brought by the same plaintiffs against a third person, who was a partner with them in the business for which the money was advanced; the circumstance that the judgment was unsatisfied was immaterial; the debt was joint, not joint and several; and it was decided, in accordance with *King* v. *Hoare* (*z*), that the matter having become *res judicata*, by the judgment against two of the co-contractors, no further action lay against the third. In a certain sense such debts are on the dissolution of partnership by death treated as joint and several.

"This, however," said Lord *Cairns*, in *Kendall* v. *Hamilton* (*y*), "is only a compendious expression, which must be interpreted with reference to what were the functions of the Court of Equity as to partnership debts. The only interposition of a Court of Equity with regard to partnership debts took place in the administration of the assets, either of the partnership or of a deceased member of the partnership. Where a member of the partnership died, the debts became in the eye of a Court of Law the debts of the survivors; but the survivors, on the other hand, in a Court of Equity, had the right, as against the estate of a deceased partner, to say that his representatives should not withdraw any part of the partnership property until all the debts were paid or provided for. If, therefore, a Court of Equity was administering the assets of a deceased partner, it would, in order to clear his estate, ascertain his liabilities to the partnership, and for this purpose would ascertain the debts due from the co-partnership at his death. From this the transition was easy to giving the creditors of the partnership a direct right, and not merely an indirect right, through the surviving partners, to come for payment against the assets of the deceased partner; and from this again the transition was easy to the expression which said that partnership debts, in the eye of a Court of Equity, were joint and several—not thereby meaning that a Court of Equity altered or changed a legal contract, but merely that the Court, in order, before distributing

in general applies. See *New Sombrero Phosphate Co.* v. *Erlanger*, 5 Ch. D. 73; *Blair* v. *Bromley*, 2 Ph. 354.

(*y*) 4 App. Cas. 504.

(*z*) 13 M. & W. 494; *Cambefort* v. *Chapman*, 19 Q. B. D. 229.

assets, to administer all the equities existing with regard to them, would go behind the legal doctrine that a partnership debt survived as a claim against the surviving partners only, and would give the creditor the benefit of the equity which the surviving partners might have insisted on" (*a*).

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The decision, therefore, in *Kendall* v. *Hamilton* has no application to a case where the partnership is dissolved by death; and a judgment recovered against one partner is no bar to proving against the estate of a deceased partner (*b*).

Whether, indeed, the claim of the partnership creditors on the *separate* estate of the deceased shall be postponed to that of his own separate creditors, or whether they shall come in with them *pari passu*, or whether, lastly, they have any claim against it at all until the insolvency of the partnership estate has been ascertained, are questions which were long unsettled (*c*). The last of them, however, was resolved by the case of *Wilkinson* v. *Henderson* (*d*), which decided that the joint creditor is not compelled to pursue the surviving partner in the first instance, but may resort at once to the assets of the deceased, without showing that full satisfaction cannot be obtained from the survivor, and may leave the representatives of the deceased to recover what, if anything, shall appear upon the partnership account to be due from the survivor to the estate of the deceased partner. The surviving partners must have been made parties to the suit (*e*). Since the Judicature Acts a creditor may sue both the surviving partner and the personal representative of a deceased partner, and may obtain judgment against them all (*f*).

Since the Judicature Act, 1875, in the administration of the assets of a person whose estate is insufficient for the payment in

(*a*) *Kendall* v. *Hamilton*, 4 App. Cas. at p. 517. See Lord *Selborne's* remarks at p. 538; and *Camberford* v. *Chapman*, 19 Q. B. D. 229.

(*b*) *In re Hodgson*, 31 Ch. D. 177; 55 L. J. Ch. 241.

(*c*) See *Gray* v. *Chiswell*, 9 Ves. 118; *Ex parte Kendall*, 17 Ves. 519; *Campbell* v. *Mallett*, 2 Swanst. 576; *Devaynes* v. *Noble*, 1 Mer. 529; *Cowell* v. *Sykes*, 2 Russ. 191.

(*d*) 1 My. & K. 589.

(*e*) *Hills* v. *McRae*, 9 Ha. 297; *In re Hodgson*, 31 Ch. D. 177; 55 L. J. Ch. 241.

(*f*) Lindley on Partnership, 5th ed. p. 598; *Gray* v. *Chiswell*, 9 Ves. 118; *Rice* v. *Gordon*, 11 Beav. 265.

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full of his debts, the same rules prevail as to the payment of debts and liabilities as in the case of bankruptcy (*g*). That is, the separate estate of a deceased partner must be applied in payment of all principal and interest due to his separate creditors before any part can be touched by the partnership creditors (*h*). On the other hand, the partnership debts must be paid in full before the share of the deceased partner becomes available for his separate creditors (*i*).

The separate estate of a deceased partner can never be discharged while any partnership debt remains outstanding. Nay, the Court will even reform joint securities, when executed by partners for a partnership debt, by construing them joint and several, so as to bind the executor of a deceased co-partner (*j*). But such an instrument must have arisen out of some antecedent partnership liability; for a presumption then arises that, as the demand for which the security was given might have been enforced against the estate of a deceased partner, the parties must have intended that the security should be similarly available (*k*). But where the instrument is pure matter of arbitrary convention, growing out of no such antecedent liability, that presumption does not arise, and then, if it be jointly worded, the Court will not construe it joint and several, but will measure its extent by the terms in which it is conceived (*l*).

The liability of a retired partner and that of a deceased partner's estate will be reduced by the amount of all pay-

(*g*) Judicature Act, 1875, s. 10; Bankruptcy Act, 1883, s. 40 (3).

(*h*) See *Lodge* v. *Prichard*, 1 De G. J. & Sm. 610; 4 Giff. 294; *Ex parte Morley*, L. R. 9 Ch. 1026; *Ex parte Dear*, L. R. 1 Ch. D. 514. As to where there is no joint estate and no solvent partner, see pp. 744, 745, *infra*.

(*i*) *Ridgway* v. *Clare*, 19 Beav. 111; *Hills* v. *McRae*, 9 Hag. 297; *In re Hodgson*, 55 L. J. Ch. 241.

(*j*) *Burn* v. *Burn*, 3 Ves. 573; *Orr* v. *Chase*, 1 Mer. 729; *Kendall* v. *Hamilton*, 4 App. Cas. 504.

(*k*) *Beresford* v. *Browning*, L. R. 20 Eq. 564; 1 Ch. D. 30.

(*l*) *Summer* v. *Powell*, 2 Mer. 30; *Wilmer* v. *Currey*, 2 De G. & S. 347, which is discussed by *James*, L. J., in *Beresford* v. *Browning*, 1 Ch. D. at p. 35.

ments (*m*) made by his late companions since the dissolution of the partnership, and appropriated, either specifically or impliedly, to the reduction of the demands upon the firm. Thus, Devaynes and others were in partnership as bankers; Clayton had a running account with the firm, and was in the habit of paying in and drawing out money. At the time of Devaynes' death there was a balance of 1,713*l.* in favour of Clayton and against the firm. After the death of Devaynes, his late partners became bankrupt; but, before their bankruptcy, Clayton had drawn out sums to more than the amount of 1,713*l.*, and had paid in other sums yet more considerable. Upon the bankruptcy of the surviving partners, Clayton was desirous of having recourse to the estate of Devaynes; but it was held, that the sums drawn out by Clayton since the death must be appropriated to the payment of the balance of 1,713*l.* then due; and that, as the total amount of those sums was greater than the balance, the debt due from the firm at the death of Devaynes had been discharged and his estate exonerated; the sums paid in by Clayton since the death constituting a new debt, for which the survivors only could be held liable (*n*).

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There is no fiduciary relationship between a surviving partner and the representatives of his deceased partners. Accordingly, the Statute of Limitations runs in the case of a claim against

(*m*) *Brooke* v. *Enderby*, 2 B. & B. 70; *Newmarch* v. *Clay*, 14 East, 239; *Clayton's case*, 1 Mer. 572; *London and County Banking Co.* v. *Ratcliffe*, 6 App. Cas. 722.

(*n*) *Clayton's case*, 1 Mer. 572; see also *Toulmin* v. *Copeland*, 3 Y. & Coll. 625 (aff. in Ho. Lds. 1 West, App. C. 164); *Jones* v. *Maund*, Ib. 347; *Hooper* v. *Keay*, 1 Q. B. D. 178; *Pemberton* v. *Oakes*, 4 Russ. 154. Having stated the principles of *Clayton's case*, *Bayley*, J., observes, in *Simson* v. *Ingham*, 2 B. & C. 65, at p. 72: "There is a third rule, viz., that where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and the new firm in one entire account, then the payments made from time to time by the surviving partners must be applied to the old debt. In that case it is to be presumed that all the parties have consented that it should be considered as one entire account, and that the death of one of the partners has produced no alteration whatever." Nor will this result depend on the knowledge of the creditors of the change which has taken place in the constitution of the firm: Lindley on Partnership, 5th ed. 229. But this is only a presumption; the creditor may decline to treat the whole as one account.

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the latter (*p*). As to the effect of the Statute of Limitations on a creditor's equity against the estate of the deceased partner, if the firm be indebted to his estate beyond the proportion it ought to bear of the claim, it seems the statute would bar the equity; and it is clear that a payment of part or of interest by surviving members will not deprive the executors of the deceased partner of this defence (*q*).

Although, among themselves, partners may, and often do, agree that after the dissolution the credits of the firm shall be received, and its debts paid by one of the late partners only, yet this arrangement does not affect their joint responsibility to third persons, *unless such persons agree to exchange the liability of the firm for that of the single partner* (*r*). Though it has been held, that neither acceptance of the single partner's note as a collateral security (*s*), nor receipt of interest from him on the joint debt (*t*), nor changing the heading of the account from the name of the firm to that of the single partner, and drawing on him for part of the balance, amounted to *conclusive* evidence of such an agreement (*u*), it seems clear, on principle, that, if the creditor be actually a party to the arrangement of the late partners among themselves, their acquiescence in that arrangement would be a consideration for his promise to accept the single instead of the double liability, which contributed to induce them so to acquiesce. Besides which, the liability of a single partner may possibly be more beneficial to the creditor than the joint liability of two, either in respect of the solvency

(*p*) *Knox* v. *Gye*, L. R. 5 H. L. 656.

(*q*) See 19 & 20 Vict. c. 97, s. 14; *Way* v. *Bassett*, 5 Hare, 55, 68; *Thompson* v. *Waithman*, 26 L. J. Ch. 134; *Watson* v. *Woodman*, L. R. 20 Eq. 721; and *Jackson* v. *Woolley*, 8 E. & B. 778.

(*r*) *Kirwan* v. *Kirwan*, 2 C. & M. 617; *Scarf* v. *Jardine*, 7 App. Cas. 345, p. 351.

(*s*) *Bedford* v. *Deakin*, 2 B. & Ald. 210.

(*t*) *Gough* v. *Davies*, 4 Price, 200.

(*u*) *David* v. *Ellice*, 5 B. & C. 196; see *Lodge* v. *Dicas*, 3 B. & Ald. 611. These cases have been much reflected on, particularly in *Hart* v. *Alexander*, 2 M. & W. 484; Lindley on Partnership, 5th ed. 242. The authority, however, of that case, as well as of *Lodge* v. *Dicas*, supra, has been much shaken by *Thompson* v. *Percival*, 5 B. & Ad. 923, 925, and, it may be added, by *Winter* v. *Innes*, 4 M. & Cr. 108-9, and *Lyth* v. *Ault*, 7 Exch. 669, which decides that the sole responsibility of one of several parties being different from their joint responsibility is a sufficient consideration for such an agreement.

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of the parties, or the convenience of the remedy. Therefore, it has been decided, that if the creditor of a firm, consisting of two persons, expressly agree with them to take, and do take, the separate bill (*x*) or the sole responsibility (*y*) of one partner in discharge of the joint debt, his so doing amounts to the discharge of the other partner. Whether such an agreement has been made is a mixed question of law and fact (*z*). This sort of arrangement was usual under the civil law, and went by the name of Novatio (*a*).

Though there be no such express agreement, a creditor of a firm may by his conduct elect to sue certain persons, and so be unable to sue others. In *Scarf* v. *Jardine* (*b*) the plaintiff, it was proved, had supplied goods to A. and B., trading as partners; A. retired; the plaintiff supplied goods to the new firm, B. and C., before receiving notice of A.'s retirement. When he did receive notice he sued the new firm. The plaintiff, it was held, was free to sue A. or B. and C., but there was no joint liability; and having elected to sue B. and C. he could not subsequently recover against A.

Lindley, L. J., in his work on Partnership (*c*) thus sums up the result of the cases:—

"(1) An express agreement by the creditor to discharge a retired partner, and to look only to a continuing partner, is not inoperative for want of consideration; for *Lodge* v. *Dicas* (*d*), has, as to this point, been overruled by *Thompson* v. *Percival* (*e*).

(*x*) *Thompson* v. *Percival*, 5 B. & Ad. 925. See *Winter* v. *Innes*, 4 M. & Cr. 109; and *Reed* v. *White*, 5 Esp. 122; *Evans* v. *Drummond*, 4 Esp. 89; *Kirwan* v. *Kirwan*, 2 C. & M. 617.

(*y*) *Lyth* v. *Ault*, 7 Exch. 669; *Scarf* v. *Jardine*, 7 App. Cas. 345. See *In re Family Endowment Society*, L. R. 5 Ch. 118, at p. 132, for difference between evidence required in the case of companies and that of partnerships.

(*z*) *Thompson* v. *Percival* and *Kirwan* v. *Kirwan*, supra; and see *Hart* v. *Alexander*, 2 M. & W. 484; *Brunswick* v. *Locke*, 5 Times Law Reports, 542.

(*a*) Novatione tollitur obligatio, veluti si id, quod tibi Seius debeat, a Titio dari stipulatus sis: Inst. lib. 3, 29. 3. See per *Bacon*, V.-C., *Wilson* v. *Lloyd*, L. R. 16 Eq. 74; *In re Anchor A. Co.*, L. R. 5 Ch. 632; *Spencer's case*, L. R. 6 Ch. 362; *Duff's Exors'. Case*, 32 Ch. D. 301.

(*b*) 7 App. Cas. 345.

(*c*) 5th ed. 253.

(*d*) 3 B. & Ald. 611.

(*e*) 5 B. & Ad. 925.

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"(2) An adoption by the creditor of the new firm as his debtor does not by any means necessarily deprive him of his rights against the old firm, either at law or in equity.

"(3) And it will certainly not do so if by expressly reserving his rights against the old firm he shows that by adopting the new firm he did not intend to discharge the old firm.

"(4) And by adopting a new firm as his debtor, a creditor cannot be regarded as having intentionally discharged a person who was a member of the old firm, but was not known to the creditor so to be.

"(5) But the fact that a creditor has taken from a continuing partner a new security for a debt due from him and a retired partner jointly is strong evidence of an intention to look only to the continuing partner for payment.

"(6) And a creditor who assents to a transfer of his debt from an old firm to a new firm, and goes on dealing with the latter for many years, making no demand for payment against the old firm, may not unfairly be inferred to have discharged the old firm."

As an entire firm may be bound, so it may also be discharged, by transaction with a single partner. Thus, payment or satisfaction of a debt by one partner is payment or satisfaction by them all (*f*); so a release or discharge, even without deed, to one of several partners or joint debtors, though the debt be joint and several, is a discharge to them all (*g*). Though a covenant not to sue an individual may be pleaded by him as a release, yet such a covenant does not release the rest (*h*).

(*f*) *Newton* v. *Blunt*, 3 C. B. 675; *Ballam* v. *Price*, 2 Moore, 235.

(*g*) Co. Litt. 232, a. See *Collins* v. *Prosser*, 1 B. & C. 682; *Nicholson* v. *Revill*, 4 A. & E. 675; *Cheetham* v. *Ward*, 1 B. & P. 630. By special words this operation may, however, be prevented: *Solly* v. *Forbes*, 2 B. & B. 38; *Thomson* v. *Lack*, 3 C. B. 540; *Price* v. *Barker*, 4 E. & B. 760; *Bateson* v. *Gosling*, L. R. 7 C. P. 9; *Muir* v. *Crawford*, L. R. 2 H. L. Sc. App. 456.

(*h*) *Hutton* v. *Eyre*, 6 Taunt. 289; *Thomas* v. *Courtnay*, 1 B. & Ald. 8; *Lacy* v. *Kynaston*, 12 Mod. 551; *Dean* v. *Newhall*, 8 T. R. 168. Compounding an action against one of two joint contractors was held no discharge of the others: *Field* v. *Robins*, 8 A. & E. 90.

Section VI.—*Rights of Partners against Third Persons.*

(A) *As to the mode in which rights of partners against third persons may be acquired.*—It has been held that, where one party applies to another for a loan, without inquiring whether the money is to be advanced by the lender as an individual or as member of a firm, he is liable either to the individual or to the firm, as the advance may chance to be made (*i*). It has also been held that, when one partner sells the goods of the firm in his own name, the whole partnership is nevertheless entitled to sue the buyer for the price (*k*). But this right of theirs does not preclude the buyer from setting off any debt due to him from the single partner, for the existence of that debt may have been his inducement to deal with him (*l*). Even in cases of collateral liability, where a written agreement is required by the Statute of Frauds, it has been held that the firm may sue upon a guaranty given to a single partner, if there be evidence that it was given for the benefit of all (*m*). All this results from an universal rule of law, viz., that where a contract not under seal is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it, the defendant in the latter case being entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the contracting party (*n*).

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Where a security, which is intended to continue in force notwithstanding any change that may take place in its constitution, is given to the firm, such intent must appear, either expressly or by implication, upon the security (*o*); since otherwise it will

(*i*) *Alexander* v. *Barker*, 2 C. & J. 133; *Sims* v. *Bond*, 5 B. & Ad. 393; *Sims* v. *Britain*, 4 B. & Ad. 375.

(*k*) *Cothay* v. *Fennell*, 10 B. & C. 671.

(*l*) *George* v. *Claggett*, 7 T. R. 359; *Gordon* v. *Ellis*, 2 C. B. 821.

(*m*) *Garrett* v. *Handley*, 4 B. & C. 664; and see *Walton* v. *Dodson*, 3 C. & P. 162; and *Moller* v. *Lambert*, 2 Camp. 548.

(*n*) *Sims* v. *Bond*, 5 B. & Ad. 393; *Browning* v. *The Provincial Ins. Co. of Canada*, L. R. 5 P. C. 263.

(*o*) *Backhouse* v. *Hall*, 6 B. & S. 507; *Barclay* v. *Lucas*, 1 T. R. 291; and see *Hollond* v. *Teed*, 7 Hare, 50; *Leadley* v. *Evans*, 2 Bing. 32; *Saunders* v. *Taylor*, 9 B. & C. 35; *Simson* v. *Ingham*, 2 B. & C. 65; *Simson* v. *Cooke*, 1 Bing. 452; *Grouix Soap Co.* v. *Cooper*, 8 C. B. N. S. 800.

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become inoperative as to future events on the incoming or outgoing of a partner (*p*). The same rule is applied to contracts under seal and simple contracts (*q*). By the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), s. 4 (*r*) the Legislature has expressly enacted the above principle. However, a promissory note, given to secure advances made by the firm, will be available for the benefit of future as well as present members, if such clearly appear to have been the intention of the makers (*s*).

(B) *As to the mode in which the rights of the firm against third persons may be determined.*—The better opinion, as has been already stated, is that the rights of the firm may *bonâ fide* be released by any one of the partners (*t*). Accord and satisfaction, without fraud, to one partner prevent the rest from suing (*u*). And there is no doubt that payment of a partnership debt to one member is payment to all; and that even after the firm has been dissolved (*v*), and notwithstanding a clause in the deed of dissolution that another partner shall receive all the joint debts (*x*). So one partner may give time to the debtor of the firm, as by taking his acceptance (*y*), or may preclude the partnership from suing by some act which would render it unconscientious in himself to do so (*z*). Thus, where Jacaud and Blair, partners in one firm, indorsed a bill to Jacaud and Gordon, partners in another firm, and afterwards received effects from the drawer to discharge it, which they converted to their own purposes, it was held that Jacaud and Gordon could not sue the acceptor on this bill. "Jacaud," said Lord *Ellenborough*,

(*p*) See *Lord Arlington* v. *Merrick*, 2 Wms. Saund. 412, and notes; *Strange* v. *Lee*, 3 East, 484; *Pemberton* v. *Oakes*, 4 Russ. 154; *Dance* v. *Girdler*, 1 N. R. 34; *Weston* v. *Barton*, 4 Taunt. 673; *Wright* v. *Russell*, 2 Bl. 934.

(*q*) *Myers* v. *Edge*, 7 T. R. 254; *Ex parte Kensington*, 2 V. & B. 79; *Dry* v. *Davy*, 10 A. & E. 30; *Hollond* v. *Teed*, 7 Hare, 50.

(*r*) See Appendix.

(*s*) *Pease* v. *Hirst*, 10 B. & C. 122.

(*t*) *Phillips* v. *Clagett*, 11 M. & W. 84; *Rawstorne* v. *Gandell*, 15 M. & W. 304.

(*u*) *Wallace* v. *Kelsall*, 8 Dowl. 841; 7 M. & W. 264.

(*v*) *Porter* v. *Taylor*, 6 M. & S. 156.

(*x*) *King* v. *Smith*, 4 C. & P. 108.

(*y*) *Tomlins* v. *Lawrence*, 6 Bing. 376.

(*z*) *Richmond* v. *Heapy*, 1 Stark. 202; *Sparrow* v. *Chisman*, 9 B. & C. 241; *Wallace* v. *Kelsall*, 7 M. & W. 264; *Jones* v. *Yates*, 9 B. & C. 532; *Gordon* v. *Ellis*, 2 C. B. 821.

"being a partner with Blair, must be considered as having, together with Blair, received money from the drawers to take up this very bill. How then can he, because he is also a partner with Gordon in another house, be permitted to contravene his own act, and sue upon this bill, which has been already satisfied as to him?" (*a*).

Rights of partners against third persons.

(*a*) *Jacaud* v. *French*, 12 East, 317, at p. 323; see *Steele* v. *Stuart*, L. R. 2 Eq. 84.

CHAPTER III.

JOINT STOCK COMPANIES.

SECT. 1. *Their Nature.*
2. *How formed and regulated.*
3. *Rights and Liabilities of Members among themselves.*
4. *Rights against, and Liabilities to, Third Parties.*
5. *How wound up and dissolved.*

SECTION I.—*Their Nature.*

Joint Stock Companies—their nature.

A JOINT STOCK COMPANY [established before the passing of the enactments presently mentioned (*a*), and which has not adopted their provisions] is a partnership consisting of a large number of members, whose rights and liabilities would be precisely the same as those of any other sort of partners, had not their multitude obliged them to adopt certain peculiar regulations for the government of the concern, which are ordinarily contained in an instrument, called a Deed of Settlement. The capital of the company is generally divided into equal parts called shares, a certain number of which is held by each member of the company, and in proportion to these he is entitled to participate in the profits of the undertaking. The immediate superintendence of its affairs is delegated to a portion of the members, called directors, subject, nevertheless, to the general control of the body, assembled at stated intervals, or on particular occasions when they may be convened. The general body of shareholders, except upon such occasions, unlike the members of an ordinary partnership, have no power to interfere in its concerns or to bind the company. Such bodies still subsist (*a*), and if established before the 7 & 8 Vict. c. 110, s. 58,

(*a*) *Womersley* v. *Merritt*, L. R. 4 Eq. 695.

Joint Stock Companies—their nature.

which required trading partnerships consisting of more than twenty-five members to be registered, they are legal (*b*); but the impossibility or great inconvenience of carrying on its business upon such a footing, frequently induced a company to add to the Deed of Settlement an Act of Parliament passed expressly for its purposes.

The vast increase in the number of such bodies, and the importance and extent of the undertakings and business carried on by them in modern times, impelled the Legislature to pass general measures for their regulation, granting them peculiar privileges and powers, but imposing upon them certain rules and obligations.

The first class of joint stock companies subject to distinct legislative enactment were joint stock banks of issue, carrying on business beyond the distance of sixty-five miles from London (*c*); and subsequently all joint stock banking companies consisting of more than six persons, established since May the 5th, 1844, were regulated by an Act passed in that year (*d*). This measure continued in force until the year 1857, when the Joint Stock Banking Companies Act, 1857 (*e*), was passed, subjecting companies formed under the last-mentioned Act, and any new companies, with some slight modifications, to the regulations ordained for other companies by "The Joint Stock Companies Acts, 1856, 1857." In the following year joint stock banks were permitted to register with limited liability, a privilege previously withheld from them (*f*). Banking companies registered under the Act of 1857 are now registered under the Companies Act, 1862 (*g*); and by sect. 4 of the latter Act all joint stock banks formed since November 2, 1862, consisting of more than ten persons, *must* be formed and registered

(*b*) See Palmer's Company Precedents, 4th ed. 321.

(*c*) 7 Geo. 4, c. 46. See a history and brief view of this and the other Acts presently mentioned in the judgment of Lord *Cranworth*, in *Oakes* v. *Turquand*, L. R. 2 H. L. 358.

(*d*) 7 & 8 Vict. c. 113, repealed by the Companies Act, 1862, s. 205.

(*e*) 20 & 21 Vict. c. 49, repealed by the Companies Act, 1862, s. 205.

(*f*) 21 & 22 Vict. c. 91, repealed by the Companies Act, 1862, s. 205.

(*g*) 25 & 26 Vict. c. 89, s. 176. See the Act in Appendix.

Joint Stock Companies—their nature.

under its provisions, unless established under a special Act or letters patent.

The result of these legislative measures affecting joint stock banking companies is, that those formed under 7 Geo. 4, c. 46, and not registered since, are governed by that Act and their Deed of Settlement. Banking companies formed under 7 & 8 Vict. c. 113, are governed by their Deed of Settlement and so much of the Companies Act, 1862, as applies to companies registered, but not formed under it. Joint stock banks formed under the 20 & 21 Vict. cc. 14, 19, and 21 & 22 Vict. c. 91, are governed by their rules and articles of association and the Companies Act, 1862; and those formed under the last-mentioned Act are entirely subject to its provisions.

With respect to *other* companies, the statute 7 & 8 Vict. c. 110 (*i*), was passed in 1844, which established a registry of such bodies, and created a uniform system for the regulation of all companies subsequently projected. But companies incorporated by statute or charter, or authorized by statute or letters patent to sue and be sued in the name of some officer, and companies for executing works which could not be carried into execution without obtaining the authority of Parliament, were exempted from these regulations.

Formerly, each company of the latter excepted class was governed by the peculiar provisions of the special Act or charter it obtained. This was found to be very inconvenient, and therefore, in order to produce uniformity, two general Acts, the one termed "The Companies Clauses Consolidation Act" (*k*), embodying all the clauses usually contained in Acts of Parliament establishing such companies, for the regulation of their proceedings, and the transfer of shares and their general government; and the other termed "The Lands Clauses Consolidation Act, 1845" (*l*), containing provisions as to their taking lands for such purposes, were passed. These Acts apply to all companies

(*i*) Repealed by Joint Stock Companies Act, 1856, and Companies Act, 1862. See *Womersley* v. *Merritt*, L. R. 4 Eq. 695.

(*k*) 8 & 9 Vict. c. 16.

(*l*) 8 & 9 Vict. c. 18.

established by Act of Parliament for the execution of undertakings of a public nature after the 8th May, 1845, and constitute a code by which such companies are governed. On account, however, of the peculiar nature and importance of railway companies, a third statute, termed "The Railways Clauses Consolidation Act, 1845" (*m*), has enacted regulations as to the mode of constructing their works, the amount of and means of enforcing tolls and fares, the making of bye-laws, the recovery of penalties and damages, and objects of a like nature. The Regulation of Railways Act, 1873 (*n*), and the Railway and Canal Traffic Act, 1888 (*o*), have further subjected railway and canal companies to the jurisdiction and control of commissioners in the conduct of their business (*p*).

Joint Stock Companies—their nature.

Bodies, the subject of these ordinances, are not, properly speaking, mercantile companies: hence they do not form a fitting subject of enquiry in the present chapter, even were it possible, within the limits of a work like this, to afford any useful explanation of the system they create, and the decisions upon them.

The statute 7 & 8 Vict. c. 110, above referred to, was superseded by the Joint Stock Companies Act, 1856 (*q*), which was repealed by the Companies Act, 1862 (*r*). This latter statute, which is now in force, consolidates the laws relating to Joint Stock Companies, and includes in its operation all companies formed and registered under the Act of 1856 (*s*), and the Joint Stock Banking Companies Act, 1857. With the exception of companies and partnerships formed under some *other* Act, or under letters patent, or engaged in working mines within the jurisdiction of the Stannaries (*t*), every banking company or partnership consisting of more than ten persons, and

(*m*) 8 & 9 Vict. c. 20.

(*n*) 36 & 37 Vict. c. 48. See App.

(*o*) 51 & 52 Vict. c. 25. See App.

(*p*) See Book III. Chap. II.

(*q*) 19 & 20 Vict. c. 47.

(*r*) 25 & 26 Vict. c. 89.

(*s*) There was also an intermediate Act, 18 & 19 Vict. c. 133, which enabled companies to acquire limited liability. Companies formed under that Act are now regulated by the Act of 1862, which has also a limited application to companies registered, but not formed under the above Acts; see sect. 177; and even to unregistered companies: sect. 199.

(*t*) 25 & 26 Vict. c. 89, s. 4. See Appendix.

Joint Stock Companies—their nature.

every other company or partnership, having for its object the acquisition of gain (*t*), and consisting of more than twenty persons, established since the first of November, 1862, *must*, and any company consisting of seven or more persons associated for any lawful purpose *may* (*u*), be formed and registered under the Act of 1862. Every other company, too, except a railway company (*v*), whether previously existing, or formed afterwards in pursuance of an Act of Parliament or letters patent, or engaged in working mines within the Stannaries jurisdiction, or otherwise duly constituted by law, and every unregistered company consisting of more than seven members may, with the assent of the shareholders, be registered as a limited, or unlimited, company under its provisions (*x*). If formed for gain, and consisting of more than twenty members, a company must be registered. A trust association, which purchases the shares of telegraph or railway companies for the purpose of dividing the proceeds of dividends or sales, is not such a body (*y*). If an association falling within the class requiring registration is not registered, the Courts will decline to recognize its existence by ordering it to be wound up, or otherwise (*z*).

If not thus registered, the law of companies established under private Acts of Parliament, charters, or letters patent, is that laid down by those instruments. Companies thus constituted certainly differ very materially from ordinary firms; but, so far as their Acts, charters, or letters patent have not provided, they are governed by the ordinary law of partnership.

There is a class of companies popularly known as "private

(*t*) *In re Arthur Average Association*, L. R. 10 Ch. 545, n.; *In re Padstow Ass. Association*, 20 Ch. D. 137.

(*u*) Sect. 6.

(*v*) It has been decided in Ireland that a railway company formed since 1862, in pursuance of an Act of Parliament, and consisting of more than seven members, may be registered under the Companies Act, 1862, or wound up under it: *In re Ennis and W. Clare Ry.*, 3 L. R. (Ir.) 94. An unregistered tramway company may be wound up under sect. 199.

(*x*) Sect. 180; *Southall* v. *British Mutual L. A. Society*, L. R. 6 Ch. 614. This includes companies registered under the Act of 1844, s. 196.

(*y*) *Smith* v. *Anderson*, 15 Ch. D. 247. Compare *In re Arthur Average Association*, L. R. 10 Ch. 545, n.

(*z*) *In re Padstow Ass. Association*, 20 Ch. D. 137; *Shaw* v. *Benson*, 11 Q. B. D. 563; *Ex parte Poppleton*, 14 Q. B. D. 379.

companies," because no shares are issued to the public. But if registered under the Companies Act, 1862, they are subject to all its provisions (*a*). Joint Stock Companies—their nature.

Section II.—*How formed and regulated.*

A joint stock company, established before 1st November, 1844, the period prescribed by the first Registration Act (*b*), was usually formed by *Deed of Settlement*, as it is called, sometimes accompanied by a Private *Act of Parliament* or a royal *patent*. How formed and regulated.

The *Deed of Settlement* constitutes trustees of the partnership property, directors of the partnership affairs, auditors of its accounts, and such other officers as the objects of the society require, and contains covenants for the performance of their respective duties, which are specifically set out, as are those of the other partners or shareholders; it also defines the number of shares, the power and method of transferring them, and of calling for the instalments required to be made thereon: the mode of convening general meetings of proprietors, their rights when convened, and a variety of other rules, suited to the exigencies of the particular undertaking. As far as the provisions of this instrument extend it is the law by which the partnership affairs are to be governed; when it is silent, the general law respecting partnership is to be followed (*c*).

Companies registered under the 7 & 8 Vict. c. 110 (*d*) were regulated by similar deeds of settlement, and their proceedings in the main continue to be thus governed. They may now,

(*a*) *Trevor* v. *Whitworth*, 12 App. Cas. 409.

(*b*) 7 & 8 Vict. c. 110.

(*c*) Palmer's Company Precedents, 4th ed. 345; *Pickering* v. *Stephenson*, L. R. 14 Eq. 322. The powers conferred by such an instrument on the directors must be strictly pursued. See *Moore* v. *Hammond*, 6 B. & C. 456; *Davies* v. *Hawkins*, 3 M. & S. 488; *Ducarry* v. *Gill*, 4 C. & P. 121; *Spackman* v. *Evans*, L. R. 3 H. L. 171.

(*d*) There were a few companies to which modified letters patent were granted under the statutes 4 & 5 Will. 4, c. 94; 1 Vict. c. 93; but it is doubtful whether any of them still exist. At all events, they are so few as not to warrant a notice in such a limited work as this.

Joint Stock Companies—how formed and regulated.

however, be, and usually are, registered under, and regulated in other respects by, the Companies Act, 1862 (*d*).

Companies established under the Joint Stock Companies Act, 1856 (*e*), were formed and regulated by a memorandum and articles of association, which generally contained provisions corresponding to those of a deed of settlement. These companies are now subjected to the operation of the Act of 1862, in the same manner as if they had been registered under it; but the original regulations, so far as they are not inconsistent with the Act, remain in force, with this additional provision, that unlimited companies, whose capital and shares are fixed by their memorandum of association, may, notwithstanding, alter their regulations as to the capital and its distribution into shares; and if the articles of association adopted were those contained in the Act of 1856, the shareholders may vary them by special resolution (*f*).

With respect to companies formed since November 1, 1862, any seven or more persons (*g*) associated for any lawful purpose *may*, by subscribing their names to a memorandum of association and complying with the requisites presently mentioned as to registration, form an incorporated company (*h*), under the provisions of the Companies Act, 1862. If they be banking companies consisting of more than ten persons, or other companies consisting of more than twenty persons, formed for the purpose of carrying on any other businesses that have for their object the acquisition of gain (*i*), they *must* be formed and regis-

(*d*) 25 & 26 Vict. c. 89, s. 196.

(*e*) Companies formed under the Joint Stock Companies Acts, 1856, 1857, the Joint Stock Banking Companies Act, 1857, and the Limited Liability Banking Companies Act, are subject to the same rule.

(*f*) 25 & 26 Vict. c. 89, s. 176.

(*g*) This includes a body corporate, *Barned's Banking Co.*, L. R. 3 Ch. 105; *Royal Bank of India's Case*, L. R. 4 Ch. 252.

(*h*) Sect. 6. As to companies formed abroad, see *Reuss* v. *Bos*, L. R. 5 H. L. 176; *Bulkeley* v. *Schutz*, L. R. 3 P. C. 764; *Bateman* v. *Service*, 6 App. Cas. 386; *In re Matheson Brothers*, 27 Ch. D. 225.

(*i*) *Harris* v. *Amery*, 1 C. P. 148; *Smith* v. *Anderson*, 15 Ch. D. 247; *In re Padstow Ass. Association*, 20 Ch. D. 137; *Jennings* v. *Hammond*, 9 Q. B. D. 225; *Crowther* v. *Thorley*, 32 W. R. 330; *In re Arthur Average Association*, L. R. 10 Ch. 542. As to trade unions, see 34 & 35 Vict. c. 31, s. 5, and 39 & 40 Vict. c. 22.

Joint Stock Companies—how formed and regulated.

tered under that Act (*k*). For this purpose, a memorandum of association (*l*), which bears the same stamp as a deed, containing the name of the company, the part of the United Kingdom in which its registered office will be located, and the objects for which it is to be established, is to be executed. This instrument, in effect, is a substitute for, and operates as, a Charter of Incorporation, and limits the powers of the body. Therefore the members of the corporation have no power to extend the operations of the company beyond those comprehended within its terms. "The memorandum of association is, under that Act" (the Companies Act of 1862), said Lord *Selborne*, in *The Ashbury Carriage Co.* v. *Riche* (*m*), "their fundamental, and (except in certain specified particulars) their unalterable law." Any proviso in the articles of association outside these limits,—*e.g.*, a power to pay dividends out of capital, or to extend the business of the company to different matters—will be void (*n*). It must be signed by seven members at least (*o*), whose execution of it is to be attested; and the name must not be that of an existing company, unless that body be in the course of dissolution and consents (*p*).

The liability of the members may be unlimited or limited. It may be limited either to the amount, if any, unpaid on the shares, or to such an amount as the members may guarantee to contribute to the assets of the company in the event of its being wound up. If the liability is intended to be limited, the word

(*k*) 25 & 26 Vict. c. 89, s. 4. See Appendix.

(*l*) Forms are given in the second schedule of the Act.

(*m*) L. R. 7 H. L. 653, at p. 693; *Att-Gen.* v. *Great Eastern Ry. Co.*, 5 App. Cas. 473. See *Ashbury* v. *Watson*, 30 Ch. D. 376.

(*n*) *Guinness* v. *Land Corporation of Ireland*, 22 Ch. D. 349; *Ashbury* v. *Watson*, 30 Ch. D. 376.

(*o*) The signature may be by an agent, whose authority need not be by deed. *In re Whitley Partners Limited*, 32 Ch. D. 337.

(*p*) 25 & 26 Vict. c. 89, s. 20. If the name so nearly resemble that of another company as to deceive, it may be changed; and by sect. 13, a company's name may, with the approval of the Board of Trade, be changed at any time, but a new certificate is necessary. See *Shackleford, Ford & Co.* v. *Dangerfield*, L. R. 3 C. P. 407. The principles applicable to individuals trading under similar names apply also to companies: *Merchant Banking Co. of London* v. *Merchants' Joint Stock Bank*, 9 Ch. D. 560; *Singer Machine Manufacturers* v. *Wilson*, 3 App. Cas. 376. As to injunction to restrain a new company from applying for registration under a name calculated to deceive, see *Hendriks* v. *Montagu*, 17 Ch. D. 638.

Joint Stock Companies—how formed and regulated.

"limited" must be the last word of the name of the company (*q*). Where the limit is by shares, the memorandum of association must state the liability to be limited as well as the amount of the capital, which must be divided into shares of a fixed amount (*r*). Each member must take at least one share, and write the number he takes opposite to his name in the memorandum of association (*s*). Where the liability is limited by guarantee, the memorandum must contain a declaration that, in the event of the company being wound up, each member undertakes to contribute towards the liabilities of the company such amount as may be required, not exceeding a specified amount (*t*). The liability of the company, too, may be limited, but that of the directors or manager or managing director unlimited (*u*).

The memorandum of association is to be registered with the registrar of joint stock companies (*x*). With it, articles of association printed, stamped and signed by each subscriber, prescribing regulations for the company in separate paragraphs numbered, *may*, in the case of a company limited by shares, and *shall*, in all other cases, be delivered to the registrar. If the company be limited by guarantee, or unlimited, these articles must also state the number of the shares, where the capital is divided into shares, and where not so divided, the proposed number of the members. Forms of articles are given, which may be adopted wholly or in part by the companies to which they are applicable. In the case of a company limited by shares, the articles contained in Table A. of the first schedule, so far as they are applicable, and not excluded or modified by the registered articles (*y*),

(*q*) 25 & 26 Vict. c. 89, s. 8. See sect. 23 of 30 & 31 Vict. c. 131, as to associations not for profit.

(*r*) 25 & 26 Vict. c. 89, s. 8. *Re Financial Corporation*, L. R. 2 Ch. 714. These may now be subdivided afterwards. See 30 & 31 Vict. c. 131, ss. 21, 22. But this will not prevent shareholders from being liable for any amount specially provided for by the articles. *Maxwell's case*, L. R. 20 Eq. 585; *McKewan's case*, 6 Ch. D. 447; *Lion Insurance Association* v. *Tucker*, 12 Q. B. D. 176.

(*s*) 25 & 26 Vict. c. 89, s. 14.

(*t*) Ibid. s. 9, and 42 & 43 Vict. c. 76, s. 5.

(*u*) 30 & 31 Vict. c. 131, s. 41. See *Lion Insurance Co.* v. *Tucker*, 12 Q. B. D. 176.

(*x*) 25 & 26 Vict. c. 89, ss. 6, 11, 17. A statement of the amount of the nominal share capital of the company must be delivered to the registrar, upon which an ad valorem stamp duty of 2*s.* for every 100*l.* and any fraction of 100*l.* over any multiple of 100*l.* of the amount of such capital is charged: 51 Vict. c. 8, s. 11; 52 Vict. c. 7, s. 16.

(*y*) 25 & 26 Vict. c. 89, ss. 14, 15, 16, 17.

become its regulations, to the same extent as if they were its registered articles of association (*z*).

Joint Stock Companies—how formed and regulated.

As the regulations thus furnished by the Act are generally varied by each company, it would be useless to detail them (*z*). Suffice it to say that generally they provide for the acceptance, transfer, transmission and forfeiture of shares, and their conversion into stock; and, where the capital is not divided into shares, they define the conditions upon which persons become members of the company. They provide for the making and payment of calls; the increase of capital; the *general meetings* of the company and the proceedings thereat; the votes of the members; the number, powers, disqualification and proceedings of the directors; the mode in which dividends are to be declared and paid, the accounts of the company kept and audited, and notices to the members given; also the event, if any, upon the occurrence of which the company is to be dissolved.

When registered, the memorandum and articles bind the company and members (*a*), in the same manner as if each member had executed a covenant to conform to them; and all monies payable under them by the members to the company become debts in the nature of specialties (*b*).

The memorandum is the charter of incorporation of the company and defines its powers (*c*). The memorandum cannot be altered (*d*) except in the following particulars:—The company may by special resolution (*e*), passed by a majority of three-fourths and confirmed by a simple majority of the members present in person or by proxy at two general meetings, (1) change its name (*f*); (2) render unlimited the liability of its directors, managers, or managing director (*g*); (3) repay accumulated undivided profits

(*z*) See Appendix.

(*a*) 25 & 26 Vict. c. 89, ss. 16 and 18.

(*b*) Ibid. s. 16.

(*c*) Per *Cairns*, L. C., *Ashbury Co.* v. *Riche*, L. R. 7 H. L. 653, at p. 668.

(*d*) *Semble*, it is alterable as to particulars not required by the statute; *e.g.*, where a shareholder subscribed for B shares and agreed to take A shares and balances. Per *Jessel*, M. R., *Duke's case*, 1 Ch. D. 620, at p. 623; and see *Winstone's case*, 12 Ch. D. 239; *Lord Claud Hamilton's case*, L. R. 8 Ch. 548.

(*e*) 25 & 26 Vict. c. 89, s. 51.

(*f*) Ibid. s. 13.

(*g*) 30 & 31 Vict. c. 131, s. 8.

Joint Stock Companies—how formed and regulated.

in reduction of the paid-up capital (*h*); (4) increase, consolidate, sub-divide, or convert into stock, or reduce the share capital of the company (*i*).

The registrar retains and registers the memorandum and articles thus delivered to him, and on payment of his fees certifies under his hand that the company is incorporated, and, in the case of a limited company, that it is limited. Thereupon the subscribers of the memorandum, together with such persons as may from time to time become members of the company, are constituted a body corporate with perpetual succession, a common seal, and power to hold lands (*k*); and the certificate thus issued becomes conclusive (*l*) evidence that the statutory requirements with respect to registration have been complied with.

Every company must have a registered office, and notice of its situation, and of any change in it, must be given to the registrar (*m*). A register of members, the most important record of the company, commencing from the registration of the company, is to be kept at the registered office (*n*) in one or more books, wherein must be entered the names, addresses, and occupations (if any) of the members; the shares, in the case of a company, having a capital divided into shares, held by each member, distinguished by numbers, and the amount paid, or considered to be paid thereon; the dates at which the name of each member was entered, and at which any person ceased to be a member (*o*).

If the capital be divided into shares, a list must be made once at least in every year of the name, address, and occupation of each person who, on the fourteenth day after the first ordinary general meeting in the year (*p*), is a member of the company,

(*h*) 43 Vict. c. 19, s. 3.

(*i*) 25 & 26 Vict. c. 89, s. 12; 30 & 31 Vict. c. 131, s. 9; 40 & 41 Vict. c. 26; 43 Vict. c. 19.

(*k*) 25 & 26 Vict. c. 89, s. 18. Companies for promoting art, science, religion, or charity, or any other object not involving the acquisition of gain, cannot hold more than two acres of land without the license of the Board of Trade. Ibid. s. 21.

(*l*) 25 & 26 Vict. c. 89, s. 18. *In re Barned's Banking Company*, L. R. 2 Ch. 674; *Oakes* v. *Turquand*, L. R. 2 H. L. 325; *Nassau Co.*, 2 Ch. D. 610; *Glover* v. *Giles*, 18 Ch. D. 173.

(*m*) 25 & 26 Vict. c. 89, ss. 39, 40.

(*n*) Ibid. s. 32.

(*o*) Ibid. s. 25.

(*p*) Ibid. s. 26. The general meeting of every company under the Act must be held once at the least in every year. 25 & 26 Vict. c. 89, s. 49.

Joint Stock Companies—how formed and regulated.

and the number of his shares. The list must also specify the capital, the shares into which it is divided, the number of shares taken, the amount of calls made, the amount received and unpaid on each share, the shares forfeited, the names, addresses, and occupations of persons who have ceased to be members since the last list was made, and the number of shares each of them held (*q*). Within seven days after such fourteenth day in each year (*r*) this entire list is to be entered on the register, and a copy of it forthwith forwarded to the registrar (*s*), under a penalty of 5*l.* per diem (*t*). If the capital of any company be consolidated and divided into shares of larger amount than its existing shares, or any portion of its capital be converted into stock, notice must be given to the registrar, whereupon, in the latter case, the provisions of the Act relating to shares cease as to the capital so converted; but the register and list of members must show the amount of stock held by each member (*u*). Notice of any increase of capital or stock beyond the registered capital, where the capital is divided into shares, or of any increase in the number of members beyond the registered number, where the capital is not so divided, must be given, within fifteen days, to the registrar, who records the change (*x*). A power is given by the Companies Act, 1867, to the company by special resolution to reduce the capital, upon an application to the Chancery Division, which creditors, who are to have notice of it, may oppose (*y*). Further powers to reduce capital are given by the Companies Act, 1877 (40 & 41 Vict. c. 26), and the Companies Act, 1880 (43 Vict.

(*q*) 25 & 26 Vict. c. 89, s. 26.

(*r*) *Gibson* v. *Barton*, L. R. 10 Q. B. 329. (Year from 1st January to 31st December.)

(*s*) 25 & 26 Vict. c. 89, s. 26. But by 30 & 31 Vict. c. 131, ss. 27 to 33, share warrants may be issued to bearer, who may be deemed a member, for shares fully paid up or stock, and then the names of the members for whose shares, &c., they are granted are struck out, and the issue and dates of the warrants, and a statement of the numbers, &c. of the shares or stock are to be entered in the register and annual summary.

(*t*) 25 & 26 Vict. c. 89, s. 27. *Gibson* v. *Barton*, ubi sup.; *Coventry and Dixon's case*, 14 Ch. D. 660.

(*u*) 25 & 26 Vict. c. 89, ss. 28, 29.

(*x*) Ibid. s. 34.

(*y*) 30 & 31 Vict. c. 131, ss. 9 to 20. *Hope* v. *International Financial Society*, 4 Ch. D. 327; *Ebbw Vale Co.'s case*, 4 Ch. D. 827; *Kirkstall Brewery Co.*, 5 Ch. D. 535; *In re Dronfield Silkstone Coal Co.*, 17 Ch. D. 76; *Taylor* v. *Pilsen Co.*, 27 Ch. D. 268; *Re Patent Invert Sugar Co.*, 31 Ch. D. 166; *Bannatyne* v. *Direct Spanish Telegraph Co.*, 34 Ch. D. 287.

Joint Stock Companies—how formed and regulated.

c. 19). Companies are enabled to cancel lost capital, to pay off capital in excess of their wants, to cancel shares never issued, and to return to shareholders accumulated capital in reduction of paid-up capital. The Companies Act, 1880 (43 Vict. c. 19) permits the return to shareholders of accumulated capital in reduction of paid-up capital. All attempts to reduce the capital of a company by the purchase of its own shares, apparently even though the memorandum professed to authorize such purchase, or by other means than those provided in the above Acts, are invalid (*y*).

A limited company must not only have the word "limited" the last in its name, but also have that name legibly painted or affixed in a conspicuous position outside every office or place where its business is carried on, under a penalty for each day's omission. The name, too, must be engraved on its seal, and mentioned in all notices, advertisements, official publications, bills, notes, indorsements, cheques, orders for money or goods, bills of parcels, invoices, receipts, and letters of credit, under a penalty of 50*l.* on the officer who uses any other seal as that of the company, or issues or signs any such notice, &c. on its behalf, wherein the name is not mentioned. Moreover, the officer, if it be not paid, will be personally responsible for the amount of any such bill, &c. (*z*). A register must, under heavy penalties, be kept of all mortgages and specific charges on its property, containing a short description of the property, the amount of the charge, and the name of the person entitled to it (*a*). Such an omission will not, in the absence of fraud or concealment, invalidate the debentures, even though in the hands of an officer whose duty it was to register (*b*). The register is to be open at all reasonable times to the inspection of any member or creditors of the company (*c*); and if such inspection be refused, a

(*y*) *Trevor* v. *Whitworth*, 12 App. Cas. 409; *In re the Mersey Construction Co.*, Times, July 22, 1889; *Re Union Plate Glass Co.* (attempted reduction of part of capital), 61 L. T. N. S. 327.

(*z*) 25 & 26 Vict. c. 89, ss. 41, 42; *Penrose* v. *Martyn*, E. B. & E. 499; infra, p. 89.

(*a*) 25 & 26 Vict. c. 89, s. 43.

(*b*) *Wright* v. *Horton*, L. R. 12 App. Cas. 371, overruling *In re Native Iron Co.*, 2 Ch. D. 345.

(*c*) *In re Credit Co.*, 11 Ch. D. 256 (refusal to allow the shareholder's solicitor to inspect); *Mutter* v. *Eastern and Midlands Ry. Co.*, 38 Ch. D. 92 (right

judge is empowered to order it immediately. Every limited banking and every insurance company, and deposit, provident or benefit society, before it commences business, and also on the first Monday in February and August in every year, is required to put up in a conspicuous place, in the registered and each branch office or place where its business is carried on, a statement (*d*) of its liabilities and assets, and, if the capital be divided into shares, the amount of capital and shares, the number of shares issued, the amount per share of calls made, and the sum received. Every member and creditor is entitled to a copy (*e*) of this on payment of a sum not exceeding sixpence. Each company, not having a capital divided into shares, must, under penalties, keep at its office a register of the names, addresses, and occupations of its directors or managers, and send a copy of the notice of any change in these officials to the registrar (*f*).

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No dividend is payable except out of the profits of the business of the company (*ff*), and no dividend shall bear interest (*g*). It is often provided that the transfer of shares or stock shall not pass the right to any dividend declared before the registration of the stock (*h*).

Section III.—*Rights and Liabilities of Members among themselves.*

Persons are generally induced to become members of new joint stock companies through the medium of prospectuses, issued by the promoters. Though some allowances may be made for sanguine expectations, "yet no misstatement or concealment of any material facts or circumstances ought to be furnished." "It cannot be too frequently or too strongly impressed," observed Lord *Chelmsford*, "upon those who, having projected any undertaking, are desirous of obtaining the co-operation of persons who have no other information on the

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to take copies). As to joint-stock banks, see 30 Vict. c. 29, s. 2.

(*d*) For form of statement, see Form D, Schedule I.

(*e*) 25 & 26 Vict. c. 89, s. 44.

(*f*) 25 & 26 Vict. c. 89, ss. 45, 46.

(*ff*) *Lee* v. *Neuchatel Co.*, 41 Ch. D. 1.

(*g*) Table A. article 73; *Fliteroft's case*, 21 Ch. D. 519.

(*h*) *Eastern Ry. Co.* v. *Symonds*, 5 Ex. 237. As to apportionment, see *Block* v. *Homersham*, 4 Ex. D. 24.

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subject than that which they choose to convey, that the utmost candour and honesty ought to characterise their published statements" (*i*). In furtherance of this principle the Companies Act, 1867 (30 & 31 Vict. c. 131), s. 38, enacts as follows:

(a) "Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors or the company, or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract" (*k*).

Two questions have arisen on this section, which extends the liability of agents to cases where the relationship of principal and agent does not exist. The first is, what classes of contracts are included? The literal construction of the section would require the specifying of every contract made by any of the persons named at any time before the issue of the prospectus or notice. There has been much difference of opinion as to the limitations with which the section must be taken. On the one hand, it has been laid down that the section included only contracts by which the companies incur obligations. On the other hand, the section has been held to extend to "every contract made before the issue of the prospectus, the knowledge of which might have an effect upon a reasonable subscriber for shares in determining him to give or withhold faith in the promoter, director, or trustee issuing the prospectus, whether such contract was made by such promoter, director, or trustee before or after he became a promoter, director, or trustee, and whether or not such contract was made on behalf of or so

(*i*) Per Lord *Chelmsford*, in *Central Railway Company of Venezuela* v. *Kisch*, L. R. 2 H. L. 99, at p. 113; *New Brunswick C. R. Co.* v. *Muggeridge*, 1 Dr. & Sm. 381; *Smith* v. *Chadwick*, 9 App. Cas. 187; *Arnison* v. *Smith*, 41 Ch. D. 348.

(*k*) Often a "waiver clause," by which applicants agree to waive the benefit of this section, is inserted in the prospectus; but it is doubtful whether such a clause has any effect. Palmer's Company Precedents, 4th ed. 58; Lindley on Company Law, 5th ed. 92.

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as, if adopted, to impose a liability on the company" (*l*), and, it may be added, whether in writing or not. The latter seems to be the true view. Who are promoters is in each case a question of fact. The term is "a short and convenient way of designating those who set in motion the machinery by which the Act enables them to create an incorporated company" (*m*). A promoter may be agent for the vendor of property to a company; the material question is, whether the purchase and the formation of the company are part of one project, or whether they are independent transactions? (*n*). There may be a promoter within the meaning of the section, notwithstanding the existence of an independent board of directors (*o*). The remedy under the section is only against the director and promoter, and not against the company. It does not enable a shareholder to repudiate his shares or the company to sue the promoter (*p*).

As the prospectus forms the basis on which the original shareholders usually agree to take shares, any one of them who has been misled by a misrepresentation, misstatement or concealment of a material fact (*q*), may, if he use diligence, so soon as he ascertains the real facts, be relieved from his engagement (*r*).

(*l*) Per *Brett*, J., in *Gover's case*, 1 Ch. D. 182, at p. 200; *Twycross* v. *Grant*, 2 C. P. D. 469; *Bagnall* v. *Charlton*, 6 Ch. D. 371; *Arkwright* v. *Newbold*, 17 Ch. D. 301; *Craig* v. *Phillips*, 3 Ch. D. 722; *Cornell* v. *Hay*, L. R. 8 C. P. 328. "The balance of authority is in favour of a construction which would render it necessary to specify every contract by a promoter, director, or trustee, which might reasonably be expected to influence persons reading the prospectus in making up their minds whether or not they will apply for shares; and further, that contracts must be specified whether made before or after the person becomes a promoter, director, or trustee, and whether they relate, directly or indirectly, to the officers of the company." Palmer's Company Precedents, 4th ed. 56; Lindley on Company Law, 5th ed. 92.

(*m*) Per Lord *Blackburn*, in *Erlanger* v. *New Sombrero Co.*, 3 App. Cas. 1218, at p. 1268. See also remarks of *Bowen*, J., in *Whaley Bridge Co.* v. *Green*, 5 Q. B. D. 109; and *Lindley*, L. J., in *Lydney and Wigpool Iron Ore Co.* v. *Bird*, 33 Ch. D. at p. 93.

(*n*) *Lydney and Wigpool Iron Co.* v. *Bird*, 31 Ch. D. 328; *In re British Seamless Box Co.*, 17 Ch. D. 467.

(*o*) *Erlanger* v. *New Sombrero Co.*, supra; *Emma Silver Mining Co.* v. *Lewis*, 4 C. P. D. 396.

(*p*) *Sullivan* v. *Mitcalfe*, 5 C. P. D. 455; *Gover's case*, 1 Ch. D. 182; *Erlanger* v. *New Sombrero Co.*, supra.

(*q*) See *Beattie* v. *Lord Ebury*, L. R. 7 Ch. 777; *Peek* v. *Derry*, 37 Ch. D. 541; *Smith* v. *Chadwick*, 9 App. Cas. 187.

(*r*) *Central Ry. Co. of Venezuela* v. *Kisch*, L. R. 2 H. L. 99; *Reese River Silver Mining Co.* v. *Smith*, L. R. 4 H. L. 64; *Arkwright* v. *Newbold*, 17 Ch. D. 301; *Western Bank of Scotland* v. *Addie*, L. R. 1 H. L. Sc. 145; *Oakes* v. *Turquand*, L. R. 2 H. L. 325; see *infra*, note (*t*); *Peek* v. *Gur-*

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So when it has been circulated by the company, any person who has been thus induced to take shares may, upon promptly repudiating them, defend any action against him by the company, providing the winding up has not began (*r*). Sometimes, too, he may obtain the restoration of any sums he may have paid (*s*); and, at all events, recover any loss he may sustain as damages against the promoters, directors, or persons who have imposed upon him (*t*). A person induced by the fraud of the agents of a joint stock company to become a member can bring no action for damages *against the company whilst he remains a member*, his only remedy is *restitutio in integrum* and rescission of the contract; if this becomes impossible, as by the winding up of the company or otherwise, his action for damages cannot be maintained against the company or liquidators (*u*). The authorities show that—(1) when an order is made for winding up a company, the shares cannot be repudiated (*x*); (2) that when a company cease in fact to carry on business, it is too late to rescind a contract to take shares, though brought about by fraud (*y*); (3) that when there is no remedy by rescission of the contract, a shareholder cannot recover calls paid (*z*); (4) that a shareholder induced by fraud to take shares cannot prove for damages in the winding up in competition with other creditors or shareholders, or against the company (*a*).

Persons applying for shares may withdraw at any time before their application has been accepted (*b*), before the shares have

ney, L. R. 6 H. L. 377; L. R. 13 Eq. 79; *Chadwick* v. *Smith*, 9 App. Cas. 187; *Arnison* v. *Smith*, 41 Ch. D. 348. As to delay in repudiating shares, *Sharpley* v. *Louth & E. Coast Ry. Co.*, 2 Ch. D. 663.

(*r*) Lord *Chelmsford*, in *Western Bank of Scotland* v. *Addie*, ubi supra.

(*s*) *Wontner* v. *Shairp*, 4 C. B. 404; *Henderson* v. *Lacon*, L. R. 5 Eq. 249. But see *Clarke* v. *Dickson*, 6 C. B. N. S. 453, and *Western Bank of Scotland* v. *Addie*, ubi supra.

(*t*) *Smith* v. *Chadwick*, 20 Ch. D. 27; *Arkwright* v. *Newbold*, 17 Ch. D. 301; *Gerhard* v. *Bates*, 2 E. & B. 476; *Arnison* v. *Smith*, *supra*. As to measure of damages, *Twycross* v. *Grant*, 2 C. P. D. 469; *Gerhard* v. *Bates*, 2 E. & B. 476.

(*u*) *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317; *In re Scottish Petroleum Co.*, 23 Ch. D. 413.

(*x*) *Addie* v. *Western Bank of Scotland*, L. R. 1 H. L. Sc. 145; *Urquhart* v. *Macpherson*, 3 App. Cas. 831.

(*y*) *Mitchell* v. *City of Glasgow Bank*, 4 App. Cas. 624.

(*z*) *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317.

(*a*) *In re Addlestone Linoleum Co.*, 37 Ch. D. 191.

(*b*) *Nackets* v. *Crosby*, 3 B. & C. 814; *Walstab* v. *Spottiswoode*, 15 M. & W. 501; *Mowath* v. *Londesborough*, 4 E. & B. 1. The principle above stated

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been allotted, or the allotment sent to the applicant (*c*), if the application be not accepted in its terms (*d*), or if it be subject to a term or condition which is not fulfilled (*e*).

The purpose of a prospectus being to invite persons to become *original* shareholders, its office is completed on allotment; and a purchaser of shares has no right of action in respect of any concealment or misrepresentation in the prospectus (*f*). Should the memorandum of association materially differ from the prospectus, a person who has agreed to subscribe on the footing of it may at once repudiate the shares (*g*), and demand a return of his deposit (*h*). So, likewise, where the scheme proves abortive and the project is never carried out. So, if the shares be not allotted within a reasonable time, they may reject them immediately upon notification of the allotment (*i*).

By sect. 25 of the Companies Act, 1867, every share shall be deemed to be held subject to the payment of the whole amount thereof in cash, "unless the same shall have been otherwise determined by a contract duly made in writing and filed with the registrar of joint stock companies at or before the issue of shares" (*k*). It is not competent to issue shares at a discount.

"The Act of 1867 only regulated the mode of payment, it prescribed that shares must be paid up in cash, unless a contract providing for some other mode of payment had been registered, but it contains no provision exempting shares from being paid up in full. I cannot agree with the cases, *In re Ince Hall Rolling Mills*

does not apply where the deposit was to be expended in preliminary expenses: *Clements* v. *Toad*, 1 Ex. 268; *Willey* v. *Parratt*, 3 Ex. 211.

(*c*) *Ramsgate Hotel Co.* v. *Montefiore*, L. R. 1 Ex. 109; *Ritso's case*, 4 Ch. D. 774; *Duff's Executors' case*, 32 Ch. D. 301.

(*d*) *Addinell's case*, L. R. 1 Eq. 225; *Pentslow's case*, L. R. 4 Ch. 178; *Beck's case*, L. R. 9 Ch. 392; *Jackson* v. *Turquand*, L. R. 4 H. L. 305.

(*e*) *Wood's case*, L. R. 15 Eq. 236; *In re Scottish Petroleum Co.*, 23 Ch. D. 413. See *Sandy's case*, 61 L. T. N. S. 98.

(*f*) *Peck* v. *Gurney*, L. R. 6 H. L. 377.

(*g*) *Fox's case*, L. R. 5 Eq. 118, which seems doubtful. See *Scottish Petroleum Co.*, 23 Ch. D. 413, *Lindley*, L. J., at p. 437; *Smith's case*, L. R. 2 Ch. 604.

(*h*) *Wright's case*, L. R. 7 Ch. 55.

(*i*) *Ramsgate Hotel Co.* v. *Montefiore*, L. R. 1 Ex. 109; *Ex parte Baily*, 3 Ch. 592.

(*k*) See, as to this section, *Almada and Tirito Co.*, 38 Ch. D. 415; *In re British Farmers' Cake Co.*, 7 Ch. D. 533; *Barrow's case*, 14 Ch. D. 432; *In re Addlestone Linoleum Co.*, 37 Ch. D. 191; *In re Jones*, 41 Ch. D. 159.

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Co. (*l*), and *In re Plaskynaston Tube Co.* (*m*), in which it was held that shares in limited companies could be issued at a discount"(*n*).

With regard to the rights of members of an *unregistered* joint stock company among themselves, these are provided for and regulated by their deed of settlement, and, if infringed, must be vindicated in the same manner as the rights of ordinary partners *inter se*, except always so far as the regulations of the company may have provided the contrary. And whenever there is no Act or letters patent, and the deed of settlement is silent, the general law of partnership prevails, and supplies its omissions. Thus, in the absence of some stipulation to the contrary, each member has a right to inspect the books of the company (*o*).

It has already been stated that, in the case of companies established under the several Acts of 1844, 1856, and 1862, upon registration the members for the time being become a corporation (*p*). A corporation aggregate (*q*) consists of several individuals, united in such a manner that they and their successors constitute but one person in law: a person distinct from that of any of the members, though made up of them all, and whose privileges and possessions, when once vested in it, will be for ever vested, without any conveyance to new successors; for all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law; as the river Thames is still the same river, though the parts which compose it are changing every instant (*r*).

By the name mentioned in the certificate of registration the company must sue or be sued, grant or receive, and do all other acts as natural persons may. Being, however, an invisible body, it cannot manifest its will by oral communication. A peculiar mode has therefore been devised for the authentic expression of its intention, viz., the affixing of the common

(*l*) 23 Ch. D. 545, n.

(*m*) 23 Ch. D. 542.

(*n*) *Lindley*, L. J., *In re Addlestone Linoleum Co.*, 37 Ch. D. 191, at p. 205; and as to allowing a set-off to calls, *In re Jones, Lloyd & Co.* 41 Ch. D. 159.

(*o*) *Baldwin* v. *Lawrence*, 2 Sim. & Stu. 18; 25 & 26 Viot. c. 89, Table A. 78.

(*p*) Ante, p. 68.

(*q*) The consideration of a corporation sole is foreign to the subject of this Treatise.

(*r*) 1 Bl. Com. 468. "The shareholders are not the corporation:" *Brett*, L. J., in *Flitcroft's case*, 21 Ch. D. at p. 535.

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seal; and it is held that, although the particular members may express their private consents by words, or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that only, which unites the several assents of the individuals composing it, and makes one joint assent of the whole (*s*). It is provided that each of these companies shall have a common seal (*t*), and individual members have, in general, no power to bind their fellows.

With respect to the rights of members of companies established under the Act of 1862, between themselves, it is enacted that the subscribers to the memorandum of association shall be deemed to have agreed to become members (*u*), and, as soon as the company is registered, shall be entered as such in the register of members. Every person, also, who has *agreed* (*x*) to become a member (*y*), and whose name is entered in the register, is deemed to be a member (*z*). To constitute an agreement under sect. 37, there must be not merely a proposal to take shares, but notice to the person of acceptance (*a*). Posting a letter of allotment which does not reach the applicant will be a sufficient acceptance (*b*). There must be an absolute unconditional agreement (*c*). As between an individual agreeing to become a member and the company, if that agreement has been obtained by fraud, it is voidable, and he may repudiate the agreement, if he acts promptly (*d*). But, as in the case of a person who has been fraudulently induced to enter into a partnership, creditors of the firm, who have trusted it, have a right to look to him, and, in the event of the company being

(*s*) See in what cases this can be dispensed with, post, p. 93.

(*t*) 25 & 26 Vict. c. 89, ss. 18, 41, 55. Companies who carry on business abroad or in the colonies may have special seals for each place, see 27 & 28 Vict. c. 19.

(*u*) 25 & 26 Vict. c. 89, s. 23. *Hall's case*, L. R. 5 Ch. 707; *Sidney's case*, L. R. 13 Eq. 228; *Gilman's case*, 31 Ch. D. 420; *Ex parte Audain*, 42 Ch. D. 1.

(*x*) 25 & 26 Vict. c. 89, s. 37.

(*y*) Not merely to take scrip. *McIlwraith* v. *Dublin Trunk Co.*, L. R. 7 Ch. 134.

(*z*) 25 & 26 Vict. c. 89, s. 23.

(*a*) *Pellatt's case*, L. R. 2 Ch. 527; *Gunn's case*, L. R. 3 Ch. 40; *Sahlgreen's case*, L. R. 3 Ch. 323; *Richards* v. *Home Assurance Association*, L. R. 6 C. P. 591.

(*b*) *Household Fire Insurance Co.* v. *Grant*, 4 Ex. D. 216 (*Bramwell*, L. J., dissenting).

(*c*) *Challis' case*, L. R. 6 Ch. 266; *Rogers' case*, L. R. 3 Ch. 633; *Dougan's case*, L. R. 8 Ch. 540.

(*d*) *Oakes* v. *Turquand*, L. R. 2 H. L. 325; and see *Ramsgate Hotel Co.* v. *Montefiore*, L. R. 1 Ex. 109; *Baily's case*, L. R. 5 Eq. 428; *Smith* v. *Chadwick*, 9 App. Cas. 187.

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wound up, or the directors issue notices calling a meeting to pass resolutions for winding-up, and his name being on the register, he will be a contributory (*e*). In the interval, however, before any application to wind up, he may, as a rule, withdraw (*f*). So if the articles of association materially vary from the prospectus upon which he agreed to take shares, he may disclaim, unless he be guilty of laches (*g*). There can be no agreement within the meaning of sect. 47 unless the allottee is capable of contracting. One who, while an infant, has accepted shares may repudiate them, if he does upon coming of age nothing inconsistent with repudiation (*h*). Where the holding of certain shares is a necessary qualification of the office of director, any one who acts as such will, not necessarily, be held to have agreed to take such shares (*i*).

The shareholder's rights, after he is so registered, are only partially defined by the statute itself; his powers and privileges are more explicitly stated in the articles of association. As these, however, differ in the case of each company, and may be altered by subsequent special resolutions, it would be useless to detail them. The articles may explain or supplement, but cannot control the general provisions of the statute and the conditions contained in the memorandum of association which prescribe them (*k*). Subject to any reasonable restriction that may be imposed, each shareholder is entitled to inspect the register of members, and have a copy of any part of it (*l*); if the company be limited, to inspect the register of mortgages (*m*); if the company be a limited banking or insurance company, to

(*e*) *Oakes* v. *Turquand*, L. R. 2 H. L. 325; *Muir* v. *Glasgow Bank*, 4 App. Cas. 337; *Tennent* v. *Glasgow Bank*, 4 App. Cas. 615.

(*f*) *Hebb's case*, L. R. 4 Eq. 9; *Central Ry. Co. of Venezuela* v. *Kisch*, L. R. 2 H. L. 99; *Reese River Silver Mining Co.* v. *Smith*, L. R. 4 H. L. 64; *Tennent* v. *City of Glasgow Bank*, ubi sup.; *In re Scottish Petroleum Co.*, 23 Ch. D. 413.

(*g*) See *Stewart's case*, L. R. 1 Ch. 574; and see *Hallows* v. *Furnie*, L. R. 3 Ch. 467; *Edgington* v. *Fitzmaurice*, 29 Ch. D. 459.

(*h*) *Cork & Bandon Ry. Co.* v. *Cazenove*, 10 Q. B. 935; *Leeds, &c. Ry. Co.* v. *Fearnley*, 4 Ex. 26; *North Western Ry. Co.* v. *McMichael*, 5 Ex. 114.

(*i*) See *De Ruvigne's case*, 5 Ch. D. 306; *Brett's case*, 25 Ch. D. 283; *Re Wheal Buller Consols*, 38 Ch. D. 42. As to what is holding shares "in his own right," *Bainbridge* v. *Smith*, 41 Ch. D. 462.

(*k*) *Ashbury Carriage Co.* v. *Riche*, L. R. 7 H. L. 653; *Guinness* v. *Land Corp. of Ireland*, 22 Ch. D. 349; *London Financial Association* v. *Kelk*, 26 Ch. D. 107; *Ashbury* v. *Watson*, 30 Ch. D. 376; *In re South Durham Brewery Co.*, 31 Ch. D. 261.

(*l*) 25 & 26 Vict. c. 89, s. 32.

(*m*) Ibid. s. 43.

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have a copy of the half-yearly statement (*n*), and every member may require to be supplied with a copy of the memorandum and articles of association (*o*).

Notice must be given to him of the general meetings of the company, and of special resolutions which it is intended to propose at them (*p*). Upon his application he is to be furnished with a copy of such resolution (*q*), and he is entitled to be present and vote at these meetings, so that he may have a voice in, and exercise control over the proceedings of the company.

In order to enable the members effectually to ascertain the state of its affairs, upon the application of persons holding not less than one-fifth, or, if a banking company, one-third of the shares, or of one-fifth of the members, if the capital is not divided into shares, the Board of Trade may appoint inspectors to examine the books and documents of the company, and its officers and agents on oath, and report their opinion to that Board. A copy of this report is to be sent to the company, and, if they desire it, to the shareholders requiring the investigation, who are to defray the expenses, unless the Board of Trade directs them to be paid by the company (*r*). The company also may by special resolution appoint inspectors with like powers to report to such persons as it may direct (*s*). Copies of these reports, under the company's seal, are admissible in any legal proceedings to show the opinion of the inspectors (*t*). The members have likewise power, at a general meeting, to resolve that the company shall be wound up, by petition to the Court (*u*), or voluntarily (*x*).

Minutes of the meetings of the company and of the directors or managers (*y*) of a company are to be entered in books, and these, purporting to be signed by the chairman of the meeting, are receivable in evidence (*z*), and the mutilation or falsification of its books, papers, &c., by any director, officer, or contributory of a company is a misdemeanour (*a*). When a company is

(*n*) 25 & 26 Vict. c. 89, s. 44.
(*o*) Ibid. s. 19.
(*p*) Ibid. ss. 51, 52.
(*q*) Ibid. s. 54.
(*r*) Ibid. ss. 56, 57, 58, 59.
(*s*) Ibid. s. 60.
(*t*) Ibid. s. 61.
(*u*) 25 & 26 Vict. c. 89, s. 79, post, p. 98.
(*x*) Ibid. s. 129, post, sect. 5.
(*y*) *Gibson* v. *Barton*, L. R. 10 Q. B. 329.
(*z*) 25 & 26 Vict. c. 89, s. 67.
(*a*) Ibid. s. 166.

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being wound up, all its books are *primâ facie* evidence between the company and the contributories (*b*).

As the management of a joint stock company is confided to the directors and their agents, and the bulk of the shareholders must necessarily continue passive, the Courts of equity are very strict in enforcing the due execution of the trust reposed in those functionaries (*c*). Though not trustees in all respects (*d*), they are liable to refund money misappropriated from the purposes of the company (*e*); and they may be restrained from using their power improperly (*f*). But directors will not be visited with the consequences of a mere error of judgment, when they have acted *bonâ fide*, and intended to do what was right and best for the company (*g*).

The chief, or one of the chief, questions which commonly occurs between the company and its individual members relates to the payment of money due from them in respect of their shares. The powers of the directors to make *calls* must be strictly followed (*h*). To use the expression of Lord *Denman*, in *Meigh* v. *Clinton* (*i*), it "is a specific power, and must be strictly pursued." Accordingly calls—and the same is true of forfeitures—of shares can be validly made only by directors who have been properly appointed, and by the number, if any, of directors required under the articles of association for the transaction of business (*k*). The liability of the shareholders or *subscribers* depends, of course, mainly upon the deed (*l*) of settlement or articles of association.

(*b*) 25 & 26 Vict. c. 89, s. 154.

(*c*) See *Overend & Gurney Co.* v. *Gibb*, L. R. 5 H. L. 480; *The Liquidators of the Imperial M. C. Ass.* v. *Coleman*, L. R. 6 H. L. 189.

(*d*) *Forest of Dean Mining Co.*, 10 Ch. D. 450; *Smith* v. *Anderson*, 15 Ch. D. 247; *In re Faure Electric Accumulator Co.*, 40 Ch. D. at p. 151.

(*e*) *Ramskill* v. *Edwards*, 31 Ch. D. 100; *Parker* v. *Lewis*, L. R. 8 Ch. 1035.

(*f*) *Cannon* v. *Trask*, L. R. 20 Eq. 669.

(*g*) As to the criminal liability of directors, 24 & 25 Vict. c. 96, s. 84. *Hunt's case*, 37 L. J. Ch. 278; *Forest of Dean Mining Co.*, 10 Ch. D. 450.

(*h*) *Moore* v. *Hammond*, 6 B. & C. 456. Trifling irregularities will not invalidate a call.

(*i*) 11 A. & E. at p. 428.

(*k*) *Garden Gully United Quartz Mining Co.* v. *McLister*, 1 App. Cas. 39; *Johnson* v. *Lyttle's Iron Agency*, 5 Ch. D. 687; *In re Alma Spinning Co.*, 16 Ch. D. 681; *Sharp* v. *Dawes*, 2 Q. B. D. 26; *In re London and Southern Counties Land Co.*, 31 Ch. D. 223. See *York Tramways Co.* v. *Willows*, 8 Q. B. D. 685; *In re Cawley*, 42 Ch. D. 209.

(*l*) See *Norwich and Lowestoft Navigation* v. *Theobald*, Moo. & Malk. 151.

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The Companies Act, 1862 (*m*), on the subject of calls, provides that the memorandum and articles of association, when registered, bind the company and shareholders to the same extent as if each shareholder had signed and *sealed* them, and all moneys payable by members in pursuance of the regulations of the company are in the nature of specialty debts (*n*). And in an action for the recovery of calls, or other money due from a member, it is not necessary to set forth the special matter: it suffices to allege that he is a member, and indebted in respect of a call or other moneys due, whereby an action or suit has accrued (*o*). To such an action a plea that the defendant was induced to hold the shares by the fraud of the company, who are the plaintiffs, is a good answer if the defendant has repudiated the shares in time (*p*).

Where there was no express prohibition, it was held that the calls might be made payable by instalments, or to take effect *in futuro* (*q*).

The liability to calls as made by the directors is confined to the amount of each share, if any precise limit be prescribed by the deed or articles, though the company be not registered as limited; but in that case the shareholder may become liable under a winding up to an unlimited contribution, equally with his fellow members, until the debts of the company be liquidated.

Generally the directors are empowered by the articles of association, if calls be unpaid, to declare (*r*) the shares of defaulters forfeited (*s*). This power is treated *strictissimi juris*,

(*m*) 25 & 26 Vict. c. 89, s. 16. See Table A., rr. 4 to 7; for regulations as to making and giving notices of calls, rr. 95 to 97.

(*n*) Ibid. s. 16.

(*o*) Ibid. s. 70. The register is, too, primâ facie evidence of membership: s. 37; *Portal* v. *Emmens*, 1 C. P. D. 201, 664; and a minute of the resolution signed, as required by s. 67, is proof of the making of the call. The fact that the whole of the shares have not been subscribed for, and that the company cannot be carried out, affords no defence: *Ornamental Woodwork Co.* v. *Brown*, 2 H. & C. 63.

(*p*) *The Bwlch Y. P. L. M. Co.* v. *Baynes*, L. R. 2 Ex. 324.

(*q*) *The Ambergate N. B. and E. J. R. Co.* v. *Coulthard*, 5 Exch. 459; *London & N. W. Rail. Co.* v. *M'Michael*, 6 Exch. 273.

(*r*) *Woollaston's case*, 4 De G. & J. 437; *Webster's case*, 32 L. J. Ch. 135; *Bigg's case*, L. R. 1 Eq. 309; and see *Moore* v. *Rawlins*, 6 C. B. N. S. 310.

(*s*) See 25 & 26 Vict. c. 89, Table A., rr. 17 to 22; and *Harris* v. *North Devon R. Co.*, 2 Beav. 384.

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and must be closely followed (*t*). In one case a forfeiture for non-payment of costs was vitiated by the fact that the call required payment of interest from the date of the call instead of the day appointed for payment, as specified by clause 17, Table A, of the Act (*u*). The Court will not allow this power to be exercised merely in order to enable a shareholder to escape liability (*v*). Where a shareholder has stood by so long that his conduct is in effect an intimation that he acquiesces in the forfeiture and abandons his interest, he will be unable to avail himself of informalities in the forfeiture; but if he has a legal, executed interest, mere laches will not disentitle him to relief (*w*). The usual provision is that a certain number of days' notice shall be given to pay (*x*), and that if the call be not paid, the shares will be forfeited. The circumstances of such a notice having been given afford a defence in an action for the *calls* (*y*). Unless the contrary is clearly provided, the company may not, after the exercise of its right of forfeiture, sue for calls (*z*).

The shares in these companies, unlike an ordinary partnership, are generally transferable without the consent of the rest of the body (*a*), and the only obligation is to find a legally competent transferee (*b*). The Companies Act, 1862, provides (*c*) that companies registered under the prior Joint Stock Companies Acts (*d*) may cause their shares to be transferred in the manner previously in use, or such other manner as they may direct; and that the shares or interest of a member (*e*) of any company formed under

(*t*) *Clarke* v. *Hart*, 6 H. L. Cas. 633, at p. 650; *Johnson* v. *Lyttle's Iron Agency*, 5 Ch. D. 687; *Garden Gully Co.* v. *McLister*, 1 App. Cas. 39.

(*u*) *Johnson* v. *Lyttle's Iron Agency*, ubi supra.

(*v*) *In re Esparto Trading Co.*, 12 Ch. D. 191.

(*w*) Compare *Prendergast* v. *Turton*, 1 Y. & C. Ch. 98; 13 L. J. Ch. 268, with *Rule* v. *Jewell*, 18 Ch. D. 660.

(*x*) See *Van Diemen's Land Company* v. *Cockerell*, 1 C. B. N. S. 732, and the cases in note (*q*), ante, p. 81.

(*y*) *Knight's case*, L. R. 2 Ch. 321; *Bigg's case*, 1 Eq. 309.

(*z*) *In re Blakeley Ordnance Co.*, L. R. 3 Ch. 412, at p. 415; *Giles* v. *Hutt*, 3 Ex. 18; *Great Northern Ry. Co.* v. *Kennedy*, 4 Ex. 417.

(*a*) *Ex parte Greenwood*, 4 De G. & J. 544; *De Paix's case*, ib.; *Ex parte Budd*, 31 L. J. Ch. 4. Contracts for the sale of such shares generally, without specifying any particular shares, are valid, except of shares in banking companies; as to which, see 30 & 31 Vict. c. 29, in Appendix.

(*b*) *Lumsden's case*, L. R. 4 Ch. 31.

(*c*) 25 & 26 Vict. c. 89, s. 178.

(*d*) See s. 175.

(*e*) 25 & 26 Vict. c. 89, s. 22. See also s. 26.

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that Act of 1862 may be transferred in manner provided by its regulations; also, that the interest of a member may, on his decease, be transferred by his personal representative, as if he were a member (*f*). In the Table A. (*g*) there are regulations on this subject, which are usually adopted in articles of association: they prescribe a form of transfer, and provide that the company may refuse to register the transfer of his shares made by a member indebted to the company (*h*). Ordinarily, therefore, a member has an absolute right to transfer his shares to whomsoever he pleases, even a pauper, provided the sale be out and out and there be no trust (*i*), and the directors have no discretion in the matter. Often express power is given them to reject a proposed transferee (*k*), but this they ought not to exercise without good reason, and the Court will interfere if they act from improper motives, or arbitrarily or capriciously (*l*).

The right to transfer comes to an end when a company has become insolvent, and stopped payment, though the winding up has not begun (*m*). Until the name of the transferee is placed on the register, he does not become a member (*n*); he cannot recover any profits, or act as a member; and the vendor continues liable as such. In order to settle disputes as to the liability or right to be registered, and to prevent improper refusals or delay in this respect, section 35 of the Companies Act, 1862, provides that if the name of any person without sufficient cause be entered, or omitted to be entered, or

(*f*) 25 & 26 Vict. c. 89, s. 24.

(*g*) Rules 8 to 16. For paid up shares, warrants to bearer, transferable by delivery, may be issued: 30 & 31 Vict. c. 131, ss. 27 and 28. These the bearer may surrender, and require his name to be entered on the register: sect. 29.

(*h*) See *Ex parte Rudolph*, 32 L. J. Q. B. 369; *Ex parte Stringer*, 9 Q. B. D. 436; *In re Bentham Spinning Mills*, 11 Ch. D. 900; *In re Cowley*, 42 Ch. D. 207.

(*i*) *Battie's case*, 39 L. J. Ch. 391; *Weston's case*, L. R. 4 Ch. 20; *Budd's case*, 30 Beav. 143; *Dr. Parr's case*, 2 De G. & J. 638; *In re Stranton Iron & Steel Co.*, L. R. 16 Eq. 559. See *King's case*, L. R. 6 Ch. 196.

(*k*) *Evans* v. *Wood*, L. R. 5 Eq. 14; *Mitchell's case*, 4 App. Cas. 567.

(*l*) See *Ex parte Penney*, L. R. 8 Ch. 446. Specific performance will not be decreed where the directors of the company have a power to refuse their assent to the transfer, and the Court cannot compel them to assent: *Bermingham* v. *Sheridan*, 33 Beav. 660; *Poole* v. *Middleton*, 29 Beav. 646.

(*m*) *Tennent* v. *City of Glasgow Bank*, 4 App. Cas. p. 615.

(*n*) 25 & 26 Vict. c. 89, ss. 23, 25; but see supra, p. 69, note (*s*); 30 & 31 Vict. c. 131, s. 30.

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if default be made, or unnecessary delay (*o*) take place in removing any person's name from, or entering any person's name on (*p*), the register, he or any member may apply to the Court, or to a Judge at Chambers, who may (*q*) order it to be rectified (*r*). In this proceeding the Court may decide any question of title (*s*) necessary to be decided for such rectification (*t*), or may direct an issue to settle it (*u*). There is, moreover, a regulation that the Court may make the company refusing to register pay all the costs of the application and any damages the party aggrieved may have sustained by the default or unnecessary delay in registering. A shareholder who has agreed to sell his shares, and executed a transfer to the purchaser, may sue him for a specific performance, and require him to be registered (*x*), unless in the interval an order has been made for winding up the company or it is insolvent, in which event the vendor must look to the purchaser for an indemnity (*y*).

Generally speaking, shares in a joint stock company, even though it be seised of land, are not goods, wares, &c., included within the 17th section of the Statute of Frauds (*z*), nor are they within the Statutes of Mortmain (*a*). They are "things in action" within the meaning of the reputed ownership section in the Bankruptcy Act,

(*o*) *Shepherd's case*, L. R. 2 Ch. 16; *Marino's case*, ib. 596.

(*p*) *In re Stranton Iron & Steel Co.*, 16 Eq. 559.

(*q*) Whether this be discretionary, see *Ex parte Parker*, L. R. 2 Ch. 685; *Ward's case*, L. R. 2 Ch. 431.

(*r*) See *Ex parte Rudolph*, 32 L. J. Q. B. 369; *Ex parte Kintrea*, L. R. 5 Ch. 95.

(*s*) As to the different views of the jurisdiction under the section, see *Ex parte Shaw*, 2 Q. B. D. 463; *Ward's case*, L. R. 2 Ch. 431; *Musgrave's case*, L. R. 5 Eq. 193; *Ex parte Sargent*, L. R. 17 Eq. 273.

(*t*) *Stewart's case*, L. R. 1 Ch. 574. The Court may order an action to be brought: *Ex parte Parker*, L. R. 2 Ch. 685.

(*u*) 25 & 26 Vict. c. 89, s. 35; see *Ex parte Faris*, 26 L. J. Ch. 369.

(*x*) *Musgrave's case*, L. R. 5 Eq. 193; *Paine* v. *Hutchinson*, L. R. 3 Ch. 388.

(*y*) *Emmerson's case*, L. R. 1 Ch. 433; *Mitchell's case*, 4 App. Cas. 567; *Mitchell* v. *City of Glasgow Bank*, ib. 624. But by 25 & 26 Vict. c. 89, s. 98, the Court may rectify the register in order to settle the list of contributories: see *Musgrave's case*, L. R. 5 Eq. 193; *Head's case*, L. R. 3 Eq. 84; *Marino's case*, L. R. 2 Ch. 596; and *Ward's case*, L. R. 2 Eq. 226; and post, sect. 5.

(*z*) *Bowlby* v. *Bell*, 3 C. B. 18; *Powell* v. *Jessop*, 18 C. B. 336; *Walker* v. *Bartlett*, 18 C. B. 845. Nor within the exception of goods, wares, and merchandise in the Stamp Act, tit. "Agreement": *Knight* v. *Barber*, 16 M. & W. 66.

(*a*) *Edwards* v. *Hall*, 6 De G. M. & G. 74. As to debentures and bonds, see *In re Mitchell's Estate*, 6 Ch. D. 655; *In re David*, 41 Ch. D. 168.

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1883 (46 & 47 Vict. c. 52), s. 44, sub-s. (iii.) (*b*). In the absence of any enactment they are personal property (*c*), and transferable by parol (*d*). An action, therefore, for not accepting them may be maintained by the vendor upon a verbal agreement to purchase them (*e*); and a promise will be implied on the part of the vendee to indemnify him against calls (*f*). By 30 & 31 Vict. c. 29, s. 1 (Leeman's Act), contracts for the sale of bank shares must specify the numbers of the shares (*g*). It would appear that whether the sale is or is not on the Stock Exchange, the seller of shares is not bound to procure the registration of the transferee; all that he is bound to do is to execute a valid transfer and hand it to the transferee (*h*). It has been decided that, when shares are, by the provisions of an Act of Parliament, transferable by deed only, the purchaser must tender a conveyance to the seller for execution before he can sue for not transferring them, even though the Act makes the shares personal property (*i*); and that a sealed instrument of transfer, having the name of the vendee in blank at the time when it is sealed and delivered, is invalid as a deed (*j*). "This is an attempt," said *Parke*, B., "to make a deed transferable and negotiable like a bill of exchange or exchequer bill, which the law does not permit" (*k*).

(*b*) *The Colonial Bank* v. *Whinney*, 11 App. Cas. 426.

(*c*) *Bradley* v. *Holdsworth*, 3 M. & W. 422; *Bligh* v. *Brent*, 2 Y. & C. 268. By the Companies Act, 1862, s. 22, shares in companies registered under it are declared to be personal property capable of being transferred in manner provided by the regulations of the company. The Companies Act, 1867, ss. 27, 28, permits companies limited by shares under the Companies Act, 1862, to issue warrants for *fully paid-up* shares payable to bearer and transferable by delivery. As to the transfer of shares by delivery generally, see *De Pass's case*, 4 De G. & J. 544; and in cases of companies under Companies Act, 1862, see *In re General Company for Promotion of Land Credit*, L. R. 5 Ch. 363.

(*d*) See judgment of *Parke*, B., *Hibblewhite* v. *M'Morine*, 6 M. & W. 200; and *Humble* v. *Mitchell*, 11 A. & E. 205; also *Knight* v. *Barber*, 16 M. & W. 66; *Walker* v. *Bartlett*, 18 C. B. 845.

(*e*) *Tempest* v. *Kilner*, 2 C. B. 300; *Bradley* v. *Holdsworth*, supra.

(*f*) *Kellock* v. *Enthoven*, L. R. 8 Q. B. 458; 9 Q. B. 241.

(*g*) See *Seymour* v. *Bridge*, 14 Q. B. D. 460, and *Perry* v. *Barnett*, ib. 467; 15 Q. B. D. 388 (C. A.).

(*h*) *Skinner* v. *City of Glasgow Bank*, 14 Q. B. D. p. 887; *London Founders' Association* v. *Clarke*, 20 Q. B. D. 576; "I have no doubt that the seller must not prevent, or do anything to prevent, the company from accepting the purchaser or his nominee": Ib. per Lord *Esher*, M. R., at p. 582.

(*i*) *Stephens* v. *De Medina*, 4 Q. B. 411; *Bowlby* v. *Bell*, 3 C. B. 284.

(*j*) *The Société Générale de Paris* v. *Walker*, 11 App. Cas. 20.

(*k*) *Hibblewhite* v. *M'Morine*, 6 M. &

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The title of the transferee in such circumstances is only an equitable title (*k*); and he has no right to require the company to enter the shares in his name in the register. In the absence of any provision requiring the transfer to be by deed, it may be by writing only, and if the name of the transferee be in blank it may be afterwards filled in, though the instrument be in fact under seal (*l*). The transferee may, however, under certain circumstances be estopped from taking advantage of a defect in the transfer, even as against the company (*m*).

A company may issue to shareholders certificates under the common seal of the company for the purpose of enabling them to deal readily with their shares (*n*). The company will be estopped from denying the truth of statements in these documents; and a person who purchases and pays for shares specified in such a certificate may recover from the company if it turn out that it has been issued to a person not entitled (*o*).

Section IV.—*Rights against and Liabilities to Third Parties.*

Rights against and liabilities to third parties.

The liability of a member in a projected company begins with the commencement of the company. He is not responsible for contracts made before that period by its intended members or directors, while preliminaries, on the accomplishment of which he had agreed to join, are unaccomplished (*p*). And though, in the absence of acquiescence (*q*), no partnership takes place till the

W. 200, at p. 216. See *Humble* v. *Langston*, 7 M. & W. 517; *Daly* v. *Thompson*, 10 M. & W. 309; *Swan* v. *North British Australasian Co.*, 2 H. & C. 175.

(*k*) *Société Générale de Paris* v. *Walker*, 11 App. Cas. 20; *Nanney* v. *Morgan*, 37 Ch. D. 346.

(*l*) *Ex parte Sargent*, L. R. 17 Eq. 273; *Walker* v. *Bartlett*, 18 C. B. 845; *Davies' case*, 33 L. T. N. S. 834. But see *France* v. *Clarke*, 26 Ch. D. 257.

(*m*) *Sheffield and Manchester Ry. Co.* v. *Woodcock*, 7 M. & W. 574; *Re Barned's Banking Co.*, L. R. 3 Ch. 105; *Royal Bank of India's case*, L. R. 4 Ch. 252.

(*n*) Sect. 31.

(*o*) *In re Bahia Ry. Co.*, L. R. 3 Q. B. 595; compare *Shropshire Union* v. *Reg.*, L. R. 7 H. L. 496.

(*p*) *Caledonian & Dumbartonshire Junction Ry.* v. *Helensburgh (Magistrates)*, 2 Macq. H. L. Cas. 391; *Fox* v. *Clifton*, 6 Bing. 776; *Pitchford* v. *Davis*, 5 M. & W. 2. For cases where the partnership liability was held to have attached, see *Harvey* v. *Kay*, 9 B. & C. 356; *Ellis* v. *Schmœck*, 5 Bing. 521; *Lawler* v. *Kershaw*, M. & M. 93; *Doubleday* v. *Muskett*, 7 Bing. 110.

(*q*) Per Lord *Abinger*, in *Pitchford* v. *Davis*, 5 M. & W. 2; *Steigenberger* v. *Carr*, 3 M. & G. 191; *Tredwen* v. *Bourne*, 6 M. & W. 461.

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preliminaries are completed, when the partnership has once begun, every member is liable in respect of a contract made by the directors or agents in the *usual course of business* (*r*). But the company will not be bound if the acts of the directors are outside the articles of association and memorandum. "Those who deal with them (companies) must be affected with notice of all that is contained in those two documents" (*s*). Persons who consent to become directors or members of the provisional committee of a projected company not yet formed, do not thereby authorize the other promoters or members of the managing committee to engage their credit, even for things necessary to establish the company (*t*). The bare fact of allowing their names to be published to the world as directors or members of such a committee, and accepting shares and paying a deposit upon them (*u*), will not warrant a verdict against them (*v*). But these, and any other acts they may have done in relation to the proposed company, raise a question of fact, whether they authorized the pledging of their credit for matters necessary to the formation of the company (*w*). So permitting their names to be inserted in a prospectus, which represents certain persons as the agents of the committee, *e.g.*, solicitors and secretaries, should be submitted to the jury, and it is for the jury to say whether, by so doing, they did not intend to authorize those agents to do all such things on their behalf as are usually done by them in similar cases. Also if the prospectus states the names of an acting committee, it is a question of fact, whether the meaning of that is, that

(*r*) *Hawken* v. *Bourne*, 8 M. & W. 703.

(*s*) Per Lord *Hatherley* in *Mahony* v. *East Holyford Mining Co.*, L. R. 7 H. L. p. 893; *Irvine* v. *Union Bank*, 2 App. Cas. 366.

(*t*) *Burbidge* v. *Morris*, 3 H. & C. 664.

(*u*) *Bright* v. *Hutton*, 3 H. L. Ca. 341; *Reynell* v. *Lewis*, 15 M. & W. 517; *Bailey* v. *Macaulay*, 15 Q. B. 533. See also *Cook* v. *Tonkin*, 9 Q. B. 936; *Lake* v. *The Duke of Argyle*, 6 Q. B. 477; *Wood* v. *The Duke of Argyle*, 6 M. & G. 928; *Hutton* v. *Upfill*, 2 H. L. Ca. 674; *Norris* v. *Cottle*, 2 H. L. Ca. 647.

(*v*) Nor will it warrant the insertion of their names in the list of contributories for calls under a winding up: *Bright* v. *Hutton*, ubi supra; *Hutton* v. *Thompson*, 3 H. L. Ca. 161.

(*w*) *Maddick* v. *Marshall*, 16 C. B. N. S. 387; *Riley* v. *Packington*, L. R. 2 C. P. 536; *Martyn* v. *Gray*, 14 C. B. N. S. 824.

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the acting committee is to take the whole management, to the exclusion of the provisional committee, their provisional character having ceased, in which case they would not be liable; or that the provisional committee have appointed the acting committee, or the majority of it, on their behalf and as their agents, in which event they would be liable upon contracts made by them as such agents. It is, however, quite clear that they cannot be charged for goods supplied, or debts incurred previously to their consenting to act (*x*); although the regulations of the company usually empower the directors to pay the expenses of getting up and registering the company (*y*), a provision which does not give promoters or third parties a right of action against the company. A company cannot ratify contracts made before it existed (*z*).

The members of an unregistered joint stock company, when once the company is established, have no peculiar rights or liabilities, but, like members of an ordinary firm, are entitled to the benefit of all its contracts, and responsible for engagements made by the agents of the concern and for its purposes (*a*). A joint stock company cannot, as we have seen, undertake a new branch of business outside the terms of the memorandum of association without the consent of all its members. Where a life assurance company, in pursuance of a resolution passed at an extraordinary general meeting, issued policies of marine assurance, it was held that the general body of shareholders were not bound by such policies, and the holders were not entitled to prove against the assets of the company in respect of losses within such policies (*b*).

A registered joint stock company is established upon its

(*x*) *Barnett* v. *Lambert*, 15 M. & W. 489, at pp. 492, 493, per *Pollock*, C. B., and *Alderson*, B.; *Whitehead* v. *Barron*, 2 M. & Rob. 248; *Beale* v. *Mouls*, 10 Q. B. 976.

(*y*) *Melhado* v. *Porto Alegre Ry. Co.*, L. R. 9 C. P. 503; *Eley* v. *Positive Insurance Co.*, 1 Ex. D. 20. But see *Touche* v. *Metropolitan Ry. Co. Warehousing Co.*, L. R. 6 Ch. 671; *In re Hereford Waggon Co.*, 2 Ch. D. 621, as qualified by *In re Rotherham Alum Co.*, L. R. 25 Ch. D. 103.

(*z*) *Re Empress Engineering Co.*, 16 Ch. D. 125; *Re Dale and Plant Limited*, 61 L. T. N. S. 206.

(*a*) *Keasley* v. *Codd*, 2 C. & P. 408, n.; *Maudeslay* v. *Le Blanc*, 2 C. & P. 409, n. See *Carlen* v. *Drury*, 1 V. & B. 154, and *Harvey* v. *Kay*, 9 B. & C. 356.

(*b*) *Re The Phœnix Life Assurance Co.*, 31 L. J. Ch. 749. Compare *Bath's case*, 8 Ch. D. 334, and *Hesketh's case*, 13 Ch. D. 693.

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registration, and then the subscribers of the memorandum, together with any other persons who become members, are constituted a body corporate (*c*). As individual partners, therefore, they incur no personal liability to third persons for its engagements, except in one instance prescribed by the Act: viz., when the company carries on business for more than six months after the number of members is less than seven (*d*). The body corporate alone becomes liable to be sued for its debts or engagements, and the members can only be compelled to contribute to the liquidation of them, either by calls made by the directors while the company is proceeding, or by calls made upon them as contributories under a winding up. The extent of a shareholder's liability is either unlimited, or, in the case of a limited company, restricted to the amount unpaid on the shares held by him, or of a specified guarantee. If the existing members are unable to satisfy the contributions required to be made, persons who have ceased to be such within one year previous to the commencement of the winding-up may be made contributories in respect of debts or liabilities incurred by the company before they ceased to be members (*e*); but in limited companies neither past nor present members can be required to contribute towards them beyond the amount unpaid on their shares, or the amount they have guaranteed (*f*). By the Companies Act, 1879, it is provided that a bank of issue registered as a limited company shall not be entitled to limited liability in respect of its notes; the members continue liable in respect of the notes as if the company had been registered as unlimited (*g*).

The directors of a registered company incur no liability to third persons, and are only contributories in their character of members (*h*). If, however, any director, manager, or officer of a

(*c*) 25 & 26 Vict. c. 89, s. 18.

(*d*) Ibid. s. 48.

(*e*) Ibid. s. 38. *Helbert* v. *Banner*, L. R. 5 H. L. 28; *Webb* v. *Whiffin*, L. R. 5 H. L. 711; *Morris's case* and *Brett's cass*, L. R. 8 Ch. 800.

(*f*) 25 & 26 Vict. c. 89, ss. 38, 90, 134. They may be liable for the costs of winding up. See *Marsh's case*, L. R. 13 Eq. 388. If an unlimited company afterwards registers itself as limited, the liability of the then shareholders for antecedent debts continues; s. 196; *Lanyon* v. *Smith*, 3 B. & S. 938.

(*g*) 42 & 43 Vict. c. 76, s. 6, repealing 25 & 26 Vict. c. 89, s. 152.

(*h*) *In re The National Assurance and I. Association*, 31 L. J. Ch. 828. But by 30 & 31 Vict. c. 131, s. 4, in a limited company the liability of the directors may be unlimited.

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limited company, or any person on its behalf, sign, or authorize to be signed on behalf of the company, any bill of exchange, promissory note, indorsement, cheque, or order for money or goods, wherein its full name is not mentioned, he is personally responsible for the amount, if it be not paid by the company (*h*). Unless the deed of settlement or articles of association provide for the giving of bills or notes, or the business to be carried on necessarily requires it, the company cannot be bound by such instruments (*i*). Directors who accept bills on behalf of a company thereby represent that, as a matter of fact, they have power so to do, and if this be false the directors are personally responsible to persons who have acted upon the representation (*j*). With regard to such instruments, the Companies Act, 1862 (*k*), provides that a note or bill shall be deemed to have been made, accepted or indorsed on behalf of a company registered under it, if made, accepted or indorsed *in the name of the company* by any person acting under its authority, or if made, accepted or indorsed *by* or on *behalf* or on *account* of the company by any person acting under its authority (*l*).

With regard to the borrowing of money, unless part of or incidental to the ordinary business of the company, *e.g.*, a banking company (*m*), or powers be given them by the deed or articles to do so, the directors have no authority to pledge the credit of the shareholders by borrowing money, even though it be necessary to enable them to carry on the affairs of the company (*n*).

(*h*) 25 & 26 Vict. c. 89, s. 42, ante, p. 70, n. (*z*).

(*i*) *Peruvian Rys. Co.* v. *Thames and Mersey Mar. Ins. Co.*, L. R. 2 Ch. 617; *Oakes* v. *Turquand*, L. R. 2 H. L. 325; *Bateman* v. *Mid Wales Ry. Co.*, L. R. 1 C. P. 499; *In re General Estates Co.*, L. R. 3 Ch. 758.

(*j*) *West London Commercial Bank* v. *Kitson*, 13 Q. B. D. 360. As to the power of directors of a banking company to borrow money, and give negotiable instruments for it binding the shareholders under the deed of settlement, see *The Bank of Australasia* v. *Breillat*, 6 Moore, P. C. Ca. 152; *Forbes* v. *Marshall*, 11 Exch. 166; *Royal British Bank* v. *Turquand*, 6 E. & B. 327.

(*k*) 25 & 26 Vict. c. 89, s. 47.

(*l*) *Gray* v. *Raper*, L. R. 1 C. P. 694. Whether such an instrument may be under seal, see *In re General Estates Co.*, L. R. 3 Ch. 758; *Crouch* v. *Crédit Foncier of England*, L. R. 8 Q. B. 374; *Goodwin* v. *Robarts*, 1 App. Cas. 476.

(*m*) *The Bank of Australasia* v. *Breillat*, 6 Moore, P. C. Ca. 152. A trading company has general powers to borrow to an extent which is reasonable and necessary for the purposes of the business. *In re Hamilton's Windsor Iron Works*, 12 Ch. D. 707.

(*n*) *Ricketts* v. *Bennett*, 4 C. B. 686; *Chambers* v. *The Manchester & M. R.*

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"There can be no doubt that where there is an express provision against borrowing, it must be obeyed," says Lord *Selborne*. "There is also no doubt that where there is not an express prohibition against borrowing in a case of a company or a society constituted for special purposes, no borrowing can be permitted without express authority, unless it be properly incident to the course and conduct of the business for its proper purposes" (*o*). Where the borrowing power of a company is limited, persons dealing with the company are bound to ascertain its exact power. If the power is exceeded they cannot recover against the company (*p*), though they are entitled to assume that powers which the company is authorized to confer upon its directors have been duly conferred (*q*). If the authority of directors to borrow is limited, but the company's powers are not so, the latter may ratify borrowing by the former (*r*).

In *Tredwen* v. *Bourne* (*s*), Lord *Abinger* expressed an opinion that the question whether the directors of a mining company have, in the absence of express provision, power to bind the company by *dealing on credit*, must depend on the general nature of the concern, and is a matter for the jury to decide on; "and, I think," added his Lordship, "they would not have had much difficulty in saying, that it is in the general nature of mining concerns to deal on credit for the purpose of carrying on their business." In the subsequent case of *Hawken* v. *Bourne* (*t*), proof to that effect was given in a Cornish case.

As the general nature of a *joint stock company* is to contract

Co., 5 B. & S. 588; *Rashdall* v. *Ford*, L. R. 2 Eq. 750; *Fountaine* v. *Carmarthen R. Co.*, L. R. 5 Eq. 316; *Weeks* v. *Propert*, L. R. 8 C. P. 427; *Yorkshire Railway Wagon Co.* v. *Maclure*, 19 Ch. D. 478; 21 Ch. D. 309. As to power of company to mortgage, see *In re Patent File Co.*, L. R. 6 Ch. 83.

(*o*) Per Lord *Selborne*, L. C., *Blackburn Building Society* v. *Cunliffe Brooks & Co.*, 22 Ch. D. at p. 70; *Chapleo* v. *Brunswick Building Society*, 6 Q. B. D. 696; *Ashbury Railway Carriage and Iron Co.* v. *Riche*, L. R. 7 H. L. 653; *Balfour* v. *Ernest*, 5 C. B. N. S. 601.

(*p*) *Chambers* v. *The Manchester & M. R. Co.*, 5 B. & S. 588; *Payne* v. *Mayor of Brecon*, 3 H. & N. 572; but see *Ashbury R. C. & I. Co.* v. *Riche*, L. R. 7 H. L. 653.

(*q*) *Fountaine* v. *Carmarthen Ry. Co.*, L. R. 5 Eq. 316; *Ernest* v. *Nicholls*, 6 H. L. Cas. 401; *Royal British Bank* v. *Turquand*, 6 E. & B. 327.

(*r*) *Irvine* v. *Union Bank of Australia*, 2 App. Cas. 366.

(*s*) 6 M. & W. 461, at p. 465.

(*t*) 8 M. & W. 703.

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through the medium of the *directors* or their agents only, the contract of a private member would in no case bind the others or the company, unless recognised. This observation appears to be in some degree sanctioned by the judgment in *Bain* v. *Cooper* (*t*). It has been expressly decided, that an *agent* appointed by the directors has no implied power to borrow money for the use of a mining company, however urgent may be the necessity (*u*).

Being incorporated, registered companies are invested with the power which belongs to corporations, of speaking and contracting by means of their common seal, and also, without that formality, of doing such other acts and making such other engagements of an ordinary nature as convenience, almost amounting to necessity (*x*), requires. If, too, the nature of the business in which such an association is engaged raise a necessary implication that, in certain cases, it was the intention of the members that this formality should be dispensed with, contracts or instruments made without it in such cases will be binding on the body (*y*).

A trading corporation may differ from others as to its powers of contracting, and its remedies on contracts relating to the purposes for which it was formed (*z*). Thus, such a corporation may, in some cases, without express powers bind itself by promissory notes (*a*) and bills of exchange (*b*); and it was even held, that the Bank of England might, without deed, appoint an agent for such purposes (*c*). But a non-trading corporation will

(*t*) 9 M. & W. 701: see particularly the judgment of Lord *Abinger*, C. B.

(*u*) *Hawtayne* v. *Bourne*, 7 M. & W. 595.

(*x*) *South of Ireland Colliery Co.* v. *Waddle*, L. R. 3 C. P. 463; 4 C. P. 617; *Church* v. *Imperial Gas Company*, 6 Ad. & E. 846. See *Hunt* v. *Wimbledon Local Board*, 4 C. P. D. 48; and *Young* v. *Mayor of Leamington*, 8 App. Cas. 517.

(*y*) See ante, pp. 76, 77. The Companies Act, 1862, contained no provision upon this subject beyond that mentioned ante, p. 90, note (*k*); but now, see post, p. 94, note (*l*), *et seq.*

(*z*) *South of Ireland Colliery Co.* v. *Waddle*, L. R. 3 C. P. 463; 4 C. P. 617; *Dunston* v. *Imperial Gas Light Co.*, 3 B. & Ad. per Lord *Tenterden*, C. J., at p. 131; *Church* v. *Imperial Gas Light Co.*, 6 Ad. & E. 846; *Henderson* v. *The Australian R. M. S. N. Co.*, 5 E. & B. 409.

(*a*) Byles on Bills, 14th ed. 77.

(*b*) *R.* v. *Bigg*, 3 P. Wms. 419; *Church* v. *Imperial Gas Light Co.*, 6 Ad. & E. at p. 861.

(*c*) *R.* v. *Bigg*, supra. N.B. There was a difference of opinion: see 1 Str. 18.

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not have these extraordinary powers, unless they are expressly given, or the ordinary nature of the business in which it is engaged raises a necessary implication of their existence (*d*). There are other acts, mostly of a trifling nature, which every corporation may do without seal, or even writing. Such, it has frequently been said, is the hiring a common servant, or the appointment of a bailiff to distrain (*e*); yet it is so doubtful what acts are included within this exception, and the authorities are so conflicting (*f*), that it is impossible to speak on the subject with confidence. Every exception of this kind stands on the ground of necessity (*g*).

In general such bodies are liable, not only to actions for debts or obligations, but also for wrongs committed by their command, or for wrongs done (*h*), or injuries (*i*) arising from the negligence or misconduct of their servants in the course of their business. Thus companies may be liable for fraudulent representations made by their servants or agents in the course of their employment (*k*). A corporation may in certain cases be indicted.

The uncertainty of the law with respect to contracts by cor-

(*d*) As to authority to accept bills, *Atkins* v. *Wardle*, 61 L. T. N. S. 23; *Bateman* v. *Mid-Wales Ry. Co.*, L. R. 1 C. P. 499; *South of Ireland Colliery Co.* v. *Waddle*, L. R. 3 C. P. 463; 4 C. P. 617. See also *Lindley*, J., in *Hunt* v. *Wimbledon Local Board*, 3 C. P. D. at p. 214; and sect. 37 of the Companies Act, 1867. The principle on which the exception depends seems to be "*convenience almost amounting to necessity.*" Per curiam in *Church* v. *Imperial Gas Light Co.*, 6 A. & E. 846, at p. 861; *Wells* v. *Kingston-upon-Hull*, L. R. 10 C. P. 402. See *Wimbledon Local Board* v. *Hunt*, 4 C. P. D. 48; *Young* v. *Mayor and Corporation of Leamington*, 8 App. Cas. 517.

(*e*) Plowd. 91; Vin. Abr. Corp. K.; Bro. Corp. 47; 3 Lev. 127; 1 Salk. 191; Com. Dig. Franchises, F. 13; *R.* v. *Bigg*, supra; *Yarborough* v. *Bank of England*, 16 East, 6; 4 H. 7, 6; 13 H. 7, 17; 13 H. 8, 12; 1 Saund. 305 b; *Smith* v. *Birmingham Gas Light Co.*, 1 A. & E. 526. And see *Smith* v. *Cartwright*, 6 Exch. 927; *Goff* v. *The Great Northern Rail. Co.*, 3 E. & E. 672; *Browning* v. *The Great Central Mining Co. of Devon*, 5 H. & N. 856; *Dr. Gray's case*, 32 L. J. Ch. 326.

(*f*) See *Lindley*, J., in *Hunt* v. *Wimbledon Local Board*, 3 C. P. D. at p. 214; Lord *Blackburn* in *Young* v. *Mayor of Leamington*, 8 App. Cas. at p. 525.

(*g*) See judgment in *Beverley* v. *Lincoln Gas Light Co.*, 6 Ad. & E. at pp. 844-5.

(*h*) *Green* v. *General Omnibus Co.*, 7 C. B. N. S. 290; *Goff* v. *Great Northern Rail. Co.*, 3 E. & E. 672; *Abrath* v. *North Eastern Rail. Co.*, 11 App. Cas. 247; *Shaw* v. *Port Philip Gold Co.*, 13 Q. B. D. 103.

(*i*) *Cowley* v. *Mayor of Sunderland*, 6 H. & N. 565.

(*k*) *Swire* v. *Francis*, 3 App. Cas. 106.

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porations, induced the legislature to make an express provision as to contracts by *registered* companies, viz., that contracts which, if made between private persons, would be required to be under seal, may be made under the seal of the company: if they would be required to be in writing and signed, they may be in writing, signed by any person acting under the express or implied authority of the company; and contracts which would be valid if made between private persons, although made by parol only, may be so made by any person acting under the express or implied authority of the company. Contracts entered into in these several ways may, in like manner, be varied or discharged (*l*).

Unless empowered by the deed of settlement or articles of association, or the consent of the body, individual members (*m*) or directors have no power to bind the company, and any contract they may enter into will not be obligatory upon it. "All who have dealings with a joint stock company," said *Campbell*, L. C., in *Burnes* v. *Pennell* (*n*), "know that the authority to manage the business is conferred upon the directors, and that a shareholder, as such, has no power to contract for the company. For this purpose it is wholly immaterial whether the company is incorporated or unincorporated." The directors, of course, by the regulations, have power to carry on the business of the company (*o*); but, almost universally, this power must be exercised at a board duly convened, at which a prescribed number are present and concur (*p*); and it has been held that even a deed under the seal of the company, executed at a meeting at which the number so required are not present, will not bind the body (*q*). But a proviso as to the number of directors may be merely directory (*r*). The mere acceptance, too, of goods by a

(*l*) 30 & 31 Vict. c. 131, s. 37.

(*m*) See as to delegating the powers of the directors, Palmer's Company Precedents, 4th ed. 239.

(*n*) 2 H. L. Cas. 497, at p. 521.

(*o*) 25 & 26 Vict. c. 89, Sched. 1, Table A, Art. 55. See *Totterdell* v. *Fareham Brick Co.*, L. R. 1 C. P. 674. Compare *Re County Life Ass. Co.*, L. R. 5 Ch. 288, with *Wandsworth Gas Light Co.* v. *Wright*, 22 L. T. N. S. 404.

(*p*) 25 & 26 Vict. c. 89, Sched. 1, Table A, Arts. 66—71.

(*q*) *Kirk* v. *Bell*, 16 Q. B. 290; *D'Arey* v. *The Tamar K. H. & C. Ry. Co.*, L. R. 2 Ex. 158.

(*r*) *Thames Haven Dock Co.* v. *Rose*, 4 M. & G. 552; and see *Re Barned's*

company, and the fact that they have been used by it, will not bind it (*s*); nor will an acknowledgment of the price of them as a debt by a meeting of the directors, consisting of a less number than that required by the deed or articles to transact business, enable the person supplying them to maintain an action against the company (*t*).

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The liability of a member of an unregistered company (*u*), not regulated by any Act of Parliament or chartered, will, in the absence of any special arrangement, be determined in the same manner as that of an ordinary partner (*x*). But such a company may be wound up under the provisions in the Companies Act, 1862 (*y*), when all proceedings by action or suit against the members may, after the presentation of the petition for winding up, be restrained by the Court, and after the order for winding up no action or suit can be commenced or proceeded with against a contributory (*z*) without the leave of the Court, and the affairs of the company are then wound up in the same manner as a registered company is wound up by the Court. Against registered companies actions or suits may be brought for the recovery of any claims or demands, either by third persons or their own members, and execution may be issued upon judgments obtained against them, under which their property may be seized and sold.

The only means now afforded to the creditor of procuring satisfaction of his demand, if a registered company has no available effects, are proceedings to wind it up (*a*). When and

Banking Co., L. R. 3 Ch. 105; *New Sombrero Phosphate Co.* v. *Erlanger*, 5 Ch. D. 73; and *Bottomley's case*, 16 Ch. D. 681.

(*s*) *Ridley* v. *The Plymouth S. and D. G. and B. Co.* (acceptance of lease), 2 Exch. 711; *Homersham* v. *Wolverhampton W. Co.*, 6 Exch. 137. See *Hunt* v. *Wimbledon Local Board*, 4 C. P. D. 48, at p. 53, per Bramwell, L. J.

(*t*) *Kingsbridge Flour Mill Co.* v. *The Plymouth S. and D. G. and B. Co.*, 2 Exch. 718. But see *Smith* v. *Hull Glass Co.*, 8 C. B. 668, as to the onus of proof.

(*u*) See *Re Bank of London Ins. Association*, L. R. 6 Ch. 421.

(*x*) *Weald of Kent Canal Co.* v. *Robinson*, 5 Taunt. 801; *Kidwelly Canal Co.* v. *Raby*, 2 Price, 93.

(*y*) 25 & 26 Vict. c. 89, ss. 79, 199.

(*z*) See *Lanyon* v. *Smith*, 3 B. & S. 938.

(*a*) 25 & 26 Vict. c. 89, s. 79.

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how such proceedings may be adopted, who are the persons liable to contribute under them, and what is the extent of their liability, and the mode in which it is enforced, will be shown in the next section (*b*). Upon the presentation of a petition for winding up by the Court, and before any order for winding up, the Court may stay all actions and suits against the company (*c*); and after an order for winding up by the Court or under its supervision (*d*), no suit or action against the company may be commenced or proceeded with without the leave of the Court (*e*). The mode, then, to be adopted by the creditor is to prove his demand, and for this purpose provision is made that all debts and claims, present and future, certain or contingent, ascertained or sounding in damages (*f*), may be proved on a just estimate of their value (*g*). This proof the creditor must prefer on or before a day fixed by the Court, or he will be excluded from the benefit of any distribution made before proof (*h*). After payment of all these demands upon the company and the costs of winding up, any surplus that may remain is distributed among the parties entitled thereto (*i*).

By sect. 10 of the Judicature Act, 1875, rules of bankruptcy as to debts and liabilities provable and the valuation of contingent liabilities are applied to the winding up of any company under the Companies Acts of 1862 and 1867 (*k*). The liquidators, with the sanction of the Court, may, if the winding up is by

(*b*) Post, pp. 97 *et seq.*

(*c*) 25 & 26 Vict. c. 89, ss. 85, 148. See *Re Briton Medical Assurance Association*, 32 Ch. D. 503 (proceedings for penalties).

(*d*) 25 & 26 Vict. c. 89, ss. 147, 151.

(*e*) Ibid. ss. 87, 151. Whether a judgment creditor will be allowed to proceed to execution is a question for the discretion of the Court; *In re Vron Colliery Co.*, 20 Ch. D. 442 (leave refused); *In re Richards & Co.*, 11 Ch. D. 676 (leave granted).

(*f*) 25 & 26 Vict. c. 89, s. 158. *Chapman's case* (claim for salary), L. R. 1 Eq. 346; and *Macdowall's case*, 32 Ch. D. 366; *Horsey's claim*, L. R. 5 Eq. 561 (claim for future rent); *Gooch* v. *London Banking Association*, 32 Ch. D. 41.

(*g*) *Re National Financial Co.*, L. R. 3 Ch. 791.

(*h*) 25 & 26 Vict. c. 89, s. 107; *Re Kit Hill Tunnel*, 16 Ch. D. 590.

(*i*) 25 & 26 Vict. c. 89, s. 109; *McKewan's case*, 6 Ch. D. 447; *Re Alexandra Palace Co.*, 23 Ch. D. 297.

(*k*) See Bankruptcy Act, 1883, s. 37, in Appendix; *Re Carriage Co-operative Supply Association*, 23 Ch. D. 154; *Gorringe* v. *Irwell India Rubber Works*, 34 Ch. D. 128.

or subject to the supervision of the Court, or with the sanction of an extraordinary resolution where the winding up is voluntary, compromise any claims (*l*).

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Section V.—*How wound up and dissolved.*

How wound up and dissolved.

As to the dissolution of a joint stock company, not regulated by the Acts above mentioned, in the deed of settlement of every unregistered company, if it be properly framed, clauses will be found providing a mode by which it may be dissolved. Whatever those provisions may be, they must be strictly pursued (*m*). Resolutions, even of general meetings, to reduce the capital or the number of shares prescribed by the deed, will not bind persons who are absent: and such acts do not bind the company, but are wholly inoperative and void (*n*). However well framed provisions of this sort might be, numerous difficulties presented themselves in carrying them out. Recourse to the ordinary tribunals was rendered hopeless, in consequence of the necessity of including every member as a party in a suit for a dissolution. Moreover, individuals who were compelled to pay more than their just proportion of the liabilities, were practically without means of effectual redress.

To obviate these inconveniences, various measures were passed for the bankruptcy (*o*) and winding up (*p*) of companies; but these are now superseded by the Companies Act, 1862, which provides a system for winding up and dissolving not only registered companies, to be presently detailed, but also enacts that any *unregistered* partnership, association or company consisting of more than seven members, except a railway company incorporated by Act of Parliament, may be wound up by an order of the Court of Chancery in any one of three events (*q*).

(*l*) 25 & 26 Vict. c. 89, s. 160; *Bath's case*, 8 Ch. D. 334; 13 Ch. D. 693 (C. A.).

(*m*) See *Wilson* v. *Butler*, 4 Bing. N. C. 748; *Lyon* v. *Haynes*, 5 M. & G. 504.

(*n*) *Smith* v. *Goldsworthy*, 4 Q. B. 430; *Const* v. *Harris*, Turn. & R. 496. In the case of a registered company, see 30 & 31 Vict. c. 131, ss. 9—20; 25 & 26 Vict. c. 89, ss. 12, 49—54; *Re South Durham Brewery Co.*, 31 Ch. D. 261.

(*o*) The first of these was 7 & 8 Vict. c. 111.

(*p*) 11 & 12 Vict. c. 45; 12 & 13 Vict. c. 108; 20 & 21 Vict. c. 14.

(*q*) As to what are "unregistered companies" within the meaning of 25 & 26 Vict. c. 89, s. 199, see *Family*

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First, when the company has dissolved or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs.

Secondly, whenever the company is unable to pay its debts. The Act declares that a company shall be deemed unable to pay its debts under the following circumstances :—(i.) Whenever a creditor to whom a sum exceeding 50*l.* is then due, has, by leaving at the principal place of business or by delivering to the secretary, or some director, or principal officer, or otherwise as the Court may direct, served a demand under his hand for payment, and the company has neglected for three weeks to pay or to secure or compound for the same to the satisfaction of the creditor. (ii.) Whenever an action or other proceeding has been instituted against a member, for a debt due from the company or from him in his character of member, and notice in writing thereof has been served on the company in the manner last mentioned, and the company has not within ten days secured or compounded for such debt or demand, caused the action, &c., to be stayed, or indemnified the defendant to his reasonable satisfaction against the action, &c. and costs. (iii.) Whenever execution or other process on a judgment, &c., obtained by a creditor against the company, or a member as such, or any person authorized to be sued as nominal defendant on behalf of the company, is returned unsatisfied. (iv.) Whenever a customary decree or order absolute for the sale of the machinery, &c. of a mine has been made in a creditor's suit in the Stannary Court. (v.) And lastly, whenever it is otherwise proved to the satisfaction of the Court that the company is unable to pay its debts (*r*).

Thirdly, whenever the Court thinks it just and equitable that the company should be wound up.

The course of proceeding and the powers of the Court are the same as those applicable to registered companies wound up by the Court, presently described; but an unregistered company, unless specially registered (*s*), as it may be for the purposes of

Endowment Society, L. R. 5 Ch. 118; *In re London India Rubber Co.*, L. R. 1 Ch. 329, and cases there referred to; *In re Arthur Average Ass.*, L. R. 10 Ch. 542; 3 Ch. D. 522.

(*r*) 25 & 26 Vict. c. 89, s. 199.

(*s*) *Bowes* v. *Hope, &c. Insurance Society*, 11 H. L. Cas. 389.

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winding up, cannot be wound up under the clauses enabling companies to wind up voluntarily, or under the supervision of the Court (*t*). For the purpose of determining the Court having jurisdiction in the winding-up of an unregistered company, the company shall be deemed to be registered in that part of the United Kingdom where its principal place of business is situated (*u*).

In such a winding-up, every one who is liable at law or in equity to pay or contribute (*x*) to the debts or liabilities of the company, to the adjustment of the rights of the members, or the costs of the winding-up, is a contributory to the extent of such liability; and in the event of the death or bankruptcy of any contributory, or the marriage of a female contributory, the personal representatives, heirs, devisees, trustees or husband, as the case may be, are liable, as in the instance of a registered company (*y*).

The Court, upon the application of any creditor, may, after the presentation of the petition and before making an order for winding up the company, stay any legal proceedings against a contributory or the company (*z*); and after an order for winding-up has been made, no such proceedings for a debt of the company can be commenced, or proceeded with, against a contributory without the leave of the Court (*a*). The Court may, by the original, or by a subsequent order, direct that all the property and things in action of the company shall vest in the official liquidators, who may then, giving such indemnity as the Court directs, bring and defend in their official names all legal proceedings necessary for winding up the company and recovering its property (*b*). These provisions for winding up unregistered companies are expressly declared to be in addition to, and

(*t*) 25 & 26 Vict. c. 89, ss. 199, 204.

(*u*) Ibid. s. 199.

(*x*) *Re European Arbitration; Ex parte British National Association*, 8 Ch. D. 679.

(*y*) 25 & 26 Vict. c. 89, s. 200. *Moore & De La Torre's case*, L. R. 18 Eq. 661.

(*z*) 25 & 26 Vict. c. 89, s. 201. *Re Great Ship Co.*, 33 L. J. Ch. 245.

(*a*) 25 & 26 Vict. c. 89, s. 202. See *Gray* v. *Raper*, L. R. 1 C. P. 694; *International Pulp Co.*, 3 Ch. D. 594; *Longdendale Cotton Co.*, 8 Ch. D. 150.

(*b*) 25 & 26 Vict. c. 89, s. 203. *Turquand* v. *Marshall*, L. R. 6 Eq. 112; 4 Ch. 376.

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not in restriction of, the powers conferred on the Court and the official liquidator in the winding up of registered companies, all of which may be exercised in the winding up of unregistered companies (*c*). Under these provisions, when the affairs of the company have been completely wound up, the Court is to make an order that the company be dissolved (*d*).

Registered companies may be wound up in one of three modes, viz., by the Court; or voluntarily by the company; or by a voluntary winding-up, continued under the supervision of the Court. The Court invested with this jurisdiction is the Chancery Division of the High Court of Justice, or if the company be a mining company subject to the jurisdiction of the Court of the Vice-Warden of the Stannaries, that Court, unless the Vice-Warden certifies that the company may be more advantageously wound up in Chancery (*e*). A judge in chambers may exercise all the powers of the Court (*f*); but after an order for winding-up has been made, the Court may direct that all the subsequent proceedings shall be conducted in the Court of Bankruptcy for the district within which the registered office of the company was situate (*g*), or a county court (*h*).

The circumstances under which a *registered* company may be wound up by the Court are (*i*)—

1. Whenever the company, in general meeting, has passed a special resolution, requiring the company to be wound up by the Court (*k*).

2. Whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year (*l*).

3. Whenever the members are reduced in number to less than seven (*m*).

(*c*) 25 & 26 Vict. c. 89, s. 204.
(*d*) Ibid. s. 111.
(*e*) Ibid. s. 81.
(*f*) Ibid. s. 83.
(*g*) Ibid. s. 81.
(*h*) 30 & 31 Vict. c. 131, ss. 41 to 46.
(*i*) 25 & 26 Vict. c. 89, s. 79.
(*k*) Ibid. s. 79 (1). *Langham Skating Rink*, 5 Ch. D. 669.
(*l*) 25 & 26 Vict. c. 89, s. 79 (2). *In re Tumacacori M. Co.*, L. R. 17 Eq. 534. But see *New Gas Generator Co.*, 4 Ch. D. 874; *Middlesboro' Assembly Rooms Co.*, 14 Ch. D. 104; *In re Capital Fire Insurance Association*, 21 Ch. D. 209.
(*m*) 25 & 26 Vict. c. 89, s. 79 (3). *Hertfordshire Brewery Co.*, 43 L. J. Ch. 358.

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4. Whenever the company is unable to pay its debts (*n*).

5. Whenever the Court is of opinion that it is just and equitable (*o*) that the company should be wound up.

The fourth of these events is defined to be, (i) whenever a creditor, to whom a sum exceeding 50*l.* is due at law or in equity by the company, has served on the company, by leaving at their registered office, a demand under his hand requiring payment, and they have, for three weeks, *neglected* (*p*) to pay the sum, or secure or compound for it to the satisfaction of the creditor; or (ii) whenever execution issued on a judgment, decree or order obtained in any Court by a creditor in any proceeding instituted by him against the company, is returned unsatisfied in whole or in part; or (iii) whenever it is proved to the satisfaction of the Court that the company is unable to pay its debts (*q*).

The course of proceeding is by a petition (*r*), which may be presented by the company, or by one or more of the creditors, or contributories, or by these or any of them jointly or separately. Every order which may be made on any such petition operates in favour of all the creditors and all the contributories, in the same manner as if it had been made on the joint petition of a creditor and a contributory (*r*). Over this petition the Court has complete control; the Court may dismiss it with or without costs, or adjourn the hearing, and make any interim or other order which is thought just (*s*). The Court has a discretion in the matter; any unpaid creditor is not entitled to an order *ex debito justitiæ*, and it will not be made if the winding-up would be inexpedient and opposed to the general wishes of the creditors (*t*). The winding-up is deemed to commence upon the presentation of the petition (*u*). In the interval between this

(*n*) 25 & 26 Vict. c. 89, s. 79 (4).

(*o*) Ibid. s. 79 (5); *In re Suburban Hotel Co.*, L. R. 2 Ch. 737; *Riea Gold Co.*, 11 Ch. D. 36; *In re German Date Coffee Co.*, 20 Ch. D. 169; *In re Haven Gold Mining Co.*, 20 Ch. D. 151.

(*p*) Not "omitted." See *In re London and Paris Banking Corporation*, L. R. 19 Eq. 444; *Cadiz Waterworks Co.* v. *Barnett*, L. R. 19 Eq. 182.

(*q*) 25 & 26 Vict. c. 89, s. 80. *In re Western of Canada Oil, Lands, & W. Co.*, L. R. 17 Eq. 1.

(*r*) 25 & 26 Vict. c. 89, s. 82.

(*s*) Ibid. s. 86. See *Re Brighton Hotel Co.*, L. R. 6 Eq. 339; *In re Western of Canada Oil, &c., Co.*, ubi sup.

(*t*) *In re Chapel House Colliery Co.*, 24 Ch. D. 259.

(*u*) 25 & 26 Vict. c. 89, s. 84.

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commencement and the making of the order, all dispositions of the company's property (*v*) and transfers of shares (*x*) in it are void, unless the Court otherwise orders (*y*); and the Court may restrain further proceedings in any action or suit against the company upon terms (*z*), and, pending the appointment of liquidators, appoint provisionally an official liquidator (*a*). When the order for winding up has been made, no proceeding against the company can be commenced or prosecuted (*b*) without leave of the Court, and subject to such terms as it may prescribe; and (*c*) when a company is being wound up by the Court, or subject to its supervision, any distress, sequestration, or execution (*d*), &c. put in force against its effects, after the commencement of the winding-up, shall be void (*e*). But under the prior section the Court will give effect to it to such an extent and upon such terms as it thinks meet (*f*).

The Court may stay the winding-up on the motion of a contributory or creditor (*g*), and in all matters may and will regard

(*v*) *Re Wiltshire Iron Company*, L. R. 3 Ch. 443; *Gibbs and West's case*, L. R. 10 Eq. 312; *In re Liverpool Civil Service Association*, L. R. 9 Ch. 511; *In re Barned's Banking Co.*, L. R. 3 Ch. 105; *Bolognesi's case*, L. R. 5 Ch. 567; *In re Capital Fire Insurance Ass.*, 24 Ch. D. 408.

(*x*) But contracts for the sale of them are valid: *Chapman* v. *Shepherd*, L. R. 2 C. P. 228; *Rudge* v. *Bowman*, L. R. 3 Q. B. 689; *Emmerson's case*, L. R. 2 Eq. 231; 1 Ch. 433. See, also, *Mitchell's case*, 4 App. Cas. 548; *Tennent* v. *City of Glasgow Bank*, ib. 615; *Mitchell* v. *City of Glasgow Bank*, ib. 625, as to refusal of directors to transfer after insolvency is known.

(*y*) 25 & 26 Vict. c. 89, s. 153.

(*z*) *In re Great Ship Co.*, 4 D. J. & S. 63; *In re Vron Colliery Co.*, 20 Ch. D. 442. As to distress for rent, see *In re Coal Consumers' Association*, 4 Ch. D. 625; *In re Oak Pits Colliery Co.*, 21 Ch. D. 322; *General Co.* v. *Wetley Brick Co.*, 20 Ch. D. 260.

(*a*) 25 & 26 Vict. c. 89, s. 85. As to the practice under this section since the Judicature Acts, see *Artistic Printing Co.*, 14 Ch. D. 502. As to restraining proceedings for penalties in police court, see *Re Briton Medical Assurance Association*, 32 Ch. D. 503.

(*b*) 25 & 26 Vict. c. 89, s. 87. The Statute of Limitations, therefore, will not run against a creditor not barred before the winding-up order. *In re General Rolling Stock Co.*, L. R. 7 Ch. 646.

(*c*) 25 & 26 Vict. c. 89, s. 163.

(*d*) *In re Australian Direct S. Nav. Co.*, L. R. 20 Eq. 325.

(*e*) *In re Oak Pits Colliery Co.*, 21 Ch. D. 322.

(*f*) *Re Great Ship Company*, 33 L. J. Ch. 245; *Re Bastow & Co.*, L. R. 4 Eq. 681; and see *Re Bank of Hindustan*, L. R. 5 Eq. 69; *In re Universal Disinfector Co.*, L. R. 20 Eq. 162; *Re Withernsea Brickworks*, 16 Ch. D. 337; *Vron Colliery Co.*, 20 Ch. D. 442.

(*g*) 25 & 26 Vict. c. 89, s. 89.

the wishes of the creditors and contributories (*h*), which it may ascertain by summoning meetings of them (*i*).

Joint Stock Companies—how wound up and dissolved.

In order to conduct the process of winding up, the Court appoints one or more "official liquidators," either provisionally or otherwise, and determines what security they are to give, and their remuneration. It may *remove* (*k*) them and supply vacancies, and, where there are several liquidators, declare whether they are to act jointly or alone (*l*). These officers are described, not by their names, but as the official liquidators of the company, and they are to take into their custody all its property, and perform such duties as the Court imposes (*m*). With the sanction of the Court, they may (*n*) compromise any claims or demands by or against the company; bring and defend legal proceedings in its name and on its behalf; carry on the business, so far as may be necessary for beneficially winding it up; sell its property (*o*); do all acts, and execute all necessary documents in the name of the company, and use its seal; in the case of the bankruptcy of a contributory, prove for any balance as a separate debt, and receive the dividends; draw, accept, make and indorse bills or notes which will bind the company; raise money on the security of its assets; in their official name take out letters of administration to a deceased contributory, and take any other step necessary for obtaining the moneys due from a contributory or his estate; and do all other things necessary for winding up the company's affairs and distributing its assets (*p*). The Court may order that they may exercise any of the above powers without its intervention, and, where an official liquidator is provisionally appointed, may limit his powers (*q*). With the approval of the Court the liquidators may appoint a solicitor to assist them (*r*).

The most important step in the winding-up is to settle who

(*h*) *In re Brighton Hotel Co.*, L. R. 6 Eq. 339; *In re Professional C. & I. Benefit Building Society*, L. R. 6 Ch. 856; *In re Langley Mill S. & I. Co.*, L. R. 12 Eq. 26.

(*i*) 25 & 26 Vict. c. 89, s. 91.

(*k*) *In re Marseilles Extension R. & L. Co.*, L. R. 4 Eq. 692; *In re British Nation L. A. Ass.*, L. R. 14 Eq. 492.

(*l*) 25 & 26 Vict. c. 89, ss. 92, 93.

(*m*) Ibid. s. 94.

(*n*) *Pearson's case*, L. R. 7 Ch. 309.

(*o*) The assignees of things in action of the company may sue in their own names: 25 & 26 Vict. c. 89, s. 157.

(*p*) Ibid. s. 95. *Turquand* v. *Marshall*, L. R. 4 Ch. 376.

(*q*) 25 & 26 Vict. c. 89, s. 96.

(*r*) Ibid. s. 97.

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are liable to contribute the funds for the satisfaction of the claims on the company and costs of the proceedings. These persons are called "contributories," and in all proceedings, until it is finally determined who they are, this term includes everybody *alleged* to be liable to contribute (*s*). As soon as may be after the order for winding up has been made, the Court settles a list of the persons who are to become the *real* contributories (*t*); and in doing this, it distinguishes those who are such in their own right from those who are contributories as representatives, or liable for the debts of others (*u*). Upon this list everybody will be placed whose name appears, with his consent, upon the register of shareholders, even though, if there be creditors, he may have been induced to take shares by the fraud of the company, or its directors (*x*). But in settling it the Court is empowered to rectify the register (*y*), either before or after the winding-up order, if the name of any person has been put or retained upon it improperly, *e.g.*, because he is an infant, and therefore incompetent (*z*), or because he had not finally (*a*) agreed to take shares (*b*), or had agreed to take them on a condition, or subject to terms which have not been fulfilled (*c*), or the memorandum materially differed from the prospectus on the faith of which he had consented to take shares (*d*), and he had immediately (*e*) taken measures to have

(*s*) 25 & 26 Vict. c. 89, s. 74.

(*t*) Ibid. s. 98.

(*u*) Ibid. s. 99.

(*x*) *Oakes* v. *Turquand*, L. R. 2 H. L. 325; and see *Pentelow's case*, L. R. 4 Ch. 178; *Askew's case*, L. R. 9 Ch. 664; *Hay's case*, L. R. 10 Ch. 593.

(*y*) 25 & 26 Vict. c. 89, ss. 38 and 98.

(*z*) *Curtis's case*, L. R. 6 Eq. 455; *Capper's case*, L. R. 3 Ch. 458; *Baker's case*, L. R. 7 Ch. 115. Such a transfer is not void, and the infant after full age may affirm it; *Lumsden's case*, L. R. 4 Ch. 31; *Gooch's case*, L. R. 14 Eq. 454; 8 Ch. 266. But see the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), s. 2.

(*a*) *Ritso's case*, 4 Ch. D. 774; *Hebb's case*, L. R. 4 Eq. 9; *Ex parte Baily*, L. R. 3 Ch. 592; *Baker's case*, ubi supra.

(*b*) *Somerville's case*, L. R. 6 Ch. 266.

(*c*) *Pellatt's case*, L. R. 2 Ch. 527; *Alabaster's case*, L. R. 7 Eq. 273; *Wood's case*, L. R. 15 Eq. 236; *Simpson's case*, L. R. 4 Ch. 184. But see *Elkington's case*, L. R. 2 Ch. 511; and *Sandy's case*, 42 Ch. D. 78.

(*d*) *Ship's case*, 2 De G. J. & S. 544; L. R. 3 H. L. 343 (sub nom. *Downes* v. *Ship*); *Webster's case*, L. R. 2 Eq. 741; *Stewart's case*, L. R. 1 Ch. 574. See, however, *Oakes* v. *Turquand*, L. R. 2 H. L. at p. 351, per Lord *Chelmsford*, L. C.

(*e*) *Lawrence's case*, L. R. 2 Ch. 412; *Kincaid's case*, ib.; *Peel's case*, ib. 674; *Smith's case*, ib. 609.

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his name removed, or if his name has been improperly retained upon it,—for instance, after his shares have been forfeited (*f*), or transferred to another, who ought to have been registered in respect of them,—it will be removed from the register (*g*). The Court will also put (*h*) upon the list of contributories the name of every person who, having actually agreed (*i*) to take unpaid shares, either originally or upon a transfer, ought to be upon the register (*j*), or having applied for shares in a false or fictitious name (*k*), or who has been registered as the holder of paid-up, instead of unpaid, shares (*l*) (unless there has been a compliance with sect. 25 of Companies Act, 1867), or whose name has been improperly or irregularly removed from it as a holder of unpaid shares. The Court has discretion as to the exercise of its jurisdiction under sect. 35, and will exercise it only if "satisfied of the justice of the case" (*m*).

The present members are included in this list, and form a class, commonly called the A class, but in a second, commonly called the B class, all persons who have, within one year of the winding-up, held unpaid shares, and ceased to hold them, are also placed (*n*). The persons who thus eventually become the contributories upon the winding-up of a registered company are the *present* and *past* members or their representatives. These members or their real or personal representatives who are liable to contribution in a due course of administration (*o*), when placed

(*f*) *King's case*, L. R. 2 Ch. 719; *Dawes' case*, L. R. 6 Eq. 232; or agreed to be cancelled, *Marshall* v. *Glamorgan Iron & C. Co.*, L. R. 7 Eq. 129.

(*g*) *Fyfs's case*, L. R. 4 Ch. 768; *Nation's case*, L. R. 3 Eq. 77.

(*h*) As to the person on whose application this will be done, see *Sichell's case*, L. R. 3Ch. 119.

(*i*) *Evans' case*, L. R. 2 Ch. 427; *Re Financial Corporation*, L. R. 2 Ch. 714; *Karuth's case*, L. R. 20 Eq. 506; *Sidney's case*, L. R. 13 Eq. 228; *Challis's case*, L. R. 6 Ch. 266.

(*j*) *Re Financial Corporation*, L. R. 2 Ch. 714; *Nation's case*, L. R. 3 Eq. 77. Allottees or holders of scrip transferable to bearer will not be contributories if the certificates contain conditions precedent—*e.g.*, payment of instalments—which are not fulfilled. See *Ormerod's case*, L. R. 5 Eq. 110; *Re Littlehampton S. S. Co.*, 2 De G. J. & S. 521; *Eustace* v. *Dublin Trunk C. Ry. Co.*, L. R. 6 Eq. 182; and Buckley on the Companies Acts, 5th ed. 66.

(*k*) *Pugh's case*, L. R. 13 Eq. 566; *Richardson's case*, L. R. 19 Eq. 588.

(*l*) *Pritchard's case*, L. R. 8 Ch. 956; *Crickmer's case*, L. R. 10 Ch. 614.

(*m*) *Trevor* v. *Whitworth*, 12 App. Cas. at p. 440.

(*n*) 25 & 26 Vict. c. 89, s. 38.

(*o*) Ibid. s. 76.

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on the list, become liable to contribute, where the company is not "limited," to an amount sufficient to pay the debts and liabilities, and also the costs of winding up and adjusting the rights of the contributories amongst themselves, with the following qualifications:—That no *past* member is liable to contribute, if he has ceased to be a member for a period of a year before the commencement of the winding-up (*o*), or in respect of any debt or liability incurred after (*p*) he has ceased to be a member. Nor is he liable, unless the existing members are unable to satisfy the contributions required (*q*).

In the case of a company limited by shares or by guarantee, no person can be required to contribute beyond the amount unpaid (*r*) on the shares, or the shares and guarantee in respect of which he is liable, except in the case of a limited banking company of issue, the members of which, in addition to their liability as the members of a limited company, are liable for the amount of any notes issued (*s*). But companies may in policies of assurance or other contracts restrict the liability of the individual members, or render the funds of the company alone liable on such contracts (*t*).

Each share is deemed to be issued and held (*u*) subject to the payment of the whole amount *in cash* (*x*), unless it shall have been otherwise determined by written contract filed with the Registrar at or before the issue of the shares (*y*). The liability of a contributory creates a debt due when the liability commenced (*z*), but payable when calls are made; in case of his

(*o*) 25 & 26 Vict. c. 89, s. 38 (1). *Re Taurine Co.*, 25 Ch. D. 118; *Gooch's case*, L. R. 14 Eq. 454; 8 Ch. 266.

(*p*) *Brett's case*, L. R. 6 Ch. 800; 8 Ch. 800; *Webb* v. *Whiffin*, L. R. 5 H. L. 711.

(*q*) See *Helbert* v. *Banner*, L. R. 5 H. L. 28; *Webb* v. *Whiffin*, L. R. 5 H. L. 711; *Andrew's case*, L. R. 3 Ch. 161; *Weston's case*, L. R. 6 Eq. 17; *Bridger's case*, L. R. 4 Ch. 266; *Morris's case*, L. R. 7 Ch. 200.

(*r*) See *Ex parte Currie*, 32 L. J. Ch. 57.

(*s*) Companies Act, 1879, s. 6.

(*t*) 25 & 26 Vict. c. 89, s. 38 (6).

(*u*) 30 & 31 Vict. c. 131, s. 25.

(*x*) But any transaction which would support a plea of payment, will suffice. *Fothergill's case*, L. R. 8 Ch. 270; *Spargo's case*, ib. 407; *White's case*, 12 Ch. D. 511, at p. 517; *Bentley's case*, 12 Ch. D. at p. 856; *In re Barrow-in-Furness Co.*, 14 Ch. D. 400.

(*y*) A contract contained in the articles is not the contract required to be registered. The articles of association are not a contract within the meaning of this exception. *Pritchard's case*, L. R. 8 Ch. 956.

(*z*) See *Williams* v. *Harding*, L. R. 1 H. L. 9; *In re West of England*

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bankruptcy, concurrently with the winding-up (*a*), proof may be made against his estate for the estimated value of his liability to future calls (*b*), and his trustee represents the bankrupt in the winding-up, and becomes a contributory accordingly (*c*), unless he disclaimed the shares (*d*). Should the liability be provable, and the liquidator have failed to carry in a proof while the bankruptcy proceedings are pending, the bankrupt, though he obtains his discharge (*e*), cannot be put on the list of contributories.

When a company limited by guarantee, with a capital divided into shares, is wound up, any share capital not called up is deemed to be assets of the company, and becomes a specialty debt due from each member to the extent of any sums unpaid on shares held by him, and payable when the Court, or the liquidators if the winding-up be voluntary, direct (*f*). If a female contributory marries, her husband during the coverture is to contribute the same sum as she would have been liable to pay, if unmarried (*g*).

No sums due from the company to its members, in their character of members, by way of dividends, profits or otherwise, are deemed to be a debt of the company payable to such member in case of competition between himself and any other creditor not being a member; but they are to be taken into account in the final adjustment of the rights of the contributories amongst themselves (*h*). The Court may require any contributory settled on the list, trustee, receiver, banker, agent or officer of the company to pay or deliver to the official liquidator any sum of money, books or effects in his hands to which the company is *primâ facie* entitled (*i*). Orders, too, may be made for payment by the settled contributories of any moneys due from

Bank, Ex parte Hatcher, 12 Ch. D. 284; *Dawes' case*, 38 L. J. Ch. 512; *Re Milan Tramways Co.*, 22 Ch. D. 122.

(*a*) See s. 23 of the Bankruptcy Act, 1883.

(*b*) 25 & 26 Vict. c. 89, s. 75. *Re Pickering*, L. R. 4 Ch. 58; *McEwen's case*, L. R. 6 Ch. 582; *Ex parte Marshall*, L. R. 7 Ch. 324.

(*c*) 25 & 26 Vict. c. 89, s. 77.

(*d*) *West of England Bank, Ex parte Budden*, 12 Ch. D. 288. See, also, *Levi* v. *Ayres*, 3 App. Cas. 842.

(*e*) *In re Mercantile Insurance Association*, 25 Ch. D. 415.

(*f*) 25 & 26 Vict. c. 89, ss. 90, 134.

(*g*) Ibid. s. 78. *In re West of England Bank, Ex parte Hatcher*, 12 Ch. D. 284. As to marriages after 1st Jan. 1883, see 45 & 46 Vict. c. 75, ss. 13, 14, 15, 17.

(*h*) 25 & 26 Vict. c. 89, s. 38 (7). *Re Leicester Club*, 30 Ch. D. 629.

(*i*) 25 & 26 Vict. c. 89, s. 100.

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them to the company exclusive of calls; the Court allowing, where the company is unlimited, any set-off, except in respect of dividends or profits, and, if the creditors are paid, allowing any set-off, whether the company is limited or unlimited (*i*).

Calls may be made by the Court on settled contributories to the extent of their liability, in order to raise the necessary funds for the payment of the debts of the company, the costs of winding up (*k*), and the settlement of the rights of the contributories (*l*). The Court adjusts the rights of the contributories amongst themselves (*m*), and makes such order as to priority of payment of the expenses of winding up out of the estate, as it thinks just (*n*). Orders for payment of moneys, unless appealed against, are conclusive that such moneys are due, and the matters stated therein are truly stated, against all persons, and in all proceedings, except those taken to charge the real estate of a deceased contributory, whose heirs or devisees are not themselves on the list of contributories, in which case they are *primâ facie* evidence only (*o*). The Court may appoint a day before which the creditors shall prove their debts, or be excluded from any distribution made before they have proved (*p*).

The powers given by this Act are in addition to, and not in restriction of, any other powers at law or in equity of recovering calls and other moneys (*q*). There may be rehearings of and appeals from any order (*r*). Orders of the Court may be enforced in Scotland and Ireland (*s*). Judicial notice is to be taken of the signatures of the officers, and of the seal or stamp of the officers appended to, and of official copies of, documents issued in the winding-up by the Court (*t*); and provision is made for compelling the attendance of witnesses, the taking of evidence on

(*i*) 25 & 26 Vict. c. 89, s. 101; *Grissell's case*, L. R. 1 Ch. 528; *In re Whitehouse*, 9 Ch. D. 595; *Black & Co.'s case*, L. R. 8 Ch. 254; Lindley on Company Law, 5th ed. 742 *et seq.*

(*k*) As to past members, see *Brett's case*, L. R. 6 Ch. 800; 8 Ch. 800; *Morris's case*, Ib.

(*l*) 25 & 26 Vict. c. 89, s. 102.

(*m*) Ibid. s. 109. *Re Alexandra Palace Co.*, 23 Ch. D. 297.

(*n*) 25 & 26 Vict. c. 89, s. 110.

(*o*) Ibid. s. 106.

(*p*) Ibid. s. 107. *In re Kit Hill Tunnel*, 16 Ch. D. 590; *Hicks* v. *May*, 13 Ch. D. 236.

(*q*) 25 & 26 Vict. c. 89, s. 119.

(*r*) Ibid. s. 124. See *Brett's case*, 8 Ch. 800; *Craig* v. *Phillips*, 7 Ch. D. 249.

(*s*) 25 & 26 Vict. c. 89, s. 122. *In re International Pulp Co.*, 3 Ch. D. 594; and see *In re Glasgow Bank*, 14 Ch. D. 628.

(*t*) 25 & 26 Vict. c. 89, s. 125.

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oath, orally or by interrogatories, and the answers of such persons may be reduced into writing and be required to be signed by them (*u*). Provision is also made for the taking of evidence by commissioners (*x*). In certain cases power is given to arrest contributories and seize their papers (*y*). Finally, the Court orders the dissolution of the company (*z*), which order is reported by the official liquidator to the registrar, and by him minuted, and the company is dissolved from the date of the order (*a*).

The second mode of winding up and dissolving a company provided by the Act, viz., *voluntarily*, may be adopted in three events: 1. Whenever the period fixed for the duration of the company by the articles of association expires, or the event happens, upon the occurrence of which it is provided by the articles that the company is to be dissolved, and the company in general meeting has resolved that it shall be wound up voluntarily. 2. Whenever the company has passed a special resolution (*b*) to wind it up voluntarily. 3. Whenever the company has passed an extraordinary resolution (*c*) that the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind it up (*d*). The passing of such a resolution, that is, the second or confirmatory resolution, is declared to be the commencement of the voluntary winding-up (*e*). Sect. 7 of the Companies Act, 1880 (43 Vict. c. 19), mentions a fourth event. When the Registrar of Joint Stock Companies is satisfied that a company is not carrying on business or in operation, he may call on the company to show cause why it should not be struck off the register and dissolved.

The company thus to be wound up must cease to carry on its

(*u*) Ibid. ss. 115, 117.

(*x*) Ibid. ss. 126, 127.

(*y*) Ibid. s. 118. *In re Imperial Mercantile Credit Co.*, L. R. 5 Eq. 264.

(*z*) 25 & 26 Vict. c. 89, s. 111.

(*a*) Ibid. ss. 111, 112.

(*b*) Ibid. s. 5. A "special resolution" is a resolution by three-fourths of the members of the company entitled to vote at a general meeting, where notice to propose such resolution has been duly given, and confirmed by a majority of such members at a subsequent general meeting, of which notice has been duly given, and held at an interval of not less than fourteen days, or more than a month from the date of the first meeting. Ibid. s. 51. See *Re Miller's Dale, &c. Co.*, 31 Ch. D. 211.

(*c*) A resolution is extraordinary, which would be a special resolution if duly confirmed. *Re Bridport Old Brewery Co.*, L. R. 2 Ch. 191; *Stone* v. *City and County Bank*, 3 C. P. D. 282.

(*d*) 25 & 26 Vict. c. 89, s. 129.

(*e*) Ibid. s. 130. *Dawes' case*, L. R. 6 Eq. 232.

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business, except so far as may be necessary for beneficially winding it up, and all transfers of shares made after the commencement of the winding-up, without the sanction of the liquidators, are void, but it retains its corporate state until the affairs are finally settled (*f*). The resolution to wind up must be notified in the "Gazette" (*g*), and the property of the company is to be applied in satisfaction of its liabilities, and subject thereto, and unless otherwise provided, distributed among the shareholders in proportion to their shares (*h*). One or more liquidators are to be appointed, and their remuneration is fixed by a general meeting; where several are appointed, any two may act; vacancies (subject to any arrangement with the creditors, presently referred to) may be filled up by a general meeting (*i*); and the Court, where there is no liquidator, on the motion of a contributory, may appoint one; it may also remove a liquidator for due cause and appoint another (*k*). The company may, by extraordinary resolution, delegate to its creditors, or a committee of them, the power of appointing liquidators and supplying vacancies and arranging as to their powers (*l*). Upon the appointment of the liquidators, the powers of the directors cease, except so far as a general meeting or the liquidators sanction their continuance. The liquidators settle the list of contributories, which, when so settled, is *primâ facie* evidence of the liability of the persons named in it; and they make such calls on the contributories as they deem necessary; pay the debts of the company, and adjust the rights of the contributories *inter se* (*m*). The costs, charges, and expenses of a voluntary winding-up, including the remuneration of the liquidators (*n*), are payable out of the assets of the company in priority to any other claims (*o*). Any arrangement sanctioned by an extra-

(*f*) 25 & 26 Vict. c. 89, s. 131.

(*g*) Ibid. s. 132.

(*h*) Ibid. s. 133.

(*i*) Ibid. s. 140.

(*k*) Ibid. s. 141. *In re British Nation Life Ass. Ass.*, L. R. 14 Eq. 492; *Ex parte Sheard*, 16 Ch. D. 107.

(*l*) 25 & 26 Vict. c. 89, s. 135.

(*m*) Ibid. s. 133. As to set-off, see ante, p. 108. As to the right of pleading a set-off to such calls, see *The Garnet & M. G. M. Co.* v. *Sutton*, 3 B. & S. 321; 6 B. & S. 326; *Brighton Arcade Co.* v. *Dowling*, L. R. 3 C. P. 175; *Black & Co.'s case*, L. R. 8 Ch. 254; *In re Alliance Co.*, 28 Ch. D. 559.

(*n*) *In re Dronfield Co.* (No. 2), 23 Ch. D. 511.

(*o*) 25 & 26 Vict. c. 89, s. 144. *Home Investment Society*, 14 Ch. D. 167; see *In re Dominion of Canada Plumbago Co.*, 27 Ch. D. 33; *Batten* v. *Wedgwood Coal and Iron Co.*, 28 Ch. D. 317.

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ordinary resolution will bind the company, and also the creditors, if acceded to by three-fourths in number and value of them (*p*), subject to the right of any creditor or contributory to appeal to the Court within three weeks from the date of the completion of the arrangement (*q*). By the Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104), s. 2, the Court may order a meeting of creditors to be summoned; and if a majority in number representing three-fourths in value of creditors present in person or by proxy agree to any arrangement or compromise, if sanctioned by the Court, it is binding on the creditors, liquidators, and contributories of the company. If applied to by the liquidators or a contributory, the Court may determine any question, or exercise the powers as to enforcing calls or any other matter (*r*), which it might exercise if the company were being wound up by the Court (*s*).

The liquidators are empowered (*t*), with the sanction of an extraordinary resolution of the company, to make compromises with creditors, or persons claiming to be creditors, or having claims (*u*); and to compromise calls, liability to calls, debts and claims between the company and contributories or other persons apprehending liability to the company, and any question relating to the assets (*x*). If it be proposed that the whole or a portion of its business or property shall be transferred or sold to another company (*y*), the liquidators, when authorised by special resolution, may enter into an arrangement that the members may receive shares or a right to participate in the profits, or any other benefit from the purchasing company in lieu of cash (*z*). Opportunity, however, is afforded to any member dissenting from such arrangement to compel the purchase of his share by

(*p*) 25 & 26 Vict. c. 89, s. 136.

(*q*) Ibid. s. 137. *Union Bank of Kingston-upon-Hull*, 13 Ch. D. 808.

(*r*) *In re Poole Firebrick and Clay Co.*, L. R. 17 Eq. 268; *In re Gold Co.*, 12 Ch. D. 77; *Heiron's case*, 15 Ch. D. 139.

(*s*) 25 & 26 Vict. c. 89, s. 138. *Re Lama Coal Co.*, L. R. 2 Ch. 692.

(*t*) *Pearson's case*, L. R. 7 Ch. 309.

(*u*) 25 & 26 Vict. c. 89, s. 159.

(*x*) Ibid. s. 160.

(*y*) *Bird* v. *Bird's Patent D. Company*, L. R. 9 Ch. 358; and thus an arrangement for an amalgamation with another company, or for the sale of the business of a company not empowered to sell its business, may be carried out. *Southall* v. *British M. L. & A. Ass.*, L. R. 6 Ch. 614.

(*z*) 25 & 26 Vict. c. 89, s. 161. See *Southall* v. *British Mutual Life Ass.*, supra; *City and County Investment Co.*, 13 Ch. D. 475.

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the company at a price to be agreed upon, or in default of agreement, to be fixed by arbitration (*z*). The liquidators may summon general meetings, and must at the end of each year, if the winding-up continue so long, lay before a general meeting an account of their acts and dealings during the preceding year (*a*); and at the conclusion of the winding-up render an account showing the manner in which the winding-up has been conducted, and the property of the company disposed of, to a general meeting, at least one month's notice of which, and of its object, must be given in the "Gazette" (*b*). The liquidators must also make a return of this meeting to the registrar, and three months after the date of the return the company is deemed to be dissolved (*c*).

The voluntary winding-up is no bar to the right of a creditor to have the company wound up by the Court, either compulsorily or under supervision (*d*). The Court, however, will not, as a rule, make an order for winding up compulsorily or under supervision after a resolution for voluntary winding-up, unless the Court thinks that the resolution was passed fraudulently or creditors support the petition (*e*). The Court may provide for the adoption in the winding-up of any of the proceedings taken in the voluntary winding-up (*f*).

Hence arises the third mode of winding-up above alluded to, viz., *voluntary, subject to the supervision of the Court*, the statute providing that when a resolution to wind up voluntarily has been passed, the Court may, upon petition, make an order that it shall continue, subject to such supervision (*g*). The making of such an order is purely discretionary on the part of the Court, who will not, without some good reason, interfere with the management by the shareholders of their own affairs (*h*). In all

(*z*) 25 & 26 Vict. c. 89, ss. 162, 163. *Ex parte Fox*, L. R. 6 Ch. 176. See sect. 73, as to settlement of disputes between the company and a stranger.

(*a*) 25 & 26 Vict. c. 89, s, 139.

(*b*) Ibid. s. 142.

(*c*) Ibid. s. 143. See *In re London and Caledonian Mar. Ins. Co.*, 11 Ch. D. 140.

(*d*) 25 & 26 Vict. c. 89, s. 145.

(*e*) *In re Gold Co.*, 11 Ch. D. 701; *In re London & Caledonian Mar. Ins. Co.*, supra.

(*f*) 25 & 26 Vict. c. 89, s. 146.

(*g*) Ibid. s. 147.

(*h*) *Re Beaujolais Wine Co.*, L. R. 3 Ch. 15; *Bank of Gibraltar and Malta*, L. R. 1 Ch. at p. 72; *In re Gold Co.*, 11 Ch. D. 701.

Joint Stock Companies—how wound up and dissolved.

matters relating to winding up under its supervision, the Court may have regard to the wishes of the creditors or contributories (*i*), which it may ascertain by summoning meetings of them. Subject to any restrictions imposed by the Court, the liquidators exercise all their powers as if the winding-up were simply voluntary (*j*), and therefore, under sect. 159, may make compromises (*k*), and under sect. 161 arrangements (*l*), subject to the supervision of the Court (*m*). In other respects, including the staying of actions and other proceedings, such an order for winding-up has the same effect as an order for winding-up by the Court (*n*). If the winding-up under supervision be superseded by an order directing the company to be wound up compulsorily, the voluntary liquidators, or any of them, either alone or with others, may be appointed the official liquidators (*o*).

Where in the course of a winding-up it appears that any past or present director, manager, liquidator, or officer of the company has misapplied any moneys of the company, or been guilty of misfeasance or breach of trust in relation to the company, the Court may, notwithstanding that the offence is one for which the offender is criminally responsible, examine into the conduct of such director or other officer, and compel him to repay such moneys with interest, or make compensation (*p*). Below are references to some of the chief cases decided under this section. The view taken by the Courts of their jurisdiction under it may be gathered from *Coventry and Dixon's case* (*q*).

(*i*) 25 & 26 Vict. c. 89, s. 149. *Re Zoedone Co.*, 53 L. J. Ch. 465.

(*j*) 25 & 26 Vict. c. 89, s. 151.

(*k*) *James* v. *May*, L. R. 6 H. L. 328; *Ex parte Poole's Executors*, L. R. 8 Ch. 702.

(*l*) *In re Imperial Mere. Credit Ass.*, L. R. 12 Eq. 504; *City and County Investment Co.*, 13 Ch. D. 475.

(*m*) See the Joint Stock Companies Arrangement Act, 1870, supra, p. 111.

(*n*) 25 & 26 Vict. c. 89, s. 151.

(*o*) Ibid. s. 152.

(*p*) Ibid. s. 165. *In re National Funds Assurance Co.*, 10 Ch. D. 118; *Coventry and Dixon's case*, 14 Ch. D. 660; *In re British Guardian Life Assurance Co.*, ib. 335; *In re Forest of Dean Coal Mining Co.*, 10 Ch. D. 450; *Caerphilly Colliery Co.*, 5 Ch. D. 336; *Marzetti's case*, 42 L. T. 206; *Wedgwood Coal and Iron Co.*, 47 L. T. 612; *Fliteroft's case* (ordered to repay dividends paid out of the capital), 21 Ch. D. 519; *Ex parte Wilson*, L. R. 8 Ch. 45; *Rance's case*, L. R. 6 Ch. 104; *Oxford Building Society*, 35 Ch. D. 502; *Faure Electric Accumulator Co.* (payment of commission to a broker out of capital), 40 Ch. D. 141.

(*q*) 14 Ch. D. 660.

Joint Stock Companies—how wound up and dissolved.

Certain persons had acted as directors without qualifications. This conduct *Jessel*, M. R., held to be "misfeasance." This, however, was overruled in the Court of Appeal. *James*, L. J., said, "I am of opinion that the word 'misfeasance' means misfeasance in the nature of a breach of trust; that is to say, it refers to something which the officer of such company has done wrongly by misapplying or retaining in his own hands any moneys of the company, or by which the company's property has been wasted, or the company's credit improperly pledged. It must be some act resulting in some actual loss to the company." Mutilation of, or making false entries in, the books, &c., is a misdemeanour, punishable by two years' imprisonment (*r*); and the Court may, on application of any person, direct the liquidators to institute a prosecution for any criminal offence committed by any past or present officer or member in relation to the company, and pay the costs out of the assets (*s*), or, if the company is being wound up voluntarily, the liquidators may so prosecute with the sanction of the Court (*t*).

On the dissolution of the company, its books, &c., when the company has been wound up by or subject to the supervision of the Court, are disposed of as the Court directs; when the winding-up has been voluntary, as the company directs. After five years all responsibility of the company or liquidators, by reason that the books, &c. are not forthcoming, ceases (*u*).

The Lord Chancellor, with the Master of the Rolls and a Vice-Chancellor, is empowered to make (*x*) general orders and rules, which have accordingly been made (*y*), containing full and minute regulations for the conduct of these proceedings.

(*r*) 25 & 26 Vict. c. 89, s. 166.
(*s*) Ibid. s. 167.
(*t*) Ibid. s. 168.
(*u*) Ibid. s. 155.
(*x*) Ibid. s. 170; also sect. 20 of 30 & 31 Vict. c. 131.
(*y*) Reg. G., Mich. T. 1862; General Order and Rules, 21st March, 1868.

CHAPTER IV.

PRINCIPAL AND AGENT.

SECT. 1. *Definition and Character of Agent.*
2. *Rights of Principal against Agent.*
3. *Rights of Agent against Principal and Sub-Agent.*
4. *Rights of Third Parties against Principal.*
5. *Rights of Principal against Third Parties.*
6. *Rights of Agent against Third Parties.*
7. *Rights of Third Parties against Agent.*

SECTION I.—*Definition and Character of Agent.*

Definition and character of agent.

AN *agent* is a person authorized to do some act or acts in the name of another, who is called his *principal* (*a*). Whatever a man has power to do in his own right, he may (except in one or two very peculiar cases (*b*)) appoint an agent to do for him. I say *in his own right*, for one agent cannot nominate another to

(*a*) It may be objected that this definition does not include the limited class of "agents" by necessity (see infra), and those who, though not authorized, are regarded as agents if their acts are ratified. See *James*, L. J.'s remarks in *Ex parte White*, L. R. 6 Ch. 397, at p. 399, as to the loose use of "agency," and contrast them with the remarks of *Jessel*, M. R., in *Ex parte Bright*, 10 Ch. D. 566, at p. 570; *Blackburn*, J., in *Ireland* v. *Livingston*, L. R. 5 H. L. 395; and *Cassaboglou* v. *Gibbs*, 9 Q. B. D. 221; 11 Q. B. D. 797.

(*b*) See 9 Geo. 4, c. 14, ss. 5, 6; *Swift* v. *Jewsbury*, L. R. 9 Q. B. 301; *Beer* v. *London Hotel Co.*, L. R. 20 Eq. 412. Nor could a devise be executed by an agent, the Statute of Frauds expressly requiring the signature of the testator; but now see 7 Will. 4 & 1 Vict. c. 26, s. 9.

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perform the subject of his agency; *vicarius non habet vicarium; delegatus non potest delegare* (*d*). It is true that, when from the nature of his trust or custom of the business or employment, it cannot be expected that he should accomplish it all by his own personal exertions, he will be allowed to employ others to assist him. The above principle is subject to many exceptions. It means that an agent cannot delegate to others duties which he has undertaken expressly or impliedly to perform himself, which is not the case as to many mercantile agencies. As was said in *De Bussche* v. *Alt* (*e*)—

"The exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and when that is the case, the reason of the thing requires that the rule should be relaxed, so as, on the one hand, to enable the agent to appoint what has been termed a 'sub-agent' or 'substitute'; and on the other hand, to constitute in the interests and for the protection of the principal a direct privity of contract between him and such substitute. And we are of opinion that an authority to the effect referred to may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where in the course of the employment unforeseen emergencies arise, which impose upon the agent the necessity of employing a substitute" (*f*).

(*d*) Roll. Abr. 330; 9 Co. 76 b; *Schmaling* v. *Thomlinson*, 6 Taunt. 147; *Catlin* v. *Bell*, 4 Camp. 183; *Doe* d. *Rhodes* v. *Robinson*, 3 Bing. N. C. 677; *Ess* v. *Truscott*, 2 M. & W. 385; *Cahill* v. *Dawson*, 3 C. B. N. S. 106. This maxim, borrowed from Roman law, has been misunderstood. In regard to mercantile agencies, *delegatus potest delegare* is nearer the truth. The maxim is quoted as if a maxim of Roman law. But there it had a meaning different from that in which it is generally used in English law.

(*e*) 8 Ch. D. at p. 310.

(*f*) Neither in the Court below, nor in the Court of Appeal, was it very clearly explained in this case on what ground the principal might sue the sub-agent. *Hall*, V.-C., in dealing with the point, refers to Story on Agency, sects. 201, 217a, who cites no authority. The case is, so far, difficult to reconcile with *New Zealand Land Co.* v. *Watson*, 7 Q. B. D. 374. See also *Kaltenbach* v. *Lewis*, 10 App. Cas.

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Where the guardians of the poor of Witney Union employed Kempthorne to draw a specification for a workhouse, and Kempthorne employed Moon to make calculations, the Court of Common Pleas decided that Moon, though he had no communication with the guardians, might sue them for a compensation, having first proved that Kempthorne, in employing him, had acted in accordance with the custom of his trade of an architect; for, said *Tindal*, C. J., "*in contractibus tacité insunt quæ sunt moris et consuetudinis*" (*g*). In these cases, the agent does not so much delegate his agency as exercise a power impliedly contained in his appointment; in doing which, he must act with precaution, and not exceed what is proper under the circumstances of the case, and warranted by the usage of trade.

Some persons may be agents for others who could not act in their own capacity. An infant or feme covert may become an agent, the latter even for her own husband (*h*). But it has been decided that one of two contracting parties cannot be agent for the other, even with that other's consent, so as to bind him by a writing within the Statute of Frauds (*i*).

An agent may in general be appointed by bare words, or such appointment may be inferred from the conduct of his supposed principal respecting him, or ordinary course of dealing (*j*). There are, however, cases in which the nomination must be in writing, or even by deed (*k*). The appointment of an agent for the purposes specified by the 1st, 2nd, and 3rd sections of the Statute of Frauds must be by writing (*l*); and it is a general rule that an agent who is to execute a deed (*m*), or to take or give livery of seisin (*n*), must be appointed by *deed* for that

617. See *Mackersy* v. *Ramsays*, 9 Cl. & F. 818; *Meyerstein* v. *Eastern Agency Co.*, 1 Times Law Reports, 595.

(*g*) *Moon* v. *Guardians of Witney Union*, 3 Bing. N. C. 814, at p. 818; *New Zealand Land Co.* v. *Watson*, L. R. 7 Q. B. D. 374; and in particular *De Bussche* v. *Alt*, ubi supra; *Black* v. *Cornelius*, 6 So. Sess. Cas. 4th Series, 581.

(*h*) Co. Litt. 52a; *Wright* v. *Leonard*, 11 C. B. N. S. 258.

(*i*) *Sharman* v. *Brandt*, L. R. 6 Q. B. 720.

(*j*) See post, sect. 4.

(*k*) Bac. Abr. Authority, A.

(*l*) 29 Car. 3, c. 3.

(*m*) *Harrison* v. *Jackson*, 7 T. R. 207.

(*n*) 2 Roll. Abr. tit. Feoffment (R.), pl. 3, 4.

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purpose. Moreover, as a corporation aggregate can in general act only by deed, its agent must likewise be so appointed (*o*), though some trifling agencies, even for corporations, may be created without one; and trading companies may in general do all acts without a deed (*p*). Though an agent cannot bind his principal by *deed* unless appointed by deed, the deed executed by the agent may bind the principal as a writing (*q*).

There are two extensive classes of mercantile agents, viz., *factors*, who are entrusted with the possession as well as the disposal of property, and *brokers*, who are employed to contract about it, without being put in possession (*r*). Though *brokers* are usually employed in the manner just stated, yet every person so employed is not a *broker*. Thus it would seem that neither auctioneers (*s*), nor merchants acting by commission from correspondents abroad (*t*), can properly be called *brokers*. It is, perhaps, strange that the meaning of the word should not be better ascertained, for, until the passing of the London Brokers Relief Act, 1870 (*u*), and the London Brokers Relief Act, 1884 (*v*), it was required by stat. 6 Anne, c. 16, and 57 Geo. 3, c. 60, that brokers in London must be admitted by the mayor and aldermen, paying 5*l.* on admission, and a like sum annually.

Since the 29th September, 1886, the necessity of admission by the court of the mayor and aldermen, and the obligation to pay this sum, are abolished (*x*). The penalty imposed by the 57 Geo. 3, c. 60, is also abolished; and a stockbroker who has

(*o*) 9 Edw. 4, pl. 59; Bro. Corp. 24, 34; 1 Roll. Abr., tit. Corporations (K), 1; *Horne* v. *Ivy*, 1 Mod. 18; *Arnold* v. *Mayor of Poole*, 4 M. & G. 860.

(*p*) Plowd. 91; Vin. Abr. Corp. See ante, pp. 92, 93.

(*q*) *Hunter* v. *Parker*, 7 M. & W. 322; *In re Whitley Partners*, 32 Ch. D. at p. 340, per *Cotton*, L. J.

(*r*) Quoted by *Brett*, L. J., in *Ex parte Dixon*, 4 Ch. D. 133, at p. 137; and *Chitty*, J., in *Stevens* v. *Biller*, 25 Ch. D. 31, at p. 34. See per *Hannen*, J., in *Mollett* v. *Robinson*, L. R. 7 C. P. 84, at p. 97; and below, p. 167.

(*s*) *Wilkes* v. *Ellis*, 2 H. Bl. 555.

(*t*) *Janssen* v. *Green*, 4 Burr. 2103. As to who are brokers, see *Milford* v. *Hughes*, 16 M. & W. 174; and *Ex parte Dixon*, supra.

(*u*) 33 & 34 Vict. c. 60.

(*v*) 47 Vict. c. 3.

(*x*) Ibid. s. 2.

not been admitted may not only carry on business without liability to a penalty, but recover his commission (*y*).

Definition and character of agent.

Section II.—*Rights of Principal against Agent and Sub-Agent.*

Rights of principal against agent.

The duties of the agent to his principal must of course depend on the instructions contained, either expressly or impliedly, in his appointment; for, be those what they may, his duty is to carry them into effect, if possible, to the letter (*z*); unless, indeed, his obedience would involve a fraud on or wrong against third persons, for no contract can oblige a man to make himself the instrument of fraud (*a*). The appointment is his only authority: it may be *general*, to act in all his principal's affairs, or *special*, concerning some particular object; it may be *limited*, by certain instructions as to the conduct he is to pursue, or *unlimited*, *i.e.*, leaving his conduct to his own discretion (*b*); but this discretion should not be exercised at random, for, in the absence of specific instructions, it is his duty to pursue the accustomed course of that business in which he is employed (*c*). A stockbroker employed to buy or sell on the Stock Exchange may bind his principal by the rules of the Stock Exchange (*d*); but the principal will not be bound by rules of a market or trade, if they are unreason-

(*y*) As to the former state of the law, see *Cope* v. *Rowlands*, 2 M. & W. 149; and *Smith* v. *Lindo*, 4 C. B. N. S. 395.

(*z*) *Guerreiro* v. *Peile*, 3 B. & Ald. 616. But if the instructions fairly admit of two interpretations, acting bonâ fide he may adopt either. *Ireland* v. *Livingston*, L. R. 5 H. L. 395; *Loring* v. *Davis*, 32 Ch. D. 625; *Pole* v. *Leask*, 28 Beav. 562.

(*a*) *Bexwell* v. *Christie*, Cowp. 395.

(*b*) *Smart* v. *Sandars*, 3 C. B. 380. There may be, though rarely there is, an universal agency.

(*c*) *Russell* v. *Palmer*, 2 Wils. 325; *Smith* v. *Cologan*, 2 T. R. 188, in notis; *Russell* v. *Hankey*, 6 T. R. 12; *Warwicke* v. *Noakes*, Peake, 68; *Ireland* v. *Livingston*, L. R. 5 H. L. 395. See *Foster* v. *Pearson*, 1 C. M. & R. 849; *Heisch* v. *Carrington*, 5 C. & P. 471.

(*d*) *Sutton* v. *Tatham*, 10 A. & E. 27; *Bayliffe* v. *Butterworth*, 1 Exch. 425; *Bowring* v. *Shepherd*, L. R. 6 Q. B. 309; *Pollock* v. *Stables*, 12 Q. B. 765; *Grissell* v. *Bristowe*, L. R. 3 C. P. 112; 4 C. P. 36; *Coles* v. *Bristowe*, L. R. 6 Eq. 149; 4 Ch. 3; *Maxted* v. *Paine*, L. R. 4 Ex. 81; *Nickalls* v. *Merry*, L. R. 7 H. L. 530; *Hartos* v. *Rubens*, 22 Q. B. D. 254; and, in certain trades, a factor or broker may by custom sell in his own name: *Johnston* v. *Usborne*, 11 A. & E. 549; *Lienard* v. *Dresslar*, 3 F. & F. 212; and buy in his own name; *Bostock* v. *Jardine*, 3 H. & C. 700; *Cropper* v. *Cook*, L. R. 3 C. P. 194.

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able or illegal, and he is not aware of them (*dd*). The agent, if prevented by some unforeseen obstruction from pursuing the accustomed course, should give due notice to his principal (*e*). He must possess a competent degree of skill, in order to enable him to do so; if he engage without such skill he is a deceiver, and will be justly liable for the consequences of his incapacity (*f*). He is, moreover, responsible not only for himself, but for those whom he may employ under him (*g*), unless he is authorized to employ others; in which case he will be answerable only for negligence or want of skill in choosing them (*h*). The most satisfactory mode of determining whether he has exercised such skill is, to show by evidence whether a majority, or even a moiety, out of a given number of skilful and experienced persons, would have acted as he has done (*i*). Of whatever description his authority may be, if he exceed it and any loss ensue, that loss will fall on him (*j*); though, if a benefit result, he will not be allowed to share it, but must account for it to his employer (*k*). However, if his principal subsequently recognize his departure from the letter of his instructions, he is exonerated; for *omnis ratihabitio retrotrahitur et mandato priori æquiparatur* (*l*). And such a recognition may be inferred from the employer's conduct. Thus, the receipt of interest on a sum lent by the agent recognizes the loan (*m*).

It has been already said, in the chapter on Partnership, that from a person standing in a situation of confidence with regard to another the strictest *good faith* is required. This maxim

(*dd*) *Robinson* v. *Mollett*, L. R. 7 H. L. 802; *Read* v. *Anderson*, 13 Q. B. D. 779; *Seymour* v. *Bridge*, 14 Q. B. D. 460; *Perry* v. *Barnett*, ib. 467; 15 Q. B. D. 388 (C. A.).

(*e*) *Callander* v. *Oelrichs*, 5 Bing. N. C. 58.

(*f*) *Harmer* v. *Cornelius*, 5 C. B. N. S. 236; *Heys* v. *Tindall*, 1 B. & S. 296 (house agent).

(*g*) *Lord North's case*, Dy. 161a; *Mackersy* v. *Ramsays*, 9 Cl. & F. 818.

(*h*) Evans on Principal and Agent, 2nd ed. 255.

(*i*) *Chapman* v. *Walton*, 10 Bing. at p. 63.

(*j*) *Catlin* v. *Bell*, 4 Camp. 183; *Barron* v. *Fitzgerald*, 6 Bing. N. C. 201. As to the measure of damages, *Cassaboglou* v. *Gibbs*, 9 Q. B. D. 220; 11 Q. B. D. 797.

(*k*) *Russell* v. *Palmer*, 2 Wils. 325, and post, p. 123.

(*l*) *Secretary of State for India* v. *Kamachee Boye Sahaba*, 13 Moore, P. C. Ca. 22, and infra.

(*m*) *Clarke* v. *Perrier*, 2 Freem. 48; *Prince* v. *Clark*, 1 B. & C. 186; and see *Fitzgerald* v. *Dressler*, 7 C. B. N. S. 374; *Sentance* v. *Hawley*, 13 C. B. N. S. 458; and infra, p. 140.

applies in full force to agents (*n*), of whose morals the law is so careful that it will not suffer them even to incur temptation. Thus, an agent is bound to disclose the fact that he is acting for both parties in a contract of purchase and sale (*o*). So, too, an agent employed to sell is not allowed to be the purchaser, at least not unless he make known that he intends to become such, and furnish his employer with all the knowledge he himself possesses (*p*), or unless the Court, perceiving that the principal would lose by a re-sale, think fit on that account to uphold the transaction (*q*). So, neither can an agent employed to purchase be himself the seller, unless there was a plain understanding between him and his principal, and a full disclosure of his interest (*r*). No usage to that effect will be binding upon the principal. It matters not that he has not been injured; the Court will inflexibly adhere to the rule that no profit can be made by the agent in the course of his agency without the consent of the principal (*s*). It is important to bear in mind that a contract which has been entered into by an agent who has secretly stipulated for gain to himself is voidable by his principal. "When a bribe is given, or a promise of a bribe is made," said Cockburn, C. J., in *Harrington* v. *Victoria Graving Dock Co.* (*t*), "to a person in the employ of another by some one who has contracted, or is about to contract, with the employer, with a view to inducing the person employed to act otherwise

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(*n*) *Huguenin* v. *Baseley*, 14 Ves. 273.

(*o*) *McDevitt* v. *Connolly*, 15 L. R. (Ir.) Ch. D. 500.

(*p*) *Lowther* v. *Lowther*, 13 Ves. at p. 103; *Charter* v. *Trevelyan*, 11 Cl. & F. 714; *Lewis* v. *Hillman*, 3 H. L. Ca. 607; *Morison* v. *Thompson*, L. R. 9 Q. B. 480; *Williamson* v. *Barbour*, 9 Ch. D. 529; *Emma Silver Mining Co.* v. *Grant*, 11 Ch. D. 918; *Re Cape Breton Co.*, 26 Ch. D. 221; 29 Ch. D. 795.

(*q*) *Lowther* v. *Lowther*, ubi sup.; *Lord Hardwicke* v. *Vernon*, 4 Ves. 411; *Whitcomb* v. *Minchin*, 5 Madd. 91; *Oliver* v. *Court*, Dan. 301; S.C., 8 Price, 127; and if he have sold again for a profit, the Court will consider him a trustee to that extent for his employer: *Barker* v. *Harrison*, 2 Coll. 546.

(*r*) *Massey* v. *Davies*, 2 Ves. jun. 317; *Kimber* v. *Barber*, L. R. 8 Ch. 56; *Robinson* v. *Mollett*, L. R. 7 H. L. 802; *Dunne* v. *English*, L. R. 18 Eq. 524; *Bentley* v. *Craven*, 18 Beav. 75; *G. W. Insurance Co.* v. *Cunliffe*, L. R. 9 Ch. 525; *Williamson* v. *Barbour*, 9 Ch. D. 529; *In re Cape Breton Co.*, 29 Ch. D. 795; *Cavendish Bentinck* v. *Fenn*, 12 App. Ca. 652.

(*s*) *Parker* v. *McKenna*, L. R. 10 Ch. 96.

(*t*) 3 Q. B. D. 549, p. 551; *Smith* v. *Sorby*, 3 Q. B. D. 552, n.; *James*, L. J., in *Panama, &c. Co.* v. *India Rubber, &c. Co.*, L. R. 10 Ch. 515, at p. 526.

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than with loyalty and fidelity to his employer, the agreement is a corrupt one, and is not enforceable at law, whatever the actual effect produced on the mind of the person bribed may be." And if an agent, who is employed to purchase, purchase for himself, he will be considered a trustee for his principal (*t*). This is in accordance with the rule of the Civilians: *Tutor rem pupilli emere non potest*: *Idemque porrigendum est ad similia, id est, ad curatores, procuratores, et qui negotia aliena gerunt* (*u*). The Legislature has, in one instance, enforced these doctrines, by prohibiting agents, employed to buy or sell cattle in London, from buying or selling on their own account (*x*); and it has, as we have seen, been held that one contracting party cannot act as the agent of the other, even with that other's consent, so as to bind him by writing within the Statute of Frauds. An agent will not be allowed to dispute the title of his principal to the subject-matter of the agency (*y*). Thus, a wharfinger who has acknowledged that he holds goods for a particular transferee cannot afterwards refuse to deliver them to him, and, if he do refuse, is liable in trover. Nor can an agent who occupies a confidential position set up in his favour against the principal or personal representatives the Statute of Limitations in an action for an account. To what class of agents this applies is not very clear; it is conceived that the statute does not protect persons occupying a confidential position as agents (*z*).

It is a very essential part of the *good faith* required from an agent that he should keep a clear account, and communicate the result from time to time to his employer (*a*). The agent's

(*t*) *Lees* v. *Nuttall*, 2 M. & K. 819; *Bank of London* v. *Tyrrell*, 27 Beav. 273; 10 H. L. Ca. 26; *De Bussche* v. *Alt*, L. R. 8 Ch. D. 286 (where the question of acquiescence is considered); *Harris* v. *Truman*, 9 Q. B. D. 264.

(*u*) Dig. 18, 1, 34, § 7; *Williams* v. *Stevens*, L. R. 1 P. C. 352; *Pisani* v. *Att.-Gen. of Gibraltar*, L. R. 5 P. C. 516.

(*x*) Stat. 31 Geo. 2, c. 40, s. 11.

(*y*) *Holl* v. *Griffin*, 10 Bing. 246. However, if the property in the agent's hands have been *fraudulently* obtained by the principal from third persons, this rule does not apply: *Hardman* v. *Wilcock*, 9 Bing. 382; for no man is bound to make himself the instrument of a fraud. See *Crawshay* v. *Thornton*, 2 My. & Cr. 1. So if the bailment has been determined by what is equivalent to an eviction by title paramount: *Biddle* v. *Bond*, 6 B. & S. 225.

(*z*) *Burdick* v. *Garrick*, L. R. 5 Ch. 233; *Re Bell*, 55 L. T. 757; *Lyell* v. *Kennedy*, 14 App. Cas. pp. 459 *et seq.*

(*a*) *Pearse* v. *Green*, 1 Jac. & W. 140. See *Turner* v. *Burkinshaw*, L. R. 2 Ch. 488, at p. 491.

duty is to be constantly ready with his accounts. "I should say that if the accounts show that he has money which he ought to pay over, he ought also to be constantly ready to pay" (*b*). Rights of principal against agent.

In stating this account, the principal will, in the absence of his own express or implied agreement to the contrary (*c*), be entitled to all profits and advantages made by the agent in (*d*) the business beyond his ordinary remuneration, and also to every increase made from his own property (*e*). Thus, an agent who has made interest upon his principal's money will, in general, be obliged to account for it (*f*). But a mere stakeholder, such as an auctioneer receiving a deposit, will be excused (*g*); and no interest is due for money which has laid dead in the agent's hands, unless his employment was of such a nature as to render it his duty to invest it (*h*). It is on this principle that the employer has a right to every increase made from his own property. If he engage a servant or agent, stipulating for his whole time and labour, *ex. gr.*, the master of a ship, and that servant undertake another agency, the first employer will be entitled to retain against the servant any remuneration earned by him in his second occupation (*i*). The agent will also be charged with all payments actually made to him, and with all losses incurred by his own negligence, or even through the imposition of a forger; for when an agent is called on to transfer his employer's property, by virtue of

(*b*) Lord *Esher*, M. R., in *Harsant* v. *Blaine*, 56 L. J. Q. B. p. 513.

(*c*) *Lord Chedworth* v. *Edwards*, 8 Ves. 48; *Beaumont* v. *Boultbee*, 11 Ves. at p. 360. See *Shepherd* v. *Maidstone*, 10 Mod. 144; *Holden* v. *Webber*, 29 Beav. 117.

(*d*) *Diplock* v. *Blackburn*, 3 Camp. 43; *Morison* v. *Thompson*, L. R. 9 Q. B. 480; *Liquidators of Imperial Merc. C. Co.* v. *Coleman*, L. R. 6 H. L. 189; *Dunne* v. *English*, L. R. 18 Eq. 524. Of course, the rule stated in the text will not apply if the principal is aware that the agent is remunerated by some allowance from other parties: *Great Western Insurance Co.* v. *Cunliffe*, L. R. 9 Ch. 525.

(*e*) *Brown* v. *Litton*, 1 P. Wms. 141; *Massey* v. *Davies*, 2 Ves. jun. 317; —— v. *Jolland*, 8 Ves. 72; *Docker* v. *Somes*, 2 My. & K. 655; *Shallcross* v. *Oldham*, 2 J. & H. 609. See *Taylor* v. *Plumer*, 3 M. & S. 562.

(*f*) See *Rogers* v. *Boehm*, 2 Esp. 704.

(*g*) *Harington* v. *Hoggart*, 1 B. & Ad. 577.

(*h*) —— v. *Jolland*, 8 Ves. 72; *Rogers* v. *Boehm*, see supra.

(*i*) *Thomson* v. *Havelock*, 1 Camp. 527; *Lidgett* v. *Williams*, 4 Hare, 462; *Diplock* v. *Blackburn*, 3 Camp. 43; Abb. on Ship. 12th ed. p. 123; Macdonell on Master and Servant, p. 220. See *Patmore* v. *Colburn*, 1 C. M. & R. 65.

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an authority given to a stranger, he must examine into its validity at his peril (*j*). But he will not be chargeable with any loss incurred by him, without default or negligence, while he is engaged in the prudent exercise of his discretion, and in pursuance of the regular and accustomed course of trade (*k*). If he place his principal's money to his own account at his bankers, without any mark distinguishing it from his own, he will be answerable for it if the banker fail; for otherwise he might treat it as his own if the banker's solvency continued, and as his principal's in case of failure (*l*).

"Wherever a specific chattel is intrusted by one man to another, either for the purposes of safe custody or for the purpose of being disposed of for the benefit of the person intrusting the chattel, then, either the chattel itself, or the proceeds of the chattel, whether the chattel has been rightfully or wrongfully disposed of, may be followed at any time, although either the chattel itself, or the money constituting the proceeds of that chattel, may have been mixed and confounded in a mass of the like material" (*m*).

The accounts between an agent and his principal might always have been investigated in a court of law by an action of account (*n*), the foundation of which, according to *Gibbs*, C. J., was that the party wanted an account and was not able to prove his items without it, or if the principal could prove the items, he might sue in *indebitatus assumpsit* (*o*). But if the agent had refused or neglected to account, the principal might maintain a

(*j*) *Forster* v. *Clements*, 2 Camp. 17. See *Smith* v. *Mercer*, 6 Taunt. 76; *Rogers* v. *Kelly*, 2 Camp. 123; *Wilkinson* v. *Johnson*, 3 B. & C. 428; *Innes* v. *Stephenson*, 1 M. & Rob. 145; *Robarts* v. *Tucker*, 16 Q. B. 560; *The British Linen Co.* v. *Caledonian Ins. Co.*, 4 Macq. 107. But see Bills of Exchange Act, ss. 60, 80, and 82.

(*k*) *Zwilchenbart* v. *Alexander*, 1 B. & S. 234; *Bank of Canada* v. *Bradshaw*, L. R. 1 P. C. 479.

(*l*) See *Wren* v. *Kirton*, 11 Ves. 377; *Massey* v. *Banner*, 1 J. & W. 241; 4 Madd. 413; *Fletcher* v. *Walker*, 3 Madd. 73; *Darke* v. *Martyn*, 1 Beav. 525. The reason given is unsatisfactory; of the existence of the rule there is no doubt. See, as to the limitations of the principle, *In re Hallett's Estate*, 13 Ch. D. 696; *Hancock* v. *Smith*, 41 Ch. D. 456.

(*m*) *Thesiger*, L. J., in *Re Hallett's Estate*, 13 Ch. D. at p. 723.

(*n*) *Scott* v. *M'Intosh*, 2 Camp. 238.

(*o*) *Tomkins* v. *Willshear*, 5 Taunt. 431; *Arnold* v. *Webb*, 5 Taunt. 432, n. This is the usual course, and if the items be disputed a judge will refer it. See Com. Law Procedure Act, 1854; Supreme Court of Judicature Act, 1873, ss. 56, 57; Sup. Court of Judicature Act, 1884, ss. 9, 10.

special action against him, for his breach of duty in refusing to account (*p*), or sue in equity (*q*). Now in an action a principal may assert any of these claims, and may have a discovery of books and papers, and the benefit of the defendant's oath (*r*). A few instances of fraudulent omissions or insertions in accounts between principals and agents will warrant the re-opening of accounts which have been long closed (*s*).

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As mercantile agents are generally employed in sales or purchases, let us examine somewhat more particularly their duties with reference to those contracts.

Factor's Duties.—A factor is bound to keep the goods entrusted to him for sale with the same care that a prudent man would keep his own (*t*). He is not liable in case of robbery, fire, or other accidental damage happening without his default (*u*), unless previous to such damage he had committed some improper act, had it not been for which the property might have escaped; for then he will be answerable (*x*), and will not be allowed to say, that perhaps it might not have

(*p*) *Wilkyns* or *Wilkin* v. *Id.*, Carth. 89; Salk. 9.

(*q*) *Mackenzie* v. *Johnston*, 4 Madd. 373. See *Scott* v. *Surman*, Willes, 404; *Ermatinger* v. *Gugy*, 5 Moore, P. C. Ca. 1; *Padwick* v. *Stanley*, 22 L. J. Ch. 184.

(*r*) 36 & 37 Viot. c. 66, s. 34; Ord. XV. r. 1.

(*s*) *Williamson* v. *Barbour*, L. R. 9 Ch. D. 529.

(*t*) *Coggs* v. *Bernard*, 2 Ld. Raym. at p. 918; 1 Sm. Leading Cases, 9th ed. 201; *Vere* v. *Smith*, 1 Vent. 121.

(*u*) Co. Litt. 89 a; *Anon.*, 2 Mod. 100; *Vere* v. *Smith*, 1 Vent. 121.

The liability of carriers and innkeepers is more extensive. As to the former, see Book III., Ch. II., Contracts with Carriers. As to innkeepers, they are bound to keep their guests' property safe from thieves: *Calye's case*, 8 Rep. 33 a; *Richmond* v. *Smith*, 8 B. & C. 9; *Kent* v. *Shuckard*, 2 B. & Ad. 803; *Jones* v. *Tyler*, 1 A. & E. 522; *Farnworth* v. *Packwood*, 1 Stark. N. P. C. 251, *et in notis*; unless, indeed, the loss would not have happened if the guest had used the ordinary care of a prudent man: *Burgess* v. *Clements*, 4 M. & S. 306; *Armistead* v. *Wilde*, 17 Q. B. 261; *Cashill* v. *Wright*, 6 E. & B. 891; *Oppenhsim* v. *The White Lion H. Co.*, L. R. 6 C. P. 515; *Herbert* v. *Markwell*, 45 L. T. N. S. 649; affirmed, W. N. 1882, p. 112; *Walker* v. *Midland Rail. Co.*, 55 L. T. N. S. 489; or the thieves were his own companions or servants: *Calye's case*, 8 Co. 32. The innkeeper is also liable for any loss or injury arising "pro defectu hospitatoris vel servientium suorum," and the loss or injury will he presumptive evidence of negligence: *Dawson* v. *Chamney*, 5 Q. B. 164. His liability, however, is now limited to 30*l.*, unless the loss has arisen from wilful neglect, &c., of himself or his servants, or the goods have been deposited for safe custody: 26 & 27 Vict. c. 41, s. 1. This liability of the carrier and innkeeper is on account of the peculiar nature of their respective employments: *Coggs* v. *Bernard*, 2 Ld. Raym. at p. 918.

(*x*) *Caffrey* v. *Darby*, 6 Ves. 496; but see *Tobin* v. *Murison*, 5 Moore, P. C. Ca. at p. 128.

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escaped even had he acted rightly, for it is a rule of law *that no man shall qualify his own wrong* (*y*).

Where goods are consigned to a factor it is his duty to insure them, or at least to make every usual exertion to insure them, at the request of his principal, if in the course of their previous dealings he have been used to do so, or even though he may not have been used, if he have effects in hand enough to cover the expenses of insurance, or if the bill of lading contain a requisition to insure, or if it be sent with an order to that effect, for by accepting the goods under it he agrees to such requisition. In any of these cases, if he neglect to make the fit insurance, he will be responsible for damage which would have been covered thereby (*z*). And where it is the duty of an agent to insure, it is his duty also to give notice to his principal in case of his being unable to effect an insurance (*a*). He may be answerable to his principal for the acts of a sub-agent. M. employed R. & Co., bankers in Edinburgh, to obtain payment of a bill drawn by him upon W. C. at Calcutta. R. & Co. accepted the employment, transmitted the bill to C. & Co., of London, who transmitted it to P. & Co., their correspondents in Calcutta, to whom the bill was duly paid. P. & Co. failed. This was held to be no answer to M.'s claim against R. & Co.; with P. & Co. M. had no privity (*b*).

If the price be limited by the agent's instructions, he must sell for that, and he will not be justified in deviating from his instructions by the circumstance that, after receiving the goods, he has made advances to his principal, of which he has required payment, and informed him of his intention to sell; for although advances made by a factor confer a lien (*c*) on the goods in his favour, they do not create a pledge. Hence, too, if a factor holding goods with an authority to sell on certain terms, make advances to his principal, the failure of the principal to repay

(*y*) *Davis* v. *Garrett*, 6 Bing. at pp. 723, 724.

(*z*) *Smith* v. *Lascelles*, 2 T. R. 189; *Smith* v. *Cologan*, 2 T. R. 188, n.; *Wallace* v. *Tellfair*, ibid.; *Tickel* v. *Short*, 2 Ves. sen. 239; *Smith* v. *Price*, 2 F. & F. 748.

(*a*) *Callander* v. *Oelrichs*, 5 Bing. N. C. 58.

(*b*) *Mackersy* v. *Ramsays*, 9 Cl. & F. 818; *Skinner* v. *Weguelin & Co.*, 1 Cab. & El. 12. See *Exchange National Bank* v. *Third National Bank*, 5 Davis, U. S. Supreme Court, p. 290.

(*c*) *Re Witt*, 2 Ch. D. 489.

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them within a reasonable time after demand does not render that authority to sell irrevocable, but the principal retains his right, in the absence of any express agreement or custom, to dictate and vary from time to time the terms of sale. The factor, therefore, will not be justified in effecting a sale on the original, or on any other terms, in defiance of subsequent instructions, even though, in the exercise of a sound discretion, he may think those terms, and in fact prove them, to be most advantageous to the principal (*d*). Whether he will be entitled to give a warranty will depend upon what is usual in the particular trade or business (*e*). If no price be limited, he must sell for what the goods are fairly worth. If the property be of a description commonly sold for ready money only, he must not sell upon credit or barter the goods (*f*); for an agent employed generally to do any act is authorized to do it only in the usual way of business (*g*). But if he be factor in a sort of dealing or trade where the usage is to sell upon credit, then if he sell to a person of good credit at the time, he is discharged, and will be entitled to his commission, though such vendee may afterwards become insolvent (*h*); provided that the credit which he gave was reasonable and usual, and that his principal was made acquainted with the transaction within a reasonable and usual space of time. However, as some merchants do not choose to run this risk, and to trust so implicitly to the discretion of their factors, an agreement called *del credere* has been invented, the name of which is taken from an Italian mercantile phrase, signifying guarantee, and by which the factor, for an additional premium beyond the usual commission, when he sells goods on credit, becomes bound to warrant the solvency of the purchaser (*i*). It was at one time thought

(*d*) *Smart* v. *Sandars*, 3 C. B. 380; 5 C. B. 895.

(*e*) Benjamin on Sale, 3rd ed. pp. 616, 617; *Pickering* v. *Busk*, 15 East, p. 45; as to a factor's authority to insure, see *Lucena* v. *Crauford*, 2 B. & P. N. R. 269.

(*f*) *Guerreiro* v. *Peile*, 3 B. & Ald. 616.

(*g*) *Wiltshire* v. *Sims*, 1 Camp. 258; *Earl of Ferrers* v. *Robins*, 2 C. M. & R. 152; *Sykes* v. *Giles*, 5 M. & W. 645. See *Boden* v. *French*, 10 C. B. 886; *Boorman* v. *Brown*, 3 Q. B. 511.

(*h*) *Anon.*, 12 Mod. 514; *Scott* v. *Surman*, Willes, 406. See *Russell* v. *Hankey*, 6 T. R. 12; *Knight* v. *Plymouth*, 3 Atk. 480.

(*i*) See *Mackenzie* v. *Scott*, 6 Bro. P. C. 280, Tomlins' edit.; *Shaw* v. *Wood*-

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that an agent acting under a *del credere* commission was not merely in the same position as a surety, responsible only in the case of the default of the purchaser, but that he was liable to his principal in the first instance (*k*); but that doctrine has been overturned by subsequent authorities (*l*), which have settled that he is but in the position of a surety (*m*). Accordingly, a consignee who is free to sell at any price, and at any time he likes, is not a *del credere* agent (*n*). If indeed a factor, after the sale, remit his own note or acceptance to his principal for the amount of the proceeds, he will be liable on that, whether employed under a *del credere* commission or not, and whether the vendee be or be not solvent. For, by giving such an instrument, he lulls all the suspicions of his employer, and causes him to dismiss all care about the solvency of the purchaser (*o*).

With respect to Purchases.—As no agent can lawfully exceed his orders or authority, it follows that, if he do so, his principal, though he may perhaps insist upon keeping them if he think it for his advantage (*p*), has a right to refuse the goods improperly purchased (*q*). It has been said that, in such case, if he have advanced money on them, he may, instead of returning, take upon himself to dispose of them, as factor for the agent who transgressed his orders (*r*). But then he must repudiate the transaction, and give notice of his disagreement to the agent within a reasonable time, else he will be taken to have adopted

cock, 7 B. & C. 73; *Ex parte White*, L. R. 6 Ch. 397, at p. 403, per *Mellish*, L. J.

(*k*) *Grove* v. *Dubois*, 1 T. R. 112; *Bize* v. *Dickason*, 1 T. R. 285; *Wienholt* v. *Roberts*, 2 Camp. 586; *Beckwith* v. *Bullen*, 8 E. & B. 683.

(*l*) *Morris* v. *Cleasby*, 4 M. & S. 566; *Hornby* v. *Lacy*, 6 M. & S. 166; *Cumming* v. *Forester*, 1 M. & S. 494; *Baker* v. *Langhorn*, 6 Taunt. 519; *Ex parte White*, ubi sup.

(*m*) Strictly speaking, he is not a surety; thus, a note in writing signed by him is not necessary to charge him: *Couturier* v. *Hastie*, 8 Exch. 40 (reversed as to another point, 5 H. L. C. 673); *Wickham* v. *Wickham*, 2 K. & J. 478.

(*n*) *Ex parte White*, L. R. 6 Ch. 397.

(*o*) *Lefevre* v. *Lloyd*, 5 Taunt. 749; *Simpson* v. *Swan*, 3 Camp. 291; *Goupy* v. *Harden*, 7 Taunt. 159.

(*p*) *Taylor* v. *Plumer*, 3 M. & S. 562.

(*q*) *Ireland* v. *Livingston*, L. R. 5 Q. B. 516; 5 H. L. 395. A question sometimes arises whether, when the agent is ordered to purchase a given quantity, he can purchase by parcels: see *Ireland* v. *Livingston*, L. R. 2 Q. B. 99; *Johnston* v. *Kershaw*, L. R. 2 Exch. 82.

(*r*) Paley on P. & A., chap. 1, Part 1, sect. 7; Story on Agency, sect. 143; *Cornwal* v. *Wilson*, 1 Ves. sen. 509. See *Kemp* v. *Pryor*, 7 Ves. jun. 240.

it, and the loss, if any, will fall upon himself (*s*). It has been intimated (*t*), that though an agent exceed the price named in his instructions, yet if, by means of doing so, he effect a saving on the same goods equal in amount to the excess of price, equity at least would consider him as justified. But it may be doubted whether this is correct where the agent had substantially exceeded his authority.

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An agent employed to purchase goods which are to be shipped abroad, ought to transmit the bill of lading to his employer as soon as possible (*u*).

In conclusion of this head, we must observe that there is a difference between the principal's rights against a remunerated and against an unremunerated agent. The former having once engaged, may be compelled to proceed to the task which he has undertaken; the latter cannot, for his promise to do so being induced by no consideration, the rule *ex nudo pacto non oritur actio* applies (*x*). But if he do commence his task, and afterwards be guilty of misconduct in performing it, he will, though unremunerated, be liable for the damage so occasioned; since, it is said, by entering upon the business he has prevented the employment of some better qualified person, and the detriment thus occasioned to his principal is a sufficient consideration to uphold an undertaking on his part to act with care and fidelity (*y*). Less skill, however, is required from him than from a paid agent. He is bound to use such skill as he possesses (*z*), but he is bound to that only; and it is sometimes said that for gross negligence alone can he be held answerable (*a*); unless he act in a public or professional character, in

(*s*) *Cornwal* v. *Wilson*, 1 Ves. sen. 509; *Prince* v. *Clark*, 1 B. & C. 186. But see *Devaux* v. *Conolly*, 8 C. B. 640.

(*t*) In *Cornwal* v. *Wilson*, ubi sup.

(*u*) *Barber* v. *Taylor*, 5 M. & W. 527.

(*x*) *Elsee* v. *Gatward*, 5 T. R. 143; *Wilkinson* v. *Coverdale*, 1 Esp. 75; *Coggs* v. *Bernard*, 2 Ld. Raym. 909; 1 Smith's L. C. 9th edit. 201.

(*y*) *Coggs* v. *Bernard*, supra; *Wilkinson* v. *Coverdale*, 1 Esp. 75; *Doorman* v. *Jenkins*, 2 A. & E. 256; *Beauchamp* v. *Powley*, 1 M. & Rob. 38; *Whitehead* v. *Greetham*, 2 Bing. 464; *Shillibeer* v. *Glyn*, 2 M. & W. 143; *Balfe* v. *West*, 13 C. B. 466; *Giblin* v. *McMullen*, L. R. 2 P. C. 317.

(*z*) *Wilson* v. *Brett*, 11 M. & W. 113.

(*a*) In *Wilson* v. *Brett*, 11 M. & W. 113, Baron *Rolfe* observed, that he

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which case he holds himself out as possessing, and will be assumed to possess, skill, his omission to use which constitutes gross negligence (*b*).

The principal has, in most cases, no remedy against the sub-agent, there being no privity between them (*c*). But if the sub-agent had been party to a breach of trust, the rule of equity applies, viz., that all parties to a breach of trust are equally liable (*d*). In *De Bussche* v. *Alt* (*e*), it was laid down by *Thesiger*, L. J., delivering the judgment of the Court of Appeal, that

> when an agent employs, in pursuance of authority, a sub-agent,—"privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him as if he had been appointed agent by the principal himself" (*e*).

Embezzlements and fraudulent conversions of their employer's property committed by agents in breach of the confidence reposed in them, are punished criminally by stat. 24 & 25 Vict. c. 96, ss. 67, 68, 75—79.

Section III.—*Rights of Agent against Principal.*

Rights of agent against principal.

The chief right of the agent is to receive his remuneration, or, as it is often called, *commission*; the amount of which is

could see no difference between negligence and *gross* negligence; that *gross* negligence was only negligence with a vituperative epithet. See *Grill* v. *General I. S. C. Co.*, L. R. 1 C. P. at p. 612; *Beal* v. *S. Devon Ry.*, 3 H. & C. 337; *Giblin* v. *M'Mullen*, L. R. 2 P. C. at p. 338. The distinction appears to refer to the greater degree of skill and care required of a remunerated agent.

(*b*) *Shiells* v. *Blackburne*, 1 H. Bl. 159. See *Bourne* v. *Diggles*, 2 Chit. 311; *Dartnall* v. *Howard*, 4 B. & C. 345; *Lanphier* v. *Phipos*, 8 C. & P. 475; *Cowley* v. *The Mayor of Sunderland*, 6 H. & N. 565.

(*c*) *Cobb* v. *Becke*, 6 Q. B. 930; *Robbins* v. *Fennell*, 11 Q. B. 248. Compare *Ex parte Edwards*, 8 Q. B. D. 262.

(*d*) *Wilson* v. *Moore*, 1 My. & K. 146.

(*e*) 8 Ch. D. at p. 311, and Story on Agency, s. 201. It is difficult to reconcile this case and *New Zealand Land Co.* v. *Watson*, 7 Q. B. D. 374. (1) In both cases the plaintiffs knew that the alleged agents were acting for them. (2) *De Bussche* v. *Alt* is not noticed in the judgment of the Court in the latter.

fixed either by contract between him and his employer, or by the usage of trade in like cases (*f*), or, in some few instances, by Act of Parliament (*g*), or, if there be no usage, contract, or enactment applicable to the case, the value of his services must be determined by a judge or jury. Thus, a custom by which shipbrokers are entitled to a commission of five per cent. upon the freight payable upon charter parties obtained by them, has been proved (*h*). By the 30 Vict. c. 23, s. 16, insurance brokers are not entitled to the commission unless the policy is duly stamped.

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Whether in the case of an agent for sale commission be due only upon sale or independently of it, turns upon the terms of the contract or the custom of the trade (*i*). When agents are employed to sell or let, the rule is that they are entitled to commissions when they have brought about the relation of seller and buyer or lessor and lessee; commission is due though the actual sale or lease is not effected by them. In some cases a doubt has arisen, whether, on the special framing of the contract, the agent or servant is left to his employer's mercy in respect of his remuneration (*k*). When there is a special contract, and the precise event provided for has not happened, the agent may not be able to recover on a *quantum meruit* (*l*). The employer may revoke the employment or authority (*m*) to sell without paying anything to the agent. But as a rule

(*f*) *Eicke* v. *Meyer*, 3 Camp. 412.

(*g*) The Solicitors' Remuneration Act, 1881, 44 & 45 Vict. c. 44. See *Pryce* v. *Wilkinson*, 2 Bing. 470.

(*h*) *Hill* v. *Kitching*, 3 C. B. at p. 306; *Burnell* v. *Bounce*, 9 C. & P. 620; *Phillips* v. *Briard*, 1 H. & N. 21.

(*i*) *Lockwood* v. *Levick*, 8 C. B. N. S. 603; *Prickett* v. *Badger*, 1 C. B. N. S. 296; *Peacock and another* v. *Freeman and another*, 4 Times Law Reports, 541; *Tomlinson* v. *Millar*, 8 Times Law Reports, 836; *Green* v. *Bartlett*, 32 L. J. C. P. 261; *Walker* v. *Birrell*, 11 Sc. Sess. Cas., 4th series, 369; *Barnett* v. *Isaacson*, 4 Times Law Reports, 645; *Wilkinson* v. *Alston*, 48 L. J. Q. B. 733; *Rimmer* v. *Knowles*, 30 L. T. N. S. 496; *Mansell* v. *Clements*, L. R. 9 C. P. 139; *Clack* v. *Wood*, L. R. 9 Q. B. D. 276; *Green* v. *Lucas*, 33 L. T. N. S. 584; *Bailey* v. *Chadwick*, 39 L. T. N. S. 429.

(*k*) *Bryant* v. *Flight*, 5 M. & W. 114; *Taylor* v. *Brewer*, 1 M. & S. 290; *Roberts* v. *Smith*, 4 H. & N. 315.

(*l*) *Green* v. *Mules*, 30 L. J. C. P. 343.

(*m*) *Simpson* v. *Lamb*, 17 C. B. 603; *Campanari* v. *Woodburn*, 15 C. B. 400; *Lockwood* v. *Levick*, 8 C. B. N. S. 603; *Wilson* v. *Miers*, 10 C. B. N. S. 348.

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he may not do so without indemnifying the agent for labour and expense in the course of the agency.

The agent may be deprived of his commission in several ways. If the object of his employment be illegal, he can of course claim none (*n*). He may also forfeit it by misconduct, as by bad faith (*o*); or neglect to keep an account, that being an essential part of his employment (*p*); or if gross negligence or want of skill on his part prevents his employer from deriving any benefit from his services (*q*); *à fortiori*, if he betray his trust and act adversely to his principal (*r*).

As the usage of trade may regulate the amount of his commission, so it may, under certain circumstances, deprive him entirely thereof. Thus, it would seem that a *shipbroker* can charge a shipowner nothing for his labour in procuring a charterer for the ship, unless the owner think proper to conclude a charter-party with him (*s*). In some cases, by the custom of merchants, only one-half commission is earned and due when the business is taken out of the hands of the agent (*t*). In these cases the usage is looked on as incorporated into the contract of agency. We have seen that, in ordinary cases, the agent, if he act with competent discretion and fidelity, and without deviating from the regular course of business, will not be answerable

(*n*) *Stackpole* v. *Earle*, 2 Wils. 133; *Josephs* v. *Pebrer*, 3 B. & C. 639; *Cope* v. *Rowlands*, 2 M. & W. 149; *Pidgeon* v. *Burslem*, 3 Exch. 465; *Allkins* v. *Jupe*, 2 C. P. D. 375. See Inst. lib. 3, tit. 26, s. 7, as to a mandate contrary to good morals not being binding; "Illud quoque mandatum non est obligatorium quod contra bonos mores est, veluti si Titius de furto aut de damno faciendo aut de injuriâ faciendâ tibi mandet, licet enim pœnam istius facti nomine præstiteris non tamen ullam habes adversus Titium actionem."

(*o*) *Harrington* v. *Victoria Dock Co.*, L. R. 3 Q. B. D. 549.

(*p*) *White* v. *Lady Lincoln*, 8 Ves. at p. 371. See *Beaumont* v. *Boultbee*, 11 Ves. 358.

(*q*) *Denew* v. *Daverell*, 3 Camp. 451; *White* v. *Chapman*, 1 Stark. 113; *Hammond* v. *Holiday*, 1 C. & P. 384; *Hill* v. *Featherstonhaugh*, 7 Bing. 569; *Turner* v. *Robinson*, 6 C. & P. 16; *Shaw* v. *Arden*, 9 Bing. 287; *Gill* v. *Lougher*, 1 C. & J. 170.

(*r*) *Hurst* v. *Holding*, 3 Taunt. 32; *Brown* v. *Croft*, 6 C. & P. 16, n. (*g*). So, if being employed to sell, he buys: *Salomons* v. *Pender*, 3 H. & C. 639.

(*s*) *Broad* v. *Thomas*, 7 Bing. 99; *Read* v. *Rann*, 10 B. & C. 440; *Dalton* v. *Irvin*, 4 C. & P. 289; *Hill* v. *Kitching*, 3 C. B. 299; and see *Wilkinson* v. *Martin*, 8 C. & P. 1. In other cases, see *Simpson* v. *Lamb*, 17 C. B. 603; *Prickett* v. *Badger*, 1 C. B. N. S. 296.

(*t*) *Spain* (*Queen of*) v. *Parr*, 39 L. J. Ch. 73.

for any loss that may occur to his employer's property, and will, notwithstanding such loss, be entitled to his commission.

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Besides commission, he has a right to charge his principal with all advances made by him *in the regular course of his employment;* in *the regular course,* for such advances the principal, who deputed him in a business where they are necessary, has impliedly requested him to make (*u*). Such, for example, are differences paid by the broker employed to purchase shares on the Stock Exchange, and entitled by the usage of the market to sell if the purchaser does not pay within a certain time, and to charge him with the differences (*x*). Such, too, are charges for duties, warehousing, and porterage. As to charges for duties, it has been said, that if an agent at his own risk evade the payment of the foreign customs, he may charge them to his principal as paid (*y*); but not so of home customs, for that would be a fraud upon the king (*z*). However, the former part of this proposition has been questioned (*a*), and appears hardly sustainable. The principal's request may be inferred, where the advances are made in the *regular course of trade,* or even on the spur of some pressing exigency not provided for by an ordinary rule, since the employer may fairly be taken to have authorized the employed to do, under any circumstances, that which a prudent man would conceive necessary for the safeguard of his interests, *ex. gr.*, to insure a cargo, which is in extraordinary danger on account of the lateness of the season (*b*). But if an agent think fit to make a payment out of the regular course of business, he will not, unless he can show circumstances from which his principal's authority may be inferred, or his principal adopts it (*c*), be entitled to repayment (*d*).

(*u*) See *Sutton* v. *Tatham*, 10 A. & E. 27; *Bayliffe* v. *Butterworth*, 1 Exch. 425; *Pollock* v. *Stables*, 12 Q. B. 765; *Bayley* v. *Wilkins*, 7 C. B. 886; *Taylor* v. *Stray*, 2 C. B. N. S. 175. See *Chapman* v. *Shepherd*, L. R. 2 C. P. 228; *Hood* v. *Stallybrass & Co.*, 3 App. Cas. 880.

(*x*) *Pollock* v. *Stables*, 12 Q. B. 765.

(*y*) *Smith* v. *Oxenden*, 1 Ch. Ca. 25; Eq. Ca. Ab. 369. See *Boulton* v. *Arlesden*, 3 Salk. 235; Skinner, 149.

(*z*) *Borr* v. *Vandal*, 1 Ch. Ca. 30; Eq. Ca. Ab. 370.

(*a*) 13 Vin. Abr., tit. Factor (B.), by Lord *North*.

(*b*) *Wolff* v. *Horncastle*, 1 B. & P. 316.

(*c*) *Bristow* v. *Whitmore*, 9 H. L. Ca. 391; *Sentance* v. *Hawley*, 13 C. B. N. S. 458.

(*d*) *French* v. *Backhouse*, 5 Burr.

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Moreover, though he is entitled to be repaid his regular expenses, yet if he conduct himself so negligently in his employment, as to incur expenses which would not have been necessary had he acted rightly, he will be allowed nothing on account of them (*e*).

A broker who has been employed to buy or sell shares on the Stock Exchange will be entitled to be indemnified in respect of payments which he has made in accordance with the rules or usages of the Stock Exchange (*f*). He may recover his commission in respect of transactions which as against the principal are void (*g*). A broker may recover differences, though the bargains are of the nature of gaming and wagering transactions.

"What the [broker] was employed to do was to buy and sell on the Stock Exchange, and this he did; and everything he did was perfectly legal, unless it was rendered illegal as between the defendant and himself by reason of the illegality of the object they had in view, or of the transactions in which they were engaged. Now, if gaming and wagering were illegal, I should be of opinion that the illegality of the transactions in which the plaintiff and defendant were engaged would have tainted, as between themselves, whatever the plaintiff had done in furtherance of their illegal design, and would have precluded him from claiming in a Court of law any indemnity in respect of the liabilities he had incurred: *Cannan* v. *Bryce* (*h*); *McKinnell* v. *Robinson* (*i*); *Lyne* v. *Siesfield* (*k*). But it has been held that, although gaming and wagering contracts cannot be enforced, they are not illegal" (*l*).

2727; *Edmiston* v. *Wright*, 1 Camp. 88; *Howard* v. *Tucker*, 1 B. & Ad. 712; *Child* v. *Morley*, 8 T. R. 610; *Stokes* v. *Lewis*, 1 T. R. 20; *Westropp* v. *Solomon*, 8 C. B. 345.

(*e*) *Capp* v. *Topham*, 6 East, 392.

(*f*) *Nickalls* v. *Merry*, L. R. 7 H. L. 530; and supra.

(*g*) *Thacker* v. *Hardy*, 4 Q. B. D. 685; *Gillies* v. *McLean*, 13 Sc. Sess. Cas., 4th series, 12; *Moffett* v. *Stewart*, 14 Sc. Sess. Cas., 4th series, 506, a case where a broker lumped together stock bought by him at different times and different prices, and parcelled out the whole among his customers at the average of the different prices.

(*h*) 3 B. & Ald. 179.

(*i*) 3 M. & W. 434.

(*k*) 1 H. & N. 278.

(*l*) *Lindley*, J., in *Thacker* v. *Hardy*, 4 Q. B. D. 685, at p. 687. In *Read* v. *Anderson*, 13 Q. B. D. 779, the Court of Appeal held (*Brett*, M. R., dissenting) that a betting agent who had paid bets made by him for his principal could recover the sums so paid.

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In *Seymour* v. *Bridge* (*m*), the Courts went still further. By Leeman's Act (30 & 31 Vict. c. 29), a contract for the sale of bank shares which does not specify their numbers is void, and it is a misdemeanour on the part of the broker to make such contract. Nevertheless, Mathew, J., held the broker entitled to recover money paid on the Stock Exchange, it being proved that it was usual to disregard the Act, and that the principal knew of this usage. The Court of Appeal, however, has decided that the principal is not bound by such a usage if he be not aware of it (*n*); and in the absence of knowledge, such rules are not binding if they are unreasonable and at variance with the nature of the transaction (*o*). In the event of the person who employs a broker not paying for stock purchased, or becoming insolvent, the latter may close his principal's account and sell.

An agent is entitled to indemnity when, acting in obedience to the lawful orders of his principal (*p*), or when, in conformity to that principal's instructions, he does an act which may be either right or wrong, but which he is induced to believe right by the conduct of his employer; for, though there can be no indemnity between wrongdoers, that rule applies only where the party who seeks for the indemnity must have been conscious that in committing the act, against the consequences of which he asks to be indemnified, he was a wrongdoer (*q*).

Section IV.—*Rights of Third Persons against Principal.*

Rights of third persons against principal.

Next in order are the considerations respecting the mutual rights of the Principal and Third Persons.

(*m*) 14 Q. B. D. 460. But quære. See also *Bridger* v. *Savage*, 15 Q. B. 363; and *Galland* v. *Hall*, 4 Times Law Reports, 761.

(*n*) *Perry* v. *Barnett*, 15 Q. B. D. 388; *Coles* v. *Bristowe*, L. R. 4 Ch. 3; and compare *Pearson* v. *Scott*, 9 Ch. D. 198.

(*o*) *Robinson* v. *Mollett*, L. R. 7 H. L. 802; *Neilson* v. *James*, 9 Q. B. D. 546; *Perry* v. *Barnett*, 15 Q. B. D. 388; *Lacey* v. *Hill* (*Crowley's claim*), L. R. 18 Eq. 182; *Lacey* v. *Hill* (*Scrimgeour's claim*), L. R. 8 Ch. 921; *Cruse* v. *Paine*, L. R. 6 Eq. 641.

(*p*) *Lacey* v. *Hill*, L. R. 18 Eq. 182; *Duncan* v. *Hill*, L. R. 6 Ex. 255; 8 Ex. 242.

(*q*) *Betts* v. *Gibbins*, 2 A. & E. 57; *Dugdale* v. *Lovering*, L. R. 10 C. P. 196; *Collins* v. *Evans*, per *Tindal*, C. J., 5 Q. B. at p. 830; *Dixon* v. *Stansfield*, 10 C. B. 394; *In re Faweus*, 3 Ch. D. 795; *Pavy's Patent Felted Fabric Co.*, 1 Ch. D. 631.

Rights of third persons against principal.

As far as the agent's authority extends, he has a right to bind his principal to third persons. Now his authority may, as we have seen, be either expressly given or inferred from the acts of his supposed principal. When it is expressly given there can be no doubt as to its extent, except from the uncertainty of words employed in delegating it (*r*), or as to the implied powers intended to accompany those expressly given (*s*). When, however, it is to be inferred from the conduct of the principal, that conduct furnishes the only evidence of its extent as well as of its existence; and, in solving all questions on this subject, the general rule is, *that the extent of the agent's authority is* (*as between his principal and third parties*) *to be measured by the extent of his usual employment;* for he who accredits another by employing him, must abide by the effects of that credit, and will be bound by contracts made with innocent third persons in the seeming course of that employment, and on the faith of that credit, whether the employer intended to authorise them or not (*t*). Since, where one of two innocent persons must suffer by the fraud of a third, he who enabled that third person to commit the fraud should be the sufferer (*u*). On this principle it is, as we have seen in the first chapter, that one partner can bind another to contracts within the scope of the partnership business. The same principle is well illustrated by *Holt*, C. J. (*x*), who says, "If a man send his servant with ready money to buy goods, and the servant buy upon credit, the master is not chargeable. But if the servant *usually* buy for the master upon tick, and the servant buy some things without the master's order,

(*r*) See *Esdaile* v. *La Nauze*, 1 Y. & C. 394.

(*s*) See *Pole* v. *Leask*, 29 L. J. Ch. 888.

(*t*) See *Pickering* v. *Busk*, 15 East, 38 (as explained in *Johnson* v. *Crédit Lyonnais*, L. R. 3 C. P. D. 32); *Smith* v. *M'Guire*, 3 H. & N. 554; *Dingle* v. *Hare*, 7 C. B. N. S. 145; *Edmunds* v. *Bushell*, L. R. 1 Q. B. 97; *Miles* v. *McIlwraith*, 8 App. Ca. 120.

(*u*) Æquum prætori visum est sicut commoda sentimus ex actu institorum, ita etiam obligari nos ex contractibus ipsorum: Dig. lib. 14, tit. 3. Qui non prohibet pro se intervenire mandare creditur: Dig. lib. 50, tit. 17. The modern authorities usually put the liability on the ground of estoppel in pais.

(*x*) Shower, 95; *Wayland's case*, 3 Salk. 234; *Rusby* v. *Scarlett*, 5 Esp. 76; and *Byles*, J., in *Howard* v. *Stewart*, L. R. 2 C. P. at p. 152. See, too, *Pickard* v. *Sears*, 6 A. & E. at p. 474.

Rights of third persons against principal.

yet, if the master were trusted by the trader, the master is chargeable." The same principle is applied to cases respecting notes or bills, which, if drawn, endorsed, or accepted by a clerk who has been previously allowed to do so, bind the master, though the money never come to his use (*y*). It is applied to sales (*z*), guarantees (*a*), and insurances (*b*); in a word, to every species of mercantile transaction, and whether the agent have or have not been dismissed from his employer's service, provided that the third party had no reason to be aware of the determination of his employment (*c*). Nor can the principal relieve himself by agreeing with his agent that the latter shall take the liability on his own shoulders, for strangers not cognizant of such an agreement are not bound by it (*d*).

The nature of the authority to be inferred, and the sufficiency of the principal's acts to raise the inference, must of course depend on the special circumstances of each case, and generally involve questions fit for the consideration of a jury (*e*). There is one instance in which the recognition of a single purchase made by his servant upon credit was held to bind the principal to a succeeding one (*f*). However, as the employment is the measure of the authority to be inferred, if there were no previous employment, there can of course be no inference of authority. In such a case, the party who trusts a servant does it at his peril, since the master will only be liable for what

(*y*) *Prescott* v. *Flinn*, 9 Bing. 19; *Boulton* v. *Arlesden*, 3 Salk. 234; *Barber* v. *Gingell*, 3 Esp. 60; *Haughton* v. *Ewbank*, 4 Camp. 88; see —— v. *Harrison*, 12 Mod. 346; Molloy, 107.

(*z*) *Pickering* v. *Busk*, ubi sup.; *Trueman* v. *Loder*, 11 A. & E. 589; *Dingle* v. *Hare*, 7 C. B. N. S. 145.

(*a*) *Watkins* v. *Vince*, 2 Stark. 368.

(*b*) 1 Arnould, 170.

(*c*) *Trueman* v. *Loder*, 11 A. & E. 591; *Nickson* v. *Brohan*, 10 Mod. at p. 111; —— v. *Harrison*, supra; Molloy, 107, 282; *Summers* v. *Solomon*, 26 L. J. Q. B. 301.

(*d*) *Precious* v. *Abel*, 1 Esp. 350; *Rich* v. *Coe*, Cowp. 636; *Waring* v. *Favenck*, 1 Camp. 85.

(*e*) See *Dyer* v. *Pearson*, 3 B. & C. 38; *Hazard* v. *Treadwell*, 1 Str. 506; *Todd* v. *Robinson*, 1 Ry. & Moo. 217; *Gilman* v. *Robinson*, ib. 226; *Boulton* v. *Arlesden*, 3 Salk. 234; *Andereon* v. *Anderson*, 2 Stark. 204; *Stubbing* v. *Heintz*, Peake, 47; *Wayland's case*, 3 Salk. 234; *Rusby* v. *Scarlett*, 5 Esp. 76; see *Smith* v. *Topping*, 5 B. & Ad. 674; *Davidson* v. *Stanley*, 2 M. & G. 721; *Reynell* v. *Lewis*, 15 M. & W. 517; *Bailey* v. *Macauley*, 13 Q. B. 815; *Hogarth* v. *Wherley*, L. R. 10 C. P. 630.

(*f*) *Hazard* v. *Treadwell*, 1 Str. 506; *Morrison* v. *Statter*, 12 Sc. Sess. Cas. 4th series, 1152.

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comes to his use; and not even for that, if he gave his servant money to pay for it (*g*).

As the employment is the measure of the authority, an employment in one line of business affords no inference of authority to act in another (*h*); and the authority must be inferred from facts which have occurred during the course of such employment, not from mere argument as to the utility or propriety of the agent's possessing it (*i*). Thus, though a clerk or apprentice may have an implied authority to receive money for his master in the course of business, that will give him no authority to receive it in collateral transactions (*k*), or out of the ordinary course of business (*l*). And thus, also, though a master of a ship, in case of necessity, when the owner is not present and cannot be communicated with, or he has not in the port any agent (*m*), has an implied authority to borrow money for the purposes of the ship, and may therefore bind his owner by contracting a loan for those purposes, yet if he borrow money on his own account, and afterwards apply it to the purposes of the ship, that is no exercise of his authority, and his master is not bound to repay that money (*n*).

It follows from the above observations that an agent may be tied down by very strict directions as between himself and principal, whom he may, notwithstanding, have power to bind by contracts, unauthorised by, and even in defiance of, them (*o*). Cases of this sort occur when *a general agent*, as he is called, exceeds his instructions. *A general agent* is a person whom a man puts in his place to transact all his business of a particular kind (*p*). Thus, a man usually retains a *factor* to buy and sell

(*g*) See Paley, P. & A. 164; *Bolton* v. *Hillersden*, 1 Ld. Raym. 224; *Kilgour* v. *Finlyson*, 1 H. Bl. 155.

(*h*) See *Boucher* v. *Lawson*, Rep. temp. Hardwicke, 85.

(*i*) *Hawtayne* v. *Bourne*, 7 M. & W. 598.

(*k*) *Sanderson* v. *Bell*, 2 C. & M. 304.

(*l*) *Kaye* v. *Brett*, 5 Exch. 269. As to a bank manager not being authorised to direct a prosecution, see *Bank of New South Wales* v. *Owston*, 4 App. Cas. 270.

(*m*) *Arthur* v. *Barton*, 6 M. & W. 138; *Gunn* v. *Roberts*, L. R. 9 C. P. 331.

(*n*) *Thacker* v. *Moates*, 1 M. & Rob. 79; *Beldon* v. *Campbell*, 6 Exch. 886; *Gunn* v. *Roberts*, L. R. 9 C. P. 331.

(*o*) *Edmunds* v. *Bushell*, L. R. 1 Q. B. 97; *National Bolivian Co.* v. *Wilson*, see infra, p. 139, note (*x*).

(*p*) This distinction has been criticised: see per *Bramwell*, B., in *Baines*

all goods, and a *broker* to negotiate all contracts of a certain description, a *solicitor* to transact all his legal business, a *master* to perform all things relating to the usual employment of his ship (*r*), and so in other instances. This distinction was illustrated in the case of *Drew* v. *Nunn* (*s*). The defendant had held out his wife as his agent, and as entitled to pledge his credit. The defendant became insane; while he was in that condition his wife ordered goods from the plaintiff, who supplied them without knowledge of the defendant's insanity. On recovering his reason, the plaintiff refused to pay for the goods. He was held liable, on the ground that he could not withdraw his authority as to third persons without giving them notice.

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The authority of an agent to perform all things usual (*t*) in the line of business in which he is employed, cannot be limited by any private order or direction not known to the party dealing with him (*u*).

"Where an agent," says Lord Blackburn, "is clothed with ostensible authority, no private instructions prevent his acts within the scope of that authority from binding his principal. Where his authority depends, and is known to those who deal with the agent to depend, on a written mandate, it may be necessary to produce or account for the non-production of that writing, in order to prove what was the scope of the agent's authority" (*x*).

v. *Ewing*, 4 H. & C. 511, at pp. 516, 517; Wharton on Agency, s. 122; 1 Hare & Wallace's Leading Cases, 678; Evans on Agency, 2nd ed. 118; Dicey's Parties to an Action, 244. It would probably be accurate to say that a general agent is one generally or usually employed to do certain things, few or many; while a special agent is only specifically authorised to act in regard to certain matters, whether many or few.

(*r*) The authority of a master is very extensive: see *Ringuist* v. *Ditchell*, Abb. 12th ed. p. 88; 3 Esp. 64; *Ellis* v. *Turner*, 8 T. R. 531; Abb. 12th ed. p. 87; and per cur. *Grant* v. *Norway*, 10 C. B. 665, at p. 687; *Alexander* v. *Dowie*, 1 H. & N. 152; *The Soblomsten*, L. R. 1 A. & E. 293; *Frost* v. *Oliver*, 1 El. & Bl. 301; *The Great Eastern*, L. R. 2 Ad. 88; *Lloyd* v. *Guibert*, 6 B. & S. 100. As to its origin, see per *Parke*, B., post, p. 143, and *Brett*, M. R., in *The Pontida*, 51 L. T. 849, at p. 850.

(*s*) 4 Q. B. D. 661.

(*t*) *Grant* v. *Norway*, 10 C. B. 665.

(*u*) *Whitehead* v. *Tuckett*, 15 East, 400; *Howard* v. *Sheward*, L. R. 2 C. P. 148. See *Baines* v. *Ewing*, L. R. 1 Ex. 320, as to those dealing with an agent being affected with notice of limitation of authority by virtue of a custom.

(*x*) *National Bolivian Navigation Co.* v. *Wilson*, 5 App. Cas. 176, at p. 209; and *Brett*, L. J., in *Chapleo* v. *Brums-*

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The rule is directly the reverse concerning a *particular agent*, *i.e.*, an agent employed specially in one single transaction; for it is the duty of the party dealing with such a one to ascertain the extent of his authority; and if he do not he must abide the consequences (*y*).

We have seen that a subsequent assent by the principal to his agent's conduct exonerates the latter from the consequences of a departure from his orders. In like manner, it will render the principal liable for contracts made in violation of such orders, or even without any previous retainer or employment, for *omnis ratihabitio retrotrahitur et mandato æquiparatur* (*z*). Such an assent may be inferred from the conduct of the principal (*a*), who cannot confirm a transaction in part and repudiate it as to the rest, but must either adopt all or none (*b*).

The general rule is, that the authority, of whatever description, *must be strictly observed*, otherwise the principal, if his agent be a particular one, will not be bound. And if he be a general agent, will not be bound, save under the circumstances above described; and not under any circumstances whatever, if the third party, at the time of his contracting was, or ought to have been, aware of the limited extent of the agent's authority, which was formerly construed by the Courts with a great deal of strictness (*c*). Thus, if given to two, it cannot be executed by one, though the other should die or refuse; and if given to

wick Building Society, 6 Q. B. D. 696, at p. 715.

(*y*) *Fenn* v. *Harrison*, 4 T. R. 177; *Brady* v. *Todd*, 9 C. B. N. S. 592; *Erle*, C. J., in *Sickens* v. *Irving*, 7 C. B. N. S. 165, at p. 174; *Smith* v. *McGuire*, 3 H. & N. 554, at p. 562.

(*z*) *Ward* v. *Evans*, Salk. 442; Comb. 450; Ld. Raym. 930; *Maclean* v. *Dunn*, 4 Bing. 722; *Henderson* v. *Barnewall*, 1 Y. & J. 387; *Fenn* v. *Harrison*, 3 T. R. 757; 4 T. R. 177; *Coles* v. *Trecothick*, 9 Ves. 234, at pp. 251, 252; see infra.

(*a*) *Thorold* v. *Smith*, 11 Mod. 88.

(*b*) *Wilson* v. *Poulter*, 2 Str. 859; *Billon* v. *Hyde*, 1 Atk. 128; *Smith* v. *Hodson*, 4 T. R. 211; *Hovil* v. *Pack*, 7 East, 164. But see note (*c*) and infra.

(*c*) *Gardner* v. *Baillie*, 6 T. R. 591; *Tobin* v. *Crawford*, 5 M. & W. 235; *Acey* v. *Fernie*, 7 M. & W. 151; Co. Litt. 258 b. It is said, that if an agent do more than he is authorised, the act is bad for the excess only, provided that can be distinguished; if he do less, bad altogether, except in cases where his authority is coupled with an interest: see Co. Litt. 258 b; *Alexander* v. *Alexander*, 2 Ves. sen. 640, at p. 644; *Baines* v. *Ewing*, L. R. 1 Ex. 320. But see ante, p. 128.

three jointly and severally, it cannot be executed by two, though it may either by all three or by one only (*d*). This rule does not apply to public agencies; and even in regard to agencies of a private nature, the Courts are now disposed to relax from the technical precision of ancient times in construing these and the like words, and will search the whole instrument for the maker's intention (*e*). But where that is once ascertained, they will confine the agent to it with the utmost strictness (*f*).

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At the same time, the Courts are so far liberal in construing authorities given to agents, that they will hold them to include permission to use all necessary, or even usual, means of carrying the main intention of the principal into effect in the best manner (*g*). Thus, an agent employed to get a bill discounted may, perhaps, unless expressly restricted, endorse it in the name of his employer (*h*). A broker employed to effect a policy of insurance may adjust the loss, and do all that is requisite towards such adjustment (*i*): an agent to receive rents and let, has power to determine the tenancy (*k*): an agent employed to issue process may receive the debt and costs (*l*):

(*d*) Co. Litt. 112 b, 181 b; 1 Roll. Abr. 329; 1 Anders. 145; *Brown* v. *Andrew*, 18 L. J. Q. B. 153.

(*e*) *Guthrie* v. *Armstrong*, 5 B. & Ald. 628; *Denyssen* v. *Botha*, 13 Moo. P. C. Ca. 352.

(*f*) *Barron* v. *Fitzgerald*, 6 Bing. N. C. 201, where an authority to Barron and Stewart to effect an insurance in their own two names was held not to warrant the effecting one in the names of Barron, Stewart, and Smith, whom they had taken into partnership; *Attwood* v. *Munnings*, 7 B. & C. 278; *Hogg* v. *Snaith*, 1 Taunt. 347; *Murray* v. *E. I. Co.*, 5 B. & A. 204; *Esdaile* v. *La Nauze*, 1 Y. & C. 394; *Fearn* v. *Filica*, 7 M. & G. 513.

(*g*) *Richardson* v. *Anderson*, 1 Camp. 43, n.; *Goodson* v. *Brooke*, 4 Camp. 163; *Withington* v. *Herring*, 5 Bing. 442; *Ducarrey* v. *Gill*, M. & M. 450; *Alexander* v. *Gibson*, 2 Camp. 555, et notis; *Helyear* v. *Hawke*, 5 Esp. 72; *Runquist* v. *Ditchell*, 3 Esp. 65. See *Hicks* v. *Hankin*, 4 Esp. 114; *Whitehead* v. *Tuckett*, 15 East, 400; *Ellis* v. *Turner*, 8 T. R. 531; *Lord* v. *Hall*, 8 C. B. 627; *Perry* v. *Holl*, 2 De G. F. & J. 38; *Webber* v. *Granville*, 30 L. J. C. P. 92; *Edmunds* v. *Bushell*, 1 Q. B. D. 467; *Johnston* v. *Kershaw*, L. R. 2 Ex. 82; *Ireland* v. *Livingston*, L. R. 2 Q. B. 99; 5 Q. B. 516; 5 H. L. 395. But see above, *Robinson* v. *Mollett*, L. R. 7 H. L. 802; and *Perry* v. *Barnett*, 14 Q. B. D. 467, as to the qualifications to the agent's power.

(*h*) *Fenn* v. *Harrison*, 3 T. R. 757; 4 T. R. 177. See *Davidson* v. *Stanley*, 2 M. & G. 721.

(*i*) *Richardson* v. *Anderson*, 1 Camp. 43, n.; *Sweeting* v. *Pearce*, 7 C. B. N. S. 449.

(*k*) *Doe* d. *Manvers* v. *Mizen*, 2 M. & Rob. 56.

(*l*) *Weary* v. *Alderson*, 2 M. & Rob. 127.

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an agent entrusted with the possession of goods for the purpose of selling, is authorised to sell them in his own name (*m*): and, it is said, a warranty given by an agent entrusted to sell *primâ facie* binds the principal (*n*). A master who sends his servant to buy goods, and gives him no money to pay, doubtless authorises him to pledge his credit (*o*). On the other hand, an authority to "negotiate, make sale, dispose of, assign and transfer" securities, does not imply authority to pledge (*p*). Nor does authority to pay, receive, or to draw cheques import authority to endorse (*q*). But evidence of such authority to draw is not to be withheld from the jury, who are to determine whether such authority to endorse exists or not, and who may justly be satisfied with less evidence thereof when it is proved that the clerk is a confidential clerk, and has undisputed authority to draw in the name of his principal (*r*). If the agent indorses by procuration, the principal is only bound if the agent was acting within the actual limits of his authority (*s*).

Though the agent has an implied authority to use those means of which the principal could not but have foreseen the necessity, and, therefore, could not but have intended to authorise, yet if an unusual contingency arise, it does not follow that the agent will have power, however useful it might be, to do that which would enable him to meet the contingency in the best manner. Thus, it was decided in *Hawtayne* v. *Bourne* (*t*), that

(*m*) *Ex parte Dixon*, 4 Ch. D. 133.

(*n*) *Dingle* v. *Hare*, 7 C. B. N. S. 145; *Howard* v. *Sheward*, L. R. 2 C. P. 148, are quoted as authorities for this. But see *Brady* v. *Todd*, 9 C. B. N. S. 592; and *Brooks* v. *Hassall*, 49 L. T. 569.

(*o*) Per *Tindal*, L. C. J., delivering judgment of Ex. Ch. in *Tobin* v. *Crawford*, 9 M. & W. 716, at p. 718.

(*p*) *Jennenjoy Coondoo* v. *Watson*, 9 App. Cas. 561.

(*q*) *Davidson* v. *Stanley*, 2 M. & G. 721.

(*r*) *Prescott* v. *Flinn*, 9 Bing. 19, at p. 22; vide *Smith* v. *Topping*, 5 B. & Ad. 674.

(*s*) Bills of Exchange Act, 1882, s. 25.

(*t*) 7 M. & W. 595. See *Sinclair, Moorhead & Co.* v. *Wallace*, 7 Sc. Sess. Cas., 4th series, 874, where an agent empowered to carry on the business of the principals in another town, and with written authority to draw, accept, indorse, and discharge bills, promissory notes, &c., borrowed money, on the representation that it was for use in the principals' business, by accepting a bill for them. The Court of Session held that, in the absence of an express power of borrowing, the principals were not chargeable. The Court did not advert to the fact that the agent signed "per pro."

there is no implied authority in an agent conducting the general business of a mine to borrow money in case of necessity.

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"No such power," said *Parke*, B., "exists, except in the cases of the master of a ship, and of the acceptor of a bill of exchange for the honour of the drawer (*u*). The latter derives its existence from the law of merchants, and in the former case, the law, which generally provides for ordinary events, and not for cases which are of rare occurrence, considers how likely and frequent are accidents at sea, when it may be necessary, in order to have the vessel repaired, or to provide the means of continuing the voyage, to pledge the credit of her owners; and therefore it is that the law invests the master with power to raise money, and, by an instrument of hypothecation, to pledge the ship itself, if necessary. If that case be analogous to this, it follows that the agent had power, not only to borrow money, but, in the event of security being required, to mortgage the mine itself. The authority of the master of a ship rests upon the peculiar character of his office, and affords no analogy to the case of an ordinary agent. I am therefore of opinion that the agent of this mine had not the authority contended for."

Such being the general rules concerning an agent's power, let us now consider, a little more particularly, what course he must pursue, in order to bind his principal by two or three of the most usual species of engagements.

In executing a deed, he may either sign the name of his principal (*x*), or state it to be done by himself as agent for his principal (*y*), or by his principal through him the agent (*z*). But if he sign his own name without mentioning his principal, the latter will not be bound (*a*). In like manner an agent employed to draw, endorse or accept negotiable instruments, must take

(*u*) There is a third case: the right of a wife deserted by her husband, or compelled by his conduct to live apart from him, to pledge his credit for necessaries: *Dsbenham* v. *Mellon*, 6 App. Ca. 24, at p. 31.

(*x*) 9 Co. 76b; Moore, 70, pl. 191; *Frontin* v. *Small*, Str. 705; *Wilks* v. *Back*, 2 East, 142.

(*y*) 9 Co. 77; *Parker* v. *Kett*, Salk. 95.

(*z*) *Wilks* v. *Back*, 2 East, 142, per *Grose*, J.

(*a*) 9 Co. 76, 77; *D'Abridgecourt* v. *Ashley*, Moore, 818, pl. 1106; *Lord Southampton* v. *Brown*, 6 B. & C. 718; *Pickering's Claim*, 6 Ch. 525.

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care not to do so in his own name, for if he do, he will himself be liable to the holder (*b*).

As to the agent's power to bind the principal by a disposition of his goods, the common law rule was, as may be collected from the foregoing observations, that to acquire a good title to the employer's property by purchasing it from his agent, such purchase must have been in market overt (*c*) and without knowledge of the seller's representative capacity, *or* from an agent acting according to his instructions, *or* from one acting in the usual course of his employment, and whom the buyer did not know to be transgressing his instructions (*d*). The reason of this is clear, unless the transaction take place *bonâ fide* in a market overt (in which case a peculiar rule of law steps in for its protection (*e*)), an agent selling without *express* authority must, that his act might be supported, have sold under an *implied* one. But we have seen that an *implied* authority always empowers the person authorised to act in the *usual course* of his employment. Consequently, if he sell in an *unusual* mode, he can have no *implied* authority to support his act; and as he has no *express* one, his sale of course falls to the ground. For instance, the *usual* employment of a factor being to *sell*, it has been repeatedly decided that he cannot *pledge* the goods entrusted to him (*f*); and at common law this was the case whether he was intrusted with the goods or the documents of title (*g*).

(*b*) As to the personal liability of persons signing a note, &c., "directors of a company," *Dutton* v. *Marsh*, L. R. 6 Q. B. 361; *Alexander* v. *Sizer*, L. R. 4 Ex. 102 (note signed as "secretary"); *Atkin* v. *Wardle*, 61 L. T. N. S. 23.

(*c*) *Cundy* v. *Lindsay*, 3 App. Ca. 459.

(*d*) Vide *Anon.*, 12 Mod. 514; *Wiltshire* v. *Sims*, 1 Camp. 258; *Newsom* v. *Thornton*, 6 East, 17; *M'Combie* v. *Davies*, 6 East, 538; *De Bouchout* v. *Goldsmid*, 5 Ves. 211; *Bank of Bengal* v. *Macleod*, 7 Moore, P. C. Ca. 35. See per *Willes*, J., in *Fuentes* v. *Montis*, L. R. 3 C. P. 268, at p. 277.

(*e*) See Book 3, Chap. "Contracts of Sale."

(*f*) *City Bank* v. *Barrow*, 5 App. Cas. 664; *Johnson* v. *Credit Lyonnais*, 2 C. P. D. 224; *Paterson* v. *Tash*, Str. 1178; and *Allen* v. *St. Louis Bank*, 13 Davis (U. S. Supreme Court), 20. See the law admirably explained per *Willes*, J., in *Fuentes* v. *Montis*, L. R. 3 C. P. 268, at pp. 277 et seq.

(*g*) Suppose that the factor is also a partner in a business, and that he pledges goods belonging to the partnership to secure the payment of his own debts to one who knew him only as a partner, would the pledge be valid? Apparently not: *Allen* v. *St. Louis Bank* (U. S. Supreme Court), 13 Davis, 20.

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Such was the rule of the common law; but, being considered prejudicial to credit by the greater number of mercantile men, it was altered by 4 Geo. 4, c. 83, and afterwards by the amending Acts, 6 Geo. 4, c. 94, 5 & 6 Vict. c. 39, and 40 & 41 Vict. c. 39 (*h*). These statutes have been repealed, and the present law is contained in the Factors Act, 1889 (52 & 53 Vict. c. 45). This Act deals with three subjects—"(a) dispositions (*i*) by mercantile agents," "(b) advances by consignees and their liens," and "(c) dispositions by sellers and buyers of goods."

"Mercantile agent" (*k*) is thus defined:

"The expression mercantile agent shall mean a mercantile agent having, in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods."

This is in accordance with the definition of "agent" and "person" in the former Acts; but the new Act expressly includes a mercantile agent authorized "to raise money on the security of goods."

"Document of title" is defined as including "any bill of lading, dock warrant, warehouse keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business, as proof of the possession or control of goods, or authorizing or purporting to authorize,

(*h*) Sect. 2 of 4 Geo. 4, c. 83, is still unrepealed.

(*i*) A *disposition* must be something in the nature of a sale: *Taylor* v. *Kymer*, 3 B. & Ad. 320, at p. 337; *Taylor* v. *Trueman*, M. & M. 453.

(*k*) As to the meaning of "agent" and "person" in the former Acts, see *Jenkyns* v. *Usborne*, 7 M. & G. 678, p. 701; *Van Casteel* v. *Booker*, 2 Ex. 703, 704; *Kingsford* v. *Merry*, 1 H. & N. 516; *Navulshaw* v. *Brownrigg*, 1 Sim. N. S. 573; 2 D. Mac. & G. 441; *Lamb* v. *Attenborough*, 1 B. & S. 831; *Heyman* v. *Flewker*, 13 C. B. N. S. 519; *City Bank* v. *Barrow*, 5 App. Cas. p. 678. In *Cole* v. *North Western Bank*, L. R. 10 C. P., *Blackburn*, J., says, at p. 368—"The Legislature meant by the word 'agent' only such agents as in the usual course of business sell goods for their principals and receive payments, such as factors, brokers (?), &c., and did not mean to include bailees, warehousemen, carriers, and others, who may in one sense no doubt be called agents, but who do not sell or receive payment for goods intrusted to them by those employing them." See *Monk* v. *Whittenbury*, 2 B. & Ad. 484 (wharfinger not an "agent"); *Baines* v. *Swainson*, 4 B. & S. 270; and *Hollings* v. *Russell*, 33 L. T. N. S. 380. The two last cases are with difficulty reconcilable.

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either by indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented." This definition is borrowed from sect. 4 of 5 & 6 Vict. c. 39.

(a) Section 2 enacts,—

"(1.) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him (*k*) when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice (*l*) that the person making the disposition has not authority to make the same.

"(2.) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

"(3.) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

"(4.) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary."

Sub-section 2, which repeals the substance of 40 & 41 Vict. c. 39, s. 2, is intended to alter the law as laid down in *Fuentes* v. *Montis* (*m*), where an agent who had been entrusted with goods for sale, but who had been deprived of his authority by his principal, was held not to be intrusted within the meaning

(*k*) Or through "a clerk or other person authorized in the ordinary course of business to make contracts of sale or pledge on his behalf": Sect. 6.

(*l*) On the question, what is notice, vide *Evans* v. *Trueman*, 1 M. & Rob. 10, ubi per Lord *Tenterden*; *Navulshaw* v. *Brownrigg*, 1 Sim. N. S. 573; 2 D. Mac. & G. 441; *Chunder Sein* v. *Ryan*, 5 L. T. N. S. 559, P. C.; 9 Moo. App. 140; and *Mildred* v. *Maspons*, 8 App. Cas. 874, at pp. 885 and 888.

(*m*) L. R. 3 C. P. 208; 4 C. P. 93.

of the Factors Acts. Sub-section 3 repeats the effect of 5 & 6 Vict. c. 39, s. 4, which altered the law as laid down in *Phillips* v. *Huth* (*n*), and *Hatfield* v. *Phillips* (*o*).

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To the power of the mercantile agent to sell or pledge, two qualifications, also derived from the former Acts, are appended. A pledgee to whom goods have been pledged as security for a debt or liability due before the time of the pledge (*p*), acquires no further right to the goods than could have been enforced by the pledgor at the time of the pledge (*q*); and if the consideration for the pledge is the delivery or transfer of other goods, documents of title, or negotiable securities, the pledgee acquires no right or interest in the goods pledged in excess of the value of the goods, documents or securities delivered or transferred (*qq*).

(b) Section 7 (1), protects advances by consignees to consignors, provided the consignee has not had notice that the latter is not the owner, and enables the consignee to transfer his lien (*r*).

(c) Sections 8, 9, and 10, which re-enact sections, 3, 4, and 5 of the Factors Act, 1877, relate to dispositions by sellers and buyers of goods.

Section 8 alters the law as laid down in *Johnson* v. *Crédit Lyonnais* (*s*). A merchant and broker sold to the plaintiff tobacco, which was in bond in the warehouses of St. Katharine's Dock Company. The merchant had received the dock warrant, and was entered as owner in the company's books. The plaintiff, not then wishing possession of the tobacco, left it in the merchant's name, and the dock warrants in his hands. The merchant fraudulently pledged the documents with the defendants. The defendants were not, it was held, protected by

(*n*) 6 M. & W. 572.

(*o*) 9 M. & W. 647.

(*p*) As to what fell within the words "antecedent debt," in 5 & 6 Vict. c. 39, s. 3, see *Jewan* v. *Whitworth*, L. R. 2 Eq. 692; *Macnee* v. *Gorst*, L. R. 4 Eq. 315; *Kaltenbach* v. *Lewis*, 10 App. Cas. 617; *Learoyd* v. *Robinson*, 12 M. & W. 745.

(*q*) Sect. 4. And therefore if the agent's interest in the thing pledged be liable to be defeated by the performance of a condition, so will the pledgee's: *Blandy* v. *Allan*, Dans. & Lloyd, 22; *Fletcher* v. *Heath*, 7 B. & C. 517.

(*qq*) Sect. 5.

(*r*) See 4 Geo. 4, c. 83, s. 2; and 6 Geo. 4, c. 94, s. 1.

(*s*) 3 C. P. D. 32.

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the Factors Acts; the merchant not being an agent entrusted with documents of title.

Section 8 enacts—

"Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same."

It was decided, in *Jenkyns* v. *Usborne* (*g*), and in *Van Casteel* v. *Booker* (*h*), that a purchaser, obtaining possession of documents of title to goods, was not an "agent entrusted" within the meaning of the Factors Act. By section 9, which reproduces section 4 of the Factors Act, 1877, it is enacted,—

"Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."

Section 10 professes to extend to all documents of title the effect which the transfer of a bill of lading has in defeating the vendor's right of stoppage *in transitu*, but it is not clear what cases, other than those included in section 9, it includes.

When an agent, having a proper authority, purchases or sells in the name of his principal, it is clear, from what has been said that the principal is bound to the vendor or purchaser. If, how-

(*g*) 7 M. & G. 678. (*h*) 2 Ex. 691.

ever, the vendor, preferring the credit of the agent to that of the principal, agree with the former to accept him as his debtor instead of the latter, he cannot afterwards alter his election, and turn round and charge the principal (*i*). But it often happens that a broker purchases in his own name, without disclosing that he has any principal. Where this takes place, the broker is, of course, the person to whom the vendor gives credit; yet, if he afterwards discover the principal, he may elect to abandon the responsibility of his broker, and charge him (*k*); and so he may if the broker, on making the purchase, stated himself to be an agent, but omitted to state the name of the principal, which is afterwards discovered (*l*), or if the broker purchases in his own name, but discloses the name of his principal (*m*).

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The liability of the undisclosed principal is subject, however, to a qualification, the rule as to which, as laid down by Bayley, J., in *Thompson* v. *Davenport* (*n*), was, that if the principal has paid the agent, or if the state of the accounts between the agent and the principal would make it unjust that the seller should call on the principal, the fact of payment, or such a state of accounts, would be an answer to the action by the seller, where he had looked to the responsibility of the agent. In *Heald* v. *Kenworthy* (*o*) this rule was somewhat narrowed, and was thus expressed by *Parke*, B.:—

"If the conduct of the seller would make it unjust for him to call upon the buyer for the money; as, for example, where the principal is induced by the conduct of the seller to pay his agent the money, on the faith that the agent and seller have come to a settlement on the matter, or if any representation to that effect is made

(*i*) *Paterson* v. *Gandasequi*, 15 East, 62; *Addison* v. *Gandasequi*, 4 Taunt. 574; 2 Sm. L. C. 9th ed., pp. 378, 387; *Wilson* v. *Zulueta*, 14 Q. B. 405; *Smyth* v. *Anderson*, 7 C. B. 21.

(*k*) *Railton* v. *Hodgeon*, 4 Taunt. 576, n.; *Wilson* v. *Hart*, 7 Taunt. 295. The law of evidence opposes no obstacle to the exercise of this election, even where the contract is in writing; for if the principal allow the agent to contract for him in his (the agent's) name, the name becomes for the purposes of the contract his own: *Trueman* v. *Loder*, 11 A. & E. 589, at p. 594; *Calder* v. *Dobell*, L. R. 6 C. P. 486.

(*l*) *Thompson* v. *Davenport*, 9 B. & C. 78; 2 Sm. L. C. 9th ed. 395; *Smethurst* v. *Mitchell*, 1 E. & E. 622.

(*m*) *Calder* v. *Dobell*, ubi sup.

(*n*) 9 B. & C. 78, at pp. 88, 89, per *Bayley*, J.

(*o*) 10 Ex. 739, at p. 746.

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by the seller, either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal."

In *Irvine* v. *Watson* (*q*)—a case of a person knowing that he was dealing with an agent, but not knowing the principal's name—*Bowen*, J., thus stated the law:—

"It surely must, at all events, be the law that in the case of sale of goods to a broker, the principal, known or unknown, cannot, by paying or settling before the time of payment comes with his own agent, relieve himself from responsibility to the seller, except in the one case where exclusive credit was given by the seller to the agent. But may the payment or settlement to or with the agent be safely made in such a case after the day of payment has arrived, and, if so, within what time? It seems to me that it can only safely be made if a delay has intervened which may reasonably lead the principal to infer that the seller no longer requires to look to the principal's credit, such a delay, for example, as leads to the inference that the debt is paid by the agent, or to the inference that, though the debt is not paid, the seller elects to abandon his recourse to the principal and to look to the agent alone."

The judgment of *Bowen*, J., was affirmed by the Court of Appeal (*Bramwell*, L.J., *Baggallay*, L.J., and *Brett*, L.J.), who approved and adopted the statement of the law by *Parke*, B., in *Heald* v. *Kenworthy* (*r*). And the same view was adopted in *Davison* v. *Donaldson* (*s*).

In the recent case of *Cooke* v. *Eshelby* (*t*), it was held by the House of Lords that the purchaser of cotton sold to him by agents in their own names, but in fact on behalf of an undisclosed principal (the purchaser knowing that the agents were in the habit of selling both for principals and on their own account, but having no belief as to whether the sale in question was on their own account or for principals), could not, in an action by the undisclosed principal for the price, set off a debt due to him by the agents. According to Lord *Watson* (*u*),—

"It must be shown that he (the agent) sold the goods as his own,

(*q*) (1879) 5 Q. B. D. 102, at p. 107; affirmed, ib. 414.

(*r*) 10 Ex. 739, at p. 746.

(*s*) 9 Q. B. D. 623. "I do not say that in very special circumstances mere delay may not amount to misrepresentation": per *Bowen*, L. J., ib. at p. 631.

(*t*) 12 App. Cas. 271 (1887).

(*u*) *Cooke* v. *Eshelby*, 12 App. Cas. at p. 278.

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or, in other words, that the circumstances attending the sale were calculated to induce, and did induce, in the mind of the purchaser a reasonable belief that the agent was selling on his own account, and not for an undisclosed principal; and it must also be shown that the agent was enabled to appear as the real contracting party by the conduct, or by the authority, express or implied, of the principal. The rule thus explained is intelligible and just; and I agree with *Bowen*, L. J., that it rests upon the doctrine of estoppel."

Accordingly, payment to an agent, known to be such, will not discharge the payer, unless the conduct of the principal induces him to pay the agent. Where the seller supposes that he is dealing with a principal, when, in fact, he is dealing with an agent, the case of *Armstrong* v. *Stokes* (*x*) seems to be an authority that payment to the agent will discharge the principal; but it is open to question whether that case is reconcilable with the *ratio decidendi* in the later case of *Irvine* v. *Watson* (*y*). The decision in *Armstrong* v. *Stokes* must be taken to have turned upon the very special circumstances there.

If the time for payment have not elapsed, the other contracting party cannot, by prematurely settling with the agent, deprive the undisclosed principal of his election (*z*).

It has been laid down also, as a rule, that whenever on a sale made here, the agent is an English and the principal a foreign merchant, the seller will be presumed, in the absence of proof to the contrary, to have given credit to the Englishman, and that he and not the foreigner is liable (*a*). So, likewise, in the case of an English merchant employing an agent to buy goods abroad, *primâ facie* he gives the agent no authority to pledge his credit (*b*). But the rule would not apply to the case of a foreign merchant sending goods to an English agent, not to be sold by him, but to forward them to be sold by others. Such was the

(*x*) L. R. 7 Q. B. 598.

(*y*) 5 Q. B. D. 414.

(*z*) *Kymer* v. *Suwercropp*, 1 Camp. 109.

(*a*) *Paterson* v. *Gandasequi*, ubi sup.; *Thomson* v. *Davenport*, ubi sup.; *Armstrong* v. *Stokes*, L. R. 7 Q. B. 598; *Hutton* v. *Bulloch*, L. R. 8 Q. B. 331; 9 Q. B. 572; *Elbinger Actien-Gesellschaft* v. *Claye*, L. R. 8 Q. B. 313; *New Zealand Land Co.* v. *Watson*, 7 Q. B. D. 374; *Ex parte Miles*, 15 Q. B. D. 39; *Mildred* v. *Maspons*, 8 App. Cas. 874.

(*b*) *Armstrong* v. *Stokes*, L. R. 7 Q. B. 598; *Hutton* v. *Bulloch*, ubi sup.

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substance of the facts in *Mildred* v. *Maspons* (*c*), where the foreign merchant was permitted to recover policy moneys from the defendant English merchants, who had effected an insurance on the ship for the benefit of all interested.

Though the foregoing observations chiefly refer to contracts, the principal will be equally bound by any act done by the agent in the course of his employment and with reference to the object of it; for a man cannot depute another to transact his business and refuse to be responsible for his conduct in transacting it. Therefore, the representation of the agent about the subject-matter of a contract, which he is negotiating for his principal, will, if made *during the course of that negotiation*, bind the latter (*d*); but it must be made *during, and in the course of, the negotiation*, while the agent is actually representing his principal therein; for if made at any other time it has no more effect than that of a mere stranger (*e*). So, also, the suppression or misrepresentation by an agent of a material fact vitiates an insurance, although that fact may have been known only to him, not to his principal (*f*); for *notice to the agent* (*g*) *is considered in law notice to the principal*, who is in general taken to know everything about a transaction that his agent in it knows (*h*); *vice versâ* notice to the principal is, where that becomes material, *generally speaking* (*i*), at least, notice to the agent (*k*).

(*c*) 8 App. Cas. 874.

(*d*) *Mackay* v. *Commercial Bank of New Brunswick*, L. R. 5 P. C. 394; *Burnes* v. *Pennell*, 2 H. L. Ca. 497; *Udell* v. *Atherton*, 7 H. & N. 172; *Denyssen* v. *Botha*, 13 Moo. P. C. Ca. 352; *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259; *Houldsworth* v. *City of Glasgow Bank*, 5 App. Cas. 317.

(*e*) 1 Ph. & Arn. Ev. 380; *Dawson* v. *Atty*, 7 East, 367; *Snowball* v. *Goodricke*, 4 B. & Ad. 541.

(*f*) *Fitzherbert* v. *Mather*, 1 T. R. 12; *Proudfoot* v. *Montefiore*, L. R. 2 Q. B. 511; *Blackburn* v. *Vigors*, 12 App. Cas. 531.

(*g*) In the course of his employment; *Dresser* v. *Norwood*, 14 C. B. N. S. 574; 17 C. B. N. S. 466.

(*h*) See as to the limitations of this, *Blackburn* v. *Vigors*, 12 App. Cas. 538, at pp. 540, 541, and infra, p. 485; *Willis* v. *Bank of England*, 4 A. & E. 21; *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259.

(*i*) These words have been added on account of the qualification which this doctrine seems to have undergone from the decision in the case of *Cornfoot* v. *Fowke*, 6 M. & W. 358; the authority of which seems, however, to be very doubtful: *Fuller* v. *Wilson*, 3 Q. B. 58; *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259; *Ludgater* v. *Love*, 44 L. T. N. S. 694, unless the decision is limited to a question of evidence.

(*k*) *Willis* v. *Bank of England*, 4 A. & E. 21.

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"Some agents so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts, intentions, and knowledge of the principal. Other agents may have so limited and narrow an authority, both in fact and in the common understanding of their form of employment, that it would be quite inaccurate to say that such an agent's knowledge or intentions are the knowledge or intentions of his principal, &c. . . . Where the employment of the agent is such that in respect of the particular matter in question he really does represent the principal, the formula that the knowledge of the agent is his knowledge, is, I think, correct; but it is obvious that formula can only be applied when the words 'agent' and 'principal' are limited in their application" (*l*).

As the agent's representation binds the principal, so is the former's admission of a fact evidence against the latter of its truth (*m*). But the admission must, like the representation, concern a matter in which the agent is employed to act for his principal, and must be made during and in the course of such employment (*n*). To use the words of *Gibbs*, J., in *Langhorn* v. *Allnutt* (*n*),—

"When it is proved that A. is agent for B., whatever A. does, or says, or writes, in the making of a contract as agent of B., is admissible in evidence, because it is part of the contract which he makes for B., and therefore binds B.; but it is not admissible as his account of what passes."

An admission in writing of a debt, signed by an agent, will now take it out of the Statute of Limitations as against his principal (*o*). But the signature of an agent is not a signature within the meaning of 9 Geo. 4, c. 14 (Lord Tenterden's Act), so as to make the principal liable for representations as to the credit of another person (*p*).

(*l*) Lord *Halsbury*, L. C., *Blackburn* v. *Vigors*, 12 App. Cas. at pp. 537, 538; see also *Blackburn, Low & Co.* v. *Haslam*, 21 Q. B. D. 144.

(*m*) *Harding* v. *Carter*, Park. 4; *Palethorp* v. *Furnish*, 2 Esp. 511, n.; *Anderson* v. *Sanderson*, 2 Stark. 204; *Gregory* v. *Parker*, 1 Camp. 394; *Clifford* v. *Burton*, 1 Bing. 199; *Jacobs* v. *Humphrey*, 2 C. & M. 413.

(*n*) *Langhorn* v. *Allnutt*, 4 Taunt. 511; *Fairlie* v. *Hastings*, 10 Ves. jun. 123; *Kahl* v. *Jansen*, Ib. 565; *Stiles* v. *Cardiff Steam Navigation Co.*, 33 L. J. Q. B. 310; *Kirkstall Brewery Co.* v. *Furness Rail. Co.*, L. R. 9 Q. B. 468.

(*o*) 19 & 20 Vict. c. 97, s. 13. Formerly this was not the case: *Hyde* v. *Johnson*, 2 Bing. N. C. 776.

(*p*) *Swift* v. *Jewsbury*, L. R. 9 Q. B. 301; *Williams* v. *Mason*, 28 L. T. N. S. 232.

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Payment, or tender of payment, to an agent in the course of his employment, is payment, or tender of payment, to the principal (*q*). But the payment must be *in the course of his employment* (*r*); for otherwise he will have no express authority, and there will be nothing whence to deduce the existence of an implied one. Therefore, if a man comes to pay a mortgage debt to a merchant at his counting house, and pays it to a clerk, or if an executor pays a legacy left to a tradesman to a shopman serving in his shop, who has been in the habit of receiving his weekly bills, in neither of these cases would there be a good payment to the master (*s*). It is not in the course of a *broker's* business to receive payment for goods, the sale of which he has negotiated (*t*), unless he be acting for an undisclosed principal (*u*). An insurance broker has a right to receive payment of a loss (*x*); but he must not, in the absence of any evidence of consent to such a course on the part of the assured, set it off against his own debt to the underwriter (*y*); for

"The general rule of law is, that *if a creditor employs an agent to receive money of a debtor, and the agent receives it, the debtor is discharged as against the principal; but if the agent, instead of receiving money, writes off money due from him to the debtor, then the latter is not discharged*" (*z*).

(*q*) *Favene* v. *Bennett*, 11 East, 36; and where an agent has a right to receive payment, a tender to him is a tender to his principal: *Moffat* v. *Parsons*, 5 Taunt. 307; *Kirton* v. *Braithwaite*, 1 M. & W. 310.

(*r*) *Sykes* v. *Giles*, 5 M. & W. 645; *Kaye* v. *Brett*, 5 Exch. 269.

(*s*) *Sanderson* v. *Bell*, 2 C. & M. 304; *Boulton* v. *Reynolds*, 2 E. & E. 369.

(*t*) *Baring* v. *Corrie*, 2 B. & Ald. 137; *Blackburne* v. *Scholes*, 2 Camp. 341. See *Mynn* v. *Joliffe*, 1 M. & Rob. 327.

(*u*) *Blackburne* v. *Scholes*, ubi sup.

(*x*) *Shee* v. *Clarkson*, 12 East, 507.

(*y*) *Todd* v. *Reid*, 4 B. & Ald. 210 (which is, however, incorrectly reported), per *Parke*, B., in *Stewart* v. *Aberdein*, 4 M. & W. at p. 224; *Bartlett* v. *Pentland*, 10 B. & C. 760; *Scott* v. *Irving*, 1 B. & Ad. 605; *Sweeting* v. *Pearce*, 9 C. B. N. S. 534; *Underwood* v. *Nicholls*, 17 C. B. 239; *Catterall* v. *Hindle*, L. R. 1 C. P. 186; 2 C. P. 368. The principal may of course render such a transaction good by adopting it: *Gibson* v. *Winter*, 5 B. & Ad. 96.

(*z*) Per *Abbott*, L. C. J., in *Russell* v. *Bangley*, 4 B. & Ald. at p. 398; *Young* v. *White*, 7 Beav. 506; *Pearson* v. *Scott*, 9 Ch. D. 198, per *Fry*, J., at p. 208, where the cases are reviewed, and *Bridges* v. *Garrett*, L. R. 5 C. P. 451, is considered. *Fry*, J., thus states his view of the effect of the authorities: "A person who owes money to an agent, knowing him to be an agent, must pay in such a manner as to

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Where, however, the usual course of trade warrants the receipt of a cheque, note, or bill, payment in that way to an agent will discharge the debtor, unless, indeed, the agent be a particular one, and such a course be inconsistent with his instructions (*a*). Though the general rule is as has just been stated, it is held that—

"Where an insurance broker or other mercantile agent has been employed to receive money for another, in the general course of his business," it was said, in *Stewart* v. *Aberdein*, "and where the known general course of business is for the agent to keep a running account with the principal, and to credit him with the sums which he may have received, by credits in account with the debtors, with whom he also keeps running accounts, and not merely with moneys actually received, the above rule cannot properly be applied; but it must be understood, that where an account is *bonâ fide* settled, according to that known usage, the original debtor is discharged, and the agent becomes the debtor, according to the meaning and intention, and with the authority of the principal" (*b*).

In *Sweeting* v. *Pearce* (*c*) this usage was held not to be binding on a shipowner unaware of it; and it is not clear that *Stewart* v. *Aberdein* (*b*) was not decided upon the facts that the plaintiff knew and assented to the usage. Payment to an agent, moreover, in order to be good, must in general (*d*) be specifically appropriated to the debt due to his principal, and not made upon a general account (*e*).

A *factor* is, by the nature of his employment, authorized to receive payment for the goods of which he disposes (*e*), yet a payment even to him will not exonerate a debtor who has received

facilitate the agent in transmitting the money to his principal, and the payer cannot pay that agent by a settlement of account in which the payer himself gets the benefit of the payment."

(*a*) *Ward* v. *Evans*, 2 Ld. Raym. 928; 2 Salk. 442. See *Partridge* v. *Bank of England*, 9 Q. B. 396; *Bridges* v. *Garratt* (Ex. Ch.), L. R. 5 C. P. 451; *Williams* v. *Evans*, L. R. 1 Q. B. at p. 354.

(*b*) Per cur. *Stewart* v. *Aberdein*, 4 M. & W. 211, 228. So in other cases: *Catterall* v. *Hindle*, L. R. 1 C. P. 186; 2 C. P. 368; *Pattison* v. *Guardians of Belford Union*, 1 H. & N. 523. But see *Pearson* v. *Scott*, 9 Ch. D. 198; *Fish* v. *Kempton*, 7 C. B. 687.

(*c*) 9 C. B. N. S. 534.

(*d*) *Catterall* v. *Hindle*, ubi sup.

(*e*) See *Bartlett* v. *Pentland*, ubi sup.

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express notice from the creditor not to pay his factor (*f*). However, if the creditor be indebted on the balance of account to the factor, the debtor will be exonerated by a payment to the latter; for a factor has, as we shall see in the Fourth Book, a lien for the general balance of his account upon the price of goods which he has sold (*g*).

When money is due upon a written security, such as a bill or bond, it is the duty of the debtor, if he pay to an agent, to see that such agent is in possession of the security, for otherwise it is said that he will not be discharged unless the money reach the principal, or unless he can prove that the agent really was deputed to receive that money: not even, it is said, though the agent to whom he pays may have been usually employed to receive money (*h*), for his non-production of the security rebuts the implication of authority arising from such his employment. But this is open to great doubt; though circumstances might be held by a jury to be proof of knowledge of the absence of authority.

As payment to an authorized agent is payment to his principal, so a delivery to the former is a delivery to the latter. Thus, a delivery of goods to a carrier's servant is a delivery of them to the carrier (*i*). All these instances, and many others, only exemplify the general maxim upon which the whole law of principal and agent hinges: *Qui facit per alium facit per se.*

Hitherto we have only considered the responsibility of the principal to third parties, in consequence of *contracts*, and acts connected with such contracts; but he is also liable, and that to a considerable extent, for *wrongs* committed by his agent while engaged in his service. He will, of course, be so in every instance in which he has expressly commanded the wrong to be done, or given orders which could be executed only by its com-

(*f*) *Mann* v. *Forrester*, 4 Camp. 60; B. N. P. 130.

(*g*) *Drinkwater* v. *Goodwin*, Cowp. 251; *Hudson* v. *Granger*, 5 B. & Ald. 27. See *Warner* v. *M'Kay*, 1 M. & W. 591.

(*h*) *Henn* v. *Conisby*, 1 Ch. Ca. 93, n.; *Gerard* v. *Baker*, 1 Ch. Ca. 94; *D. of Cleveland* v. *Dashwood*, 2 Eq. Ca. Ab. 709; *Wolstenholme* v. *Davies*, 2 Freem. 289.

(*i*) *In re Wiltshire Iron Co.*, L. R. 3 Ch. 443.

mission (*k*); and there are many instances in which it requires no express command to make him answerable.

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Thus he is responsible for the *negligence* of his agent, acting in the prosecution of his business (*l*), though not under his immediate direction. The most common instance is the liability of a master for the negligence of his servants, that is, for this purpose, persons bound to obey his orders as to the mode of doing work (*m*). This liability does not extend to the negligence of agents, sub-agents, contractors or sub-contractors, who are free to carry out work in what manner they think fit without being controlled by the employer. It does not extend to such a case as this: the defendant hired job horses and coachmen from a livery stable-keeper to drive the defendant's carriage, and the coachman, appointed and paid by the stable-keeper, negligently drove the carriage against the plaintiff's horse (*n*). Nor is the employer answerable for the acts of those whom he is bound by statute to employ, *e.g.*, pilots (*o*). Nor, before the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), was the master generally answerable to a servant for the negligence of a fellow servant. It was assumed that a servant undertook to accept, as one of the risks of his employment, the negligence of a fellow servant (*p*). The Act has materially altered the common law, and, "with certain exceptions, has placed the workman in a position as advantageous as, but no better than, that of the rest of the world, who use the master's premises at his invitation on

(*k*) *Gregory* v. *Piper*, 9 B. & C. 591. See *Freeman* v. *Rosher*, 13 Q. B. 780; *Bennett* v. *Bayes*, 5 H. & N. 391.

(*l*) *Mitchell* v. *Crassweller*, 13 C. B. 237; *Reg.* v. *Stephens*, L. R. 1 Q. B. 702. As to the liability of corporation and public trustees for the neglect or acts of their agents, see *The Mersey Docks Trustees* v. *Gibbs*, L. R. 1 H. L. 93; *Mackay* v. *Commercial Bank of New Brunswick*, L. R. 5 P. C. 394; *Goff* v. *G. N. Rail. Co.*, 3 El. & El. 672; *Foreman* v. *Mayor of Canterbury*, L. R. 6 Q. B. 214.

(*m*) *Rapson* v. *Cubitt*, 9 M. & W. 710; *Murray* v. *Currie*, L. R. 6 C. P. 24; *Pearson* v. *Cox*, 2 C. P. D. 369. There are exceptions to the above rule: see Macdonell on Master and Servant.

(*n*) *Jones* v. *Corporation of Liverpool*, 14 Q. B. D. 890; *Quarman* v. *Burnett*, 6 M. & W. 499.

(*o*) *Lucey* v. *Ingram*, 6 M. & W. 302.

(*p*) *Priestley* v. *Fowler*, 3 M. & W. 1; *Wilson* v. *Merry*, L. R. 1 Sc. Ap. 326.

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business" (*r*). Though a master is answerable for the negligence of his agents while acting in his service, he is not so liable for wilful or malicious trespasses for their private ends. Thus, "if a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person and produce the accident, the master is not liable. But if, in order to perform his master's orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct for which the master will be liable, being an act done in pursuance of the servant's employment" (*s*). The master, however, will be liable for an injury committed by his servant at the time acting in his master's service and for his benefit, though the latter has acted wilfully or maliciously (*t*).

The principal may be liable not only for the negligence, but the fraud of the agent. Notwithstanding the reluctance of many judges to accept this view, it is now settled that, in the language of *Willes*, J., in *Barwick* v. *English Joint Stock Bank* (*u*), "with respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong." The Court of Appeal has, in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (*x*), drawn attention to an important qualification of a principal's liability for frauds or similar torts. A secretary of a company gave untrue and fraudulent answers to questions put to him; the jury found that he was employed by the defendant to answer such inquiries. Nevertheless, the fraud having been committed in his own interest and for his own benefit, the company were not liable (*y*).

In general the principal is not *criminally* responsible for the

(*r*) *Bowen*, L. J., in *Thomas* v. *Quartermaine*, 18 Q. B. D. 685, at p. 693.

(*s*) Per curiam, *Croft* v. *Alison*, 4 B. & Ald. 590; *M'Manus* v. *Crickett*, 1 East, 106; *Lyons* v. *Martin*, 8 A. & E. 512; *Gordon* v. *Rolt*, 4 Exch. 365; *North* v. *Smith*, 10 C. B. N. S. 572; *Seymour* v. *Greenwood*, 6 H. & N. 359; 7 H. & N. 355; *Bayley* v. *The Manchester, S. & L. R. Co.*, L. R. 7 C. P. 415.

(*t*) *Limpus* v. *General Omnibus Co.*, 1 H. & C. 526 (Exchequer); Macdonell on Master and Servant, 260, 278 et seq.

(*u*) L. R. 2 Ex. 259, at p. 265.

(*x*) 18 Q. B. D. 714.

(*y*) See judgment of *Bowen*, L. J., at p. 718.

act of his agent, unless he expressly commanded it (*z*). However, in a case of indictment for a nuisance, it was held that the owner of the works who carried them on by means of his agents was liable for their acts in conducting them, though done contrary to his orders (*a*). So upon an indictment for libel, the person who derived profit from, and furnished the funds for, carrying on a newspaper, intrusting the publication to one in whom he confided, would, at common law, be criminally answerable for what appeared therein, though it could not be shown that he was concerned in the individual publication (*b*). In informations for breaches of the revenue laws, the employment of an agent in the defendant's usual course of business has been held sufficient *evidence* to be left to a jury, who may, if they think fit, thence *presume* that such an agent was authorized to do the prohibited act, with which it is sought to charge his principal (*c*).

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Our last inquiry under this head is, how the agent's power to commit his principal to third parties may be determined. It will be so, of course, by the revocation of his authority. The general rule is, that a principal may revoke the authority of his agent at any time unless there is a contract, express or implied, to the contrary (*d*). In *Rhodes* v. *Forwood* (*e*), the chief facts were these: A. and B. agreed, in consideration of services and payments to be mutually rendered, that for seven years, or as long as A. should carry on business in Liverpool, A. should be the sole agent there for the sale of B.'s coals. At the end of four years B. sold his colliery and ceased to send coals to Liverpool or to employ A. In an action by A. against B. the House

(*z*) *R.* v. *Huggins*, Str. 882, at p. 885, per *Raymond*, C. J.; *Lamb's case*, 9 Co. 59.

(*a*) *Reg.* v. *Stephens*, L. R. 1 Q. B. 702.

(*b*) *R.* v. *Gutch*, M. & M. 433, at p. 437. See *R.* v. *Almon*, 5 Burr. 2686; *R.* v. *Dixon*, 3 M. & S. 11; *Reg.* v. *Holbrook*, 4 Q. B. D. 42; 6 & 7 Vict. c. 96, s. 7; and Newspaper Libel Act, 1881 (44 & 45 Vict. c. 60).

(*c*) *Att.-Gen.* v. *Siddon*, 1 C. & J. 220; *Att.-Gen.* v. *Riddle*, 2 C. & J. 493; *Att.-Gen.* v. *Burges*, Bunb. 223. As to penalties, see *Miles* v. *McIlwraith*, 8 App. Cas. 120.

(*d*) *Farmer* v. *Robinson*, 2 Camp. 339 n.; *Warwick* v. *Slade*, 3 Camp. 127; *Bristow* v. *Taylor*, 2 Stark. 50.

(*e*) 1 App. Cas. 256; compare *Tasker* v. *Shepherd*, 6 H. & N. 575, and *Stirling* v. *Maitland*, 5 B. & S. 840.

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of Lords laid it down that there was no implied understanding that B. would keep the colliery or do more than employ the agent in the event of his sending coals to Liverpool. Nor will the circumstance that an agent has made advances to his principal of itself make the agency irrevocable (*f*); there must be an agreement to that effect. But an agency will not be revocable at will if the authority has been partly executed and cannot be withdrawn without injuring the agent (*g*). One decision, *Read* v. *Anderson* (*h*), appears to go further than any former case. The plaintiff, a turf commission agent, was instructed to make bets for the defendant at Tattersall's. After the bets had been made and lost, the defendant revoked his authority. The plaintiff brought an action to recover the amount of three bets which he had made for the defendant and paid. Had the plaintiff not paid the bets, he would, it was proved, have been a defaulter within the meaning of Tattersall's rules, and would have been liable to have been turned out of the room. *Brett*, M. R., held that the action would not lie on the ground that no claim could have been enforced in law by the winners against the agent. *Bowen*, L. J., and *Fry*, L. J., however, held that the action would lie.

"As an inference of fact," said the former, "it seems to me that it was well understood to be part of the bargain that the principal should recoup his agent, and should not revoke the authority to pay, but should indemnify the agent against all payments made in the regular course of business. I feel the force of the point that the obligation to pay a lost bet relied upon by the plaintiff is not recognised by law; but the plaintiff has placed himself in a position of pecuniary difficulty at the defendant's request, who impliedly contracted, I think, to indemnify him from the consequences which would ensue in the ordinary course of his business from the step which he had taken."

An authority coupled with an interest, or given for valuable consideration, as in the case of a power of attorney by way of

(*f*) *De Comas* v. *Prost*, 3 Moo. P. C. C. N. S. 158.

(*g*) *Blasco* v. *Fletcher*, 14 C. B. N. S. 147; *Campanari* v. *Woodburn*, 15 C. B. 400; Story on Agency, s. 466.

(*h*) 13 Q. B. D. 779.

security to a creditor, is not revocable (*i*). Authority may be terminated by the agent's own renunciation of it, at all events if accepted by his principal (*k*).

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It was formerly held that agency was revoked by the marriage of the principal, if a feme sole (*l*); but this appears to be no longer true. Agency will in general expire by operation of law when the capacity of the principal ends. Thus, it will be revoked by the death of the principal (*m*), and that even though coupled with an interest; "for how," says Lord *Ellenborough*, "can a valid act be done in the name of a dead man?" (*n*) or by his bankruptcy (*o*), except in certain cases in which the interest of the creditors cannot be affected, and the power is one which in conscience ought to be exercised, as where the vendor of a ship at sea executed a power to indorse the transfer on her certificate, and then became bankrupt, the power was held not revoked by the bankruptcy (*p*). The effect of insanity upon the relation of principal and agent seems not yet well settled (*q*). It seems clear that as soon as the principal's lunacy comes to

(*i*) *Walsh* v. *Whitcomb*, 2 Esp. 565; *Bromley* v. *Holland*, 7 Ves. at p. 28; *Gaussen* v. *Morton*, 10 B. & C. 731; *Walker* v. *Rostron*, 9 M. & W. 411. The authority of a stakeholder, with whom is deposited a bet, is countermandable: *Trimble* v. *Hill*, 5 App. Cas. 542; *Diggle* v. *Higgs*, 2 Ex. D. 422.

(*k*) Generally speaking, a *power* cannot be released unless coupled with an interest in the party possessing it: *Trippet* v. *Eyre*, 2 Vent. 110; *Digge's case*, Moore, 603, pl. 835. But this case does not seem applicable to the case of a mercantile agent, for he may be said to have an interest in the remuneration he is entitled to; and, besides, his power being in its nature revocable by the principal, whom it would be unfair in many cases to treat as free while the agent was bound, probably it may be considered that the creation of a mercantile agency contains an implied term, that it shall be revocable at the will of either, if the contrary do not appear. See in cases of sale, ante.

(*l*) *Anon.*, Salk. 117; *Charnley* v. *Winstanley*, 5 East, 266.

(*m*) Bac. Abr. "Authority," E.; Co. Litt. 52, b. See *Whitehead* v. *Taylor*, 10 A. & E. 210; *Shoman* v. *Allen*, 1 M. & G. 96, n.; *Palmer* v. *Reiffenstein*, Ib. 94; *Smout* v. *Ilbery*, 10 M. & W. 1; *Blasco* v. *Fletcher*, 14 C. B. N. S. 147; *Smart* v. *Saunders*, 5 C. B. 895; *Tasker* v. *Shepherd*, 30 L. J. Ex. 287. But see Story on Agency, s. 489.

(*n*) *Watson* v. *King*, 4 Camp. 272. See *Lepard* v. *Vernon*, 2 V. & B. 51; *Harden* v. *Forsyth*, 1 Q. B. 177.

(*o*) *Parker* v. *Smith*, 16 East, 382; *Minett* v. *Forrester*, 4 Taunt. 541; *Pearson* v. *Graham*, and *Kynaston* v. *Crouch*, post.

(*p*) *Dixon* v. *Ewart*, 3 Meriv. 322; Buck. 94; *Ex parte Snowball*, L. R. 7 Ch. 534; *Elliott* v. *Turquand*, 7 App. Cas. at p. 88; Evans on Principal and Agent, 2nd ed. 186.

(*q*) *Drew* v. *Nunn*, 4 Q. B. D. 661.

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the knowledge of the agent his authority ends: what forms or degrees of insanity will operate of themselves as a revocation is not clear.

The implied authority arising from previous employment can, as we have seen, be determined only by rendering it notorious to the world in general, or to the particular person who relies on it, that such employment has been put an end to (*g*). Si Titium omnibus negotiis meis præposuero, deinde vetuero eum, ignorantibus debitoribus, administrare negotia mea, debitores ei solvendo liberabuntur. And if a particular agent were to contract after the revocation of his authority, but before the revocation had been made known to him, persons who had dealt upon the faith of it would not be permitted to suffer (*h*); excepting, indeed, in the case of a revocation by death, in which it seems, from *Blades* v. *Free* (*i*), that the representatives of the deceased principal would not be liable, and from *Smout* v. *Ilbery* (*k*), that the agent, if he had made no representation on the subject, would not be so. It would seem also just, on principle, that an agent should not be prejudiced by the revocation of his power, without his own knowledge (*l*). Yet, though it would appear that an agent acting under a particular authority, after his master's bankruptcy, which was not known to him, will not be liable to the assignees, it has been held otherwise where his authority was a general one (*m*).

The rule of the civil law guarded against detriment either to the agent or to those contracting with him, by the sudden revocation of his authority. Nemo potest mutare consilium suum in alterius injuriam (*n*). Si mandassem tibi ut fundum emeres,

(*g*) *Hazard* v. *Treadwell*, Str. 506; —— v. *Harrison*, 12 Mod. 346.

(*h*) See per *Buller*, J., in *Salte* v. *Field*, 5 T. R. at p. 215; and *Hodgson* v. *Anderson*, 3 B. & C. 842.

(*i*) 9 B. & C. 167. But see remarks of *Brett*, L. J., in *Drew* v. *Nunn*, 4 Q. B. D. at p. 668.

(*k*) 10 M. & W. 1. It seems difficult to reconcile this view of the matter with the cases in which it has been held, that an agent impliedly warrants that he has authority; see post; and *Randell* v. *Trimen*, 18 C. B. 786.

(*l*) The stat. 22 & 23 Vict. c. 35, s. 26, protects a trustee, executor or administrator acting bonâ fide under a power of attorney under such circumstances.

(*m*) *Pearson* v. *Graham*, 6 A. & E. 899; *Kynaston* v. *Crouch*, 14 M. & W. 266.

(*n*) Dig. 50. 17. 75.

postea scripsissem ne emeres, tu antequam scias me vetuisse emisses, mandati tibi obligatus ero, ne damno afficiatur is qui suscipit mandatum (*o*). Pothier goes further, and lays it down that an agent has, in such cases, a right "faire ce qui est une suite nécessaire de ce qu'il avoit commencé" (*p*). When an agent has completed his task, his authority of course determines. Thus, an auctioneer, when he has sold, is *functus officio*, and has no right to treat about the mode of making out a title (*q*). So where the prefixed time, during which the agency was to continue, expires (*r*). As to this point, each contract of agency must be considered by itself. Below will be found some of the cases in which the Courts have determined the question (*s*).

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Section V.—*Rights of the Principal against Third Parties.*

As the principal is bound by the acts and contracts of his authorized agent, so he may take advantage of them (*t*); and if one person contract, even without authority, in the name of another, that other, though he may repudiate the contract, may, if he think fit, adopt and enforce it (*u*). But (1.) He must adopt it altogether: he cannot ratify what is beneficial to himself, and reject the remainder (*x*). (2.) The act to be ratified must not be void or *ultra vires* (*y*). (3.) There can be no

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(*o*) Dig. 17. 1. 15.

(*p*) Pothier de Mandat, s. 121. See the subject discussed and all the authorities collected, Story on Agency, ss. 467 et seq. See per *Pollock*, C. B., in *MacCarthy* v. *Young*, 6 H. & N. 329.

(*q*) *Seton* v. *Slade*, 7 Ves. 276. See *Dickinson* v. *Lilwall*, 4 Camp. 279; *Mynn* v. *Joliffe*, 1 M. & Rob. 326; *Sykes* v. *Giles*, 5 M. & W. 645; and see *Mews* v. *Carr*, 1 H. & N. 484.

(*r*) *Dickinson* v. *Lilwall*, and *Mews* v. *Carr*, ubi sup.

(*s*) *Rhodes* v. *Forwood*, 1 App. Cas. 256; *Emmens* v. *Elderton*, 4 H. L. 624.

(*t*) *Seignior* v. *Wolmer*, Godb. 360.

(*u*) *Routh* v. *Thompson*, 13 East, 274; *Hagedorn* v. *Oliverson*, 2 M. & S. 485; *Marsh* v. *Keating*, 1 Bing. N. C. 198. See per cur. *Watson* v. *Swann*, 11 C. B. N. S. 756. In *Whitehead* v. *Taylor*, 10 A. & E. 210, it was held that an executor might adopt a distress made under the testator's direction, but after his death.

(*x*) *Wilson* v. *Poulter*, Str. 859; *Billon* v. *Hyde*, 1 Atk. 128; *Smith* v. *Hodson*, 4 T. R. 211; B. N. P. 131; *Brewer* v. *Sparrow*, 7 B. & C. 310; *Thorpe* v. *Thorpe*, 3 B. & Ad. 580; *Burn* v. *Morris*, 2 C. & M. 579; *Bristow* v. *Whitmore*, 9 H. L. 391.

(*y*) *Spackman* v. *Evans*, L. R. 3 H. L. 171, at p. 244; *Ashbury Railway Carriage Co.* v. *Rich*, L. R. 7 H. L. 653.

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ratification of an indictable offence or an act contrary to public policy. Thus it is not competent for a principal to ratify a forged indorsement to a bill of exchange (z). (4.) The principal must be ascertained or in contemplation at the time when the act to be ratified was performed (a). He must also be in existence (b). Hence a company cannot ratify a contract entered into by promoters or others before its formation, though it may, and often does, enter into a new contract which has an effect similar to that of ratification (c). (5.) The principal must be capable of making the contract which the agent has entered into. To this there is an exception in the case of marine insurance. An insurance of a vessel effected by a person who knew at the time of entering into the contract of the loss would be invalid. But the authorities show that when an insurance is effected without authority by one person on behalf of another, the principal may ratify it, even after the loss is known to him (d). (6.) The act must be performed by a person professing to be agent for the principal. Even if it be done professedly as an agent, but for the benefit of A., B.'s adoption of it would be inoperative (e). (7.) To bind the principal the ratification must be with knowledge of the material circumstances (f). (8.) Assent must be given to acts really done by the agent, and not to those which he is falsely represented to have done (g). (9.) An estate once vested cannot be divested; and an act lawful at the time of performance cannot be rendered unlawful by the application of the doctrine of ratification (h). (10.) There is a difference between the principal's right to adopt a contract, and a bare act, the effect of which would be to raise a duty towards him from a third party, and subject that third party to damage for its non-performance. Such an act can

(z) *Brook* v. *Hook*, L. R. 6 Ex. 89.

(a) *Kelner* v. *Baxter*, L. R. 2 C. P. 174; Evans on Principal and Agent, 63.

(b) *In re Empress Engineering Co.*, 16 Ch. D. 125.

(c) *Gover's case*, 1 Ch. D. 182.

(d) *Williams* v. *North China Insurance Co.*, 1 C. P. D. 757.

(e) *Wilson* v. *Tumman*, 6 M. & G. 236.

(f) *Fitzgerald* v. *Dressler*, 7 C. B. N. S. 374.

(g) *Horsfall* v. *Fauntleroy*, 10 B. & C. 755.

(h) *Cotton*, L. J., in *Bolton Partners* v. *Lambert*, 41 Ch. D. at p. 307; and *Lyell* v. *Kennedy*, 18 Q. B. D. p. 814; and 14 App. Cas. p. 462.

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never, if unauthorized at first, be confirmed by any recognition *ex post facto*. Thus, a demand of payment, in order to oust the debtor's plea of tender, or a demand of property, in order to found an action of trover, must be made by an agent *previously* authorized (*i*); and the same doctrine applies to a notice to quit (*j*), notwithstanding the case of *Roe* v. *Pierce* (*k*), and *Goodtitle* v. *Woodward* (*l*) (which latter may be supported on another ground (*m*)). Where a *previous* authority is requisite, it seems that the person whom it is to affect may require to be properly satisfied of its existence, and is not bound to take the agent's bare assertion (*n*). In other instances, where no duty is to be raised on the part of a third person, an adoption *ex post facto* is generally sufficient (*o*).

If an agent acting for an undisclosed principal have made a contract *in his own name*, the principal may sue upon it (*p*), unless the contract is under seal (*q*), or unless the agent really contracts as principal, *e.g.*, where he describes himself in a charter-party as "owner" (*r*). It follows, as a branch of this rule, that if a person lend money nominally on his own account, but really on account and as the loan of another, the real lender may sue for the money. But in such a case, the plaintiff who alleges that he was in reality the lender, must prove that fact clearly and distinctly (*s*).

(*i*) *Coore* v. *Callaway*, 1 Esp. 115; *Coles* v. *Bell*, 1 Camp. 478, n.; *Solomons* v. *Dawes*, 1 Esp. 83. See *Bartram* v. *Farebrother*, 4 Bing. 579. See this distinction, much discussed, in *Whitshead* v. *Anderson*, 9 M. & W. 518, and in Story on Agency, ss. 246, 247. Story, referring to *Tindal* v. *Brown*, 1 T. R. 167, says, "Notice of the dishonour of a promissory note, or of a bill of exchange, by a mere stranger, not a party to the same bill, or authorized thereto, will not be a good notice to bind the indorsee or drawer." *Tindal* v. *Brown* is overruled by *Chapman* v. *Keane*, 3 A. & E. 197. See sect. 44 of Bills of Exchange Act, 1882; and infra, p. 268.

(*j*) *Doe* d. *Lyster* v. *Goldwin*, 2 Q. B. 143; *Doe* d. *Mann* v. *Walters*, 10 B. & C. 626; *Jones* v. *Phippe*, L. R. 3 Q. B. 567.

(*k*) 2 Camp. 96.

(*l*) 3 B. & Ald. 689.

(*m*) Vide *Doe* d. *Aslin* v. *Summersett*, 1 B. & Ad. 135.

(*n*) *Solomons* v. *Dawes*, 1 Esp. 83. See *Roe* d. *West* v. *Davis*, 7 East, 363; *Charrington* v. *Johnson*, 13 M. & W. 856; and *Bolton Partners* v. *Lambert*, 41 Ch. D. 295.

(*o*) Co. Litt. 258 a.

(*p*) *Browning* v. *Provincial Ins. Co. of Canada*, L. R. 5 P. C. 263, at p. 272; *Phelps* v. *Prothero*, 16 C. B. 370.

(*q*) *Horsley* v. *Rush*, cited in *Harrison* v. *Jackson*, 7 T. R. 209.

(*r*) *Humble* v. *Hunter*, 12 Q. B. 310.

(*s*) See *Sims* v. *Bond*, 5 B. & Ad.

Rights of the principal against third parties.

The principal's right to enforce contracts made by his agent is subject to this rule, viz., that if the agent have been allowed to deal in his own name, the party dealing with him will enjoy the same rights and equities against the employer as he might have exercised against his agent had that agent really been a principal (*t*). Thus, when a factor dealing for a principal, but concealing the existence of a principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes the principal; and, though the real principal may appear, and bring an action on that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor, in answer to the demand of the principal. If the existence of a principal is not known, the person contracting with the agent will have the right of set-off, even if the agent in selling in his own name is contravening his instructions (*u*). This rule is to prevent the hardship under which a purchaser would labour if, after having been induced by peculiar considerations, such, for instance, as the consciousness of possessing a set-off, to deal with one man, he could be turned over and made liable to another, to whom those considerations would not apply, and with whom he would not willingly have contracted. But if, at any time in the course of the transaction, he know or have means of knowing that the person with whom he deals is not a principal, the above reason does not apply, and then *cessante ratione cessat ipsa lex* (*v*). Thus, if a *factor* sells goods in his own name, the buyer may avail himself of a right of set off against the factor;

389; *Alexander* v. *Barker*, 2 C. & J. 133; *Sims* v. *Brittain*, 4 B. & Ad. 375; *Cooke* v. *Seeley*, 2 Exch. 746.

(*t*) *Coates* v. *Lewes*, 1 Camp. 444. See this doctrine clearly stated in *Sims* v. *Bond*, supra; *George* v. *Claggett*, 7 T. R. 359, et note; *Blackbourne* v. *Sholes*, 2 Camp. 341; *Carr* v. *Hinchcliff*, 4 B. & C. 547; *Taylor* v. *Kymer*, 3 B. & Ad. at p. 334; *Warner* v. *Mackay*, 1 M. & W. 591, which goes perhaps further than any previous case; *Borries* v. *Imperial Ottoman Bank*, L. R. 9 C. P. 38; *Ex parte Dixon*, 4 Ch. D. 133.

(*u*) *Ex parte Dixon*, 4 Ch. D. 133.

(*v*) *Maanss* v. *Henderson*, 1 East, 335; *Semenza* v. *Brinsley*, 18 C. B. N. S. 467, at p. 477; *Borries* v. *Imperial Ottoman Bank*, L. R. 9 C. P. 38; *Mildred* v. *Maspons*, 8 App. Cas. 874; *Dresser* v. *Norwood*, 17 C. B. N. S. 466.

if, however, a *broker* do so, the rule will, except under special circumstances, be different. For— Rights of the principal against third parties.

"A *factor*, who has the possession of goods, differs materially from a *broker*. The former is a person to whom goods are sent or consigned. When he sells in his own name, it is within the scope of his authority; and it may be right, therefore, that the principal should be bound by the consequences of such sale, amongst which the right of setting off a debt due from the *factor* is one (*x*). But the case of a *broker* is different; he has not the possession of the goods, and so the vendee cannot be deceived by that circumstance: and, besides, the employing of a person to sell goods as a *broker* does not authorize him to sell in his own name. If, therefore, he sells in his own name, he acts beyond the scope of his authority, and his principal will not be bound (*y*). But it is said that by these means the *broker* would be enabled by his principal to deceive innocent persons. The answer, however, is obvious: that that cannot be so, unless the principal delivers over to him the possession and indicia of property" (*z*).

To entitle the purchaser dealing with a broker to a set off, it must be shown that the circumstances connected with the sale were such as to make him reasonably believe that the broker was selling on his own account, and that the agent was enabled, by the conduct or authority, express or implied, of the undisclosed principal to appear as the seller (*a*).

We have seen that payment or delivery to an agent is payment or delivery to his principal. This holds good *vice versâ* (*b*); and therefore where the agent has paid away or delivered over his master's property on a consideration which fails, or otherwise under circumstances which would entitle him to recover it, the master may, if he please, maintain an action in his own name to be reimbursed (*c*), which it will often be advisable to do. In some cases the master may sue for this purpose where the agent could not. For instance, if the agent and a third

(*x*) *Ex parte Dixon*, 4 Ch. D. 133; supra, p. 113.

(*y*) But this, as has been already stated, has often been modified by custom: *Fleet* v. *Murton*, L. R. 7 Q. B. 126, and supra.

(*z*) *Baring* v. *Currie*, 2 B. & Ald. 137, at p. 148: per *Holroyd*, J.

(*a*) Lord *Watson* in *Cooke* v. *Eshelby*, 12 App. Cas. at p. 278.

(*b*) *Coare* v. *Giblett*, 4 East, 85.

(*c*) *Duke of Norfolk* v. *Worthy*, 1 Camp. 337; *Ancher* v. *Bank of England*, 2 Dougl. 637; *Stevenson* v. *Mortimer*, Cowp. 805.

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person have joined in applying his property to an illegal purpose, as to the insurance of lottery tickets; for though the agent, being *particeps criminis* (*d*), might not be able to recover on account of the rule *in pari delicto potior est conditio defendentis*, yet that rule does not affect the master, who is guilty of no criminality (*e*). And where the agent disposes of the master's property without either an express or an implied authority, as if he sell his master's goods on credit in a trade the usual course of which is to sell for cash only, the master, though he may affirm the transaction, may, if he please, repudiate it, and recover the property thus tortiously disposed of from the disponee (*f*). Of course, if the agent has sold with authority, the owner will recover only the balance, if any, after adjustment of accounts with the agent (*g*).

There is another case in which it has been thought that a principal, in consequence of his having contracted through an agent, may be in a better situation than he would have been if he had contracted personally. It arose in *Cornfoot* v. *Fowke* (*h*), in which an agent who had been employed to let a house, being asked whether there was anything objectionable about it, answered in the negative. It turned out that there was an objection, of which the principal was aware, though the agent was not. It was contended that the contract was invalid on the ground of *fraud:* for that the knowledge of the principal was that of the agent, whose statement, therefore, would amount

(*d*) There is no doubt of this position, if the agent can be looked on as a particeps criminis; and he was considered such in *Clarke* v. *Shee*, Cowp. 197; but see *Jaques* v. *Golightly*, 2 Bl. 1073. It is, generally speaking, safer to sue in the name of the principal than in that of the agent; for if the agent be made plaintiff, anything which would be a good defence *against him* will be an answer to the action: *Gibson* v. *Winter*, 5 B. & Ad. 96, where all the authorities are collected; *Wilkinson* v. *Lindo*, 7 M. & W. 81.

(*e*) *Clarke* v. *Shee*, Cowp. 197; *Holman* v. *Johnson*, Cowp. 341; *Atkinson* v. *Denby*, 7 H. & N. 934; *Taylor* v. *Chester*, L. R. 4 Q. B. 309. See also, as to meaning of the above maxim, *James*, L. J., in *Re Maplebeck*, 4 Ch. D. 156.

(*f*) *Anon.*, 12 Mod. 514; *Wiltshire* v. *Sims*, 1 Camp. 258; *Guerreiro* v. *Peile*, 3 B. & Ald. 616; *Litt* v. *Martindale*, 18 C. B. 314; *Jessel*, M. R., in *Re Hallett's Estate*, 13 Ch. D. at p. 708; *Bramwell*, L. J., in *New Zealand Land Co.* v. *Watson*, 7 Q. B. D. at p. 382.

(*g*) *Kaltenbach* v. *Lewis*, 10 App. Cas. pp. 628, 629, per Lord *Watson*.

(*h*) 6 M. & W. 358.

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to such a misrepresentation as would entitle the contractee to repudiate the agreement; or that, at least, the agent's assertion, being made about a matter of which he knew nothing, and turning out afterwards to be false, amounted to a fraud *in law*, and might be taken advantage of against the principal. On the other hand, it was said, that there was no fraud in the principal, for he did not make the representation, nor any fraud in the agent, for he did not know that the representation was false. Lord *Abinger*, C. B., was of the former opinion; but *Parke*, *Alderson*, and *Rolfe* (*i*), BB., being of the latter, the contract was held valid. The authority of this decision has been questioned (*k*), and the Court of Queen's Bench repudiated it in a case (*l*), in which, however, the judgment was reversed on another point in the Exchequer Chamber (*m*). It is open to question whether the decision turned on more than a point of pleading (*n*), and the case can no longer be with certainty regarded as good law. No doubt, "a representation which is false in fact, but not known to be so by the party making it, but, on the contrary, made honestly and in the full belief that it is true, affords no ground of action" (*o*). The same principle has since been frequently affirmed; and in the words of *Bramwell*, L. J., in *Dickson* v. *Reuter's Telegram Co.* (*p*), "the general rule of law is clear that no action is maintainable for a mere statement, although untrue, and although acted on to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it." But it is clear that misrepresentation by an agent amounting to a warranty will be a defence to an action, whether or not there is fraud, if the warranty was within his authority (*q*). Apparently an action will not lie for

(*i*) *Rolfe*, B., appears to have relied chiefly upon the absence of authority to make the representation.

(*k*) *National, &c. Association* v. *Drew*, 2 Macq. 103.

(*l*) *Fuller* v. *Wilson*, 3 Q. B. 58.

(*m*) *Wilson* v. *Fuller*, 3 Q. B. 68. See also *Stone* v. *Compton*, 5 Bing. N. C. at p. 156.

(*n*) *Willes*, J., in *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. at p. 262.

(*o*) *Collins* v. *Evans*, 5 Q. B. 820 (Exch. Cham.); *Thom* v. *Bigland*, 8 Ex. 725; *Ormrod* v. *Huth*, 14 M. & W. 651.

(*p*) 3 C. P. D. at p. 5.

(*q*) *Behn* v. *Burness*, 3 B. & S. 751.

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specific performance in the circumstances stated in *Cornfoot* v. *Fowke*. In *Mullens* v. *Miller* (*r*), *Bacon*, V.-C., remarked, "A man employs an agent to let a house for him; that authority contains also an authority to describe the property truly; to represent its actual situation, and, if he thinks fit, to represent its value." The employment of an agent ignorant of the facts, and an *intentional* omission to mention them to him, might be fraudulent, and constitute a ground at least of defence, if not of action (*s*); at all events, the omission to mention the fact might be evidence for a jury of negligence.

Section VI.—*Rights of Agents against Third Parties.*

Rights of agents against third parties.

The general rule is, that an agent cannot sue or be sued upon a contract avowedly made by him solely on behalf of a principal (*t*). But a factor or other agent, who has made a contract, *in the subject-matter of which he has a special property*, may maintain an action thereon in his own name, and that *whether he professed to contract for himself or not* (*u*). Thus, an auctioneer may sue in his own name for the price of goods sold by him on the owner's premises, or in a public auction room, and known to be his property (*x*). So, if an agent have transferred his master's property—for example, made payments under a mistake of fact—under circumstances which give a right to recover it back, he may do so in his own name, though we have seen that it may also be recovered in that of his principal (*y*). So, he may maintain actions of tort for injuries done to it while in his possession (*z*). In the above instances, he sues as a trustee for

(*r*) 22 Ch. D. 194, at p. 199.

(*s*) See remarks of *Rolfe*, B., in *Cornfoot* v. *Fowke*, 6 M. & W. at p. 370; *Rawlings* v. *Bell*, 1 C. B. 951; *Taylor* v. *Ashton*, 11 M. & W. 401; *Willis* v. *Bank of England*, 4 A. & E. 21.

(*t*) *Evans* v. *Hooper*, 1 Q. B. D. 45. See *Charles* v. *Blackwell*, 2 C. P. D. 151.

(*u*) *Atkyns* v. *Amber*, 2 Esp. 493; B. N. P. 130; *Schmaltz* v. *Avery*, 16 Q. B. 655.

(*x*) *Williams* v. *Millington*, 1 H. Bl. 81; *Taplin* v. *Florence*, 10 C. B. 744. See *Sykes* v. *Giles*, 5 M. & W. 645.

(*y*) Per Lord *Mansfield*, *Stevenson* v. *Mortimer*, Cowp. 805.

(*z*) *Williams* v. *Millington*, 1 H. Bl. 81; *Joseph* v. *Knox*, 3 Camp. 320; Evans on Principal and Agent, 2nd ed. 461.

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his principal; but there are others in which he may proceed for his own benefit; thus, a factor who has a lien for his balance on the price of goods sold by him, may maintain an action for that price against the buyer. And, if he have previously given him notice not to pay to his principal, payment to the principal would not be a defence to such an action (*a*), though without notice it has been thought that it would be so (*b*); and in such a case *Eyre*, L. C. J., refused to allow the defendant to set off money due to him from the principal (*c*). There are, however, cases in which great hardships might result if such a set off were not allowed (*d*); and, generally speaking, where an agent sues in right of his principal, whatever would be a defence against the principal would be so against him. And the declarations and admissions of the principal will be evidence against him (*e*). A broker ordinarily cannot sue on a contract made by him as broker (*f*); but this rule may be modified by custom (*g*).

An agent may also sue upon *any* contract made with him, *in his own name, for an undisclosed principal* (*h*): and, if such a contract be made by deed, he is the only person who can sue on it; for it is an invariable rule of law, that no person can sue upon a deed who is neither party to, nor mentioned in it (*i*).

Another state of facts also may occur, viz., *where a person has entered into a contract as agent for a third person who is named,*

(*a*) *Drinkwater* v. *Goodwin*, Cowp. 255; *Robinson* v. *Rutter*, 4 E. & B. 954.

(*b*) *Coppin* v. *Walker*, 7 Taunt. 237. But see contra, *Robinson* v. *Rutter*, ubi sup.; and see *Grice* v. *Kenrick*, L. R. 5 Q. B. 340.

(*c*) *Atkyns* v. *Amber*, 2 Esp. 493. See Lord *Mansfield's* judgment in *Drinkwater* v. *Goodwin*, Cowp. 256.

(*d*) See the observations of *Eyre*, C. J., in *Atkyns* v. *Amber*, ubi supra; *Isberg* v. *Bowden*, 8 Exch. 852; and see *Coppin* v. *Craig*, 7 Taunt. 243; *Holmes* v. *Tutton*, 5 E. & B. 65; *Middleton* v. *Pollock*, 44 L. J. Ch. 584.

(*e*) *Welstead* v. *Levy*, 1 M. & Rob. 138; *Megginson* v. *Harper*, 2 C. & M. 322; *R.* v. *Hardwick*, 11 East, 578; *Harrison* v. *Vallance*, 1 Bing. 45; *Smith* v. *Lyon*, 3 Camp. 465.

(*f*) *Fairlie* v. *Fenton*, L. R. 5 Ex. 169; *Sharman* v. *Brandt*, L. R. 6 Q. B. 720.

(*g*) *Fleet* v. *Murton*, L. R. 7 Q. B. 126; *Dale* v. *Humfrey*, E. B. & E. 1004.

(*h*) Per Lord *Denman*, C. J., delivering the judgment of the Court in *Sims* v. *Bond*, 5 B. & Ad. at p. 393; *Schmaltz* v. *Avery*, 16 Q. B. 655.

(*i*) *Chesterfield Silkstone Colliery Co.* v. *Hawkins*, 34 L. J. Ex. 121.

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when in fact he was the principal. It would appear that in such a case the party making the contract could not sue upon it, if it were a contract involving the consideration of personal skill or knowledge, or if it were wholly executory, or had been partially executed, the other contracting party remaining in ignorance of the real principal. But if it were of a description not involving such a consideration, but being of such a nature that partial execution would render the contract obligatory, as if, for instance, it were for the sale of goods, and part of them had been accepted with a knowledge that the person delivering was the real principal, and not a mere agent as he professed to be, then he could maintain an action for its non-fulfilment (*k*). Nor would the rule apply where the principal was not named (*l*).

Section VII.—*Rights of Third Parties against the Agent.*

Rights of third parties against the agent.

An agent, contracting as such for a known and responsible employer, incurs no personal liability to third parties (*m*). If the individual with whom he contracted knew him to be an agent, knew his principal, and knew that he intended to bind that principal, he will be taken to have trusted to the credit of the principal, and the agent will not be bound. There is an exception to this rule, viz., the case of masters of ships, who, as well as their owners, are responsible on contracts for repairs, or stores, or loans of money for those purposes (*n*), or on bills of lading signed by them (*o*). Yet, even in that case, if there be circumstances which show that the owners alone were trusted, they alone will be responsible (*p*). What constitutes election

(*k*) *Rayner* v. *Grote*, 15 M. & W. 359; *Schmaltz* v. *Avery*, 16 Q. B. at p. 661. See also *Bickerton* v. *Burrell*, 5 M. & S. 383.

(*l*) *Schmaltz* v. *Avery*, 16 Q. B. at p. 662.

(*m*) *Ex parte Hartop*, 12 Ves. at p. 352; *Fairlie* v. *Fenton*, L. R. 5 Ex. 169; *Southwell* v. *Bowditch*, 1 C. P. D. 374; *Woolfe* v. *Horne*, 2 Q. B. D. 355.

(*n*) *Rich* v. *Coe*, Cowp. 636. See *Morse* v. *Sluice*, 1 Vent. 190, 238; 1 Mod. 85; 2 Lev. 69; *Priestley* v. *Fernie*, 3 H. & C. 977.

(*o*) *Priestley* v. *Fernie*, 3 H. & C. 977.

(*p*) *Hoskins* v. *Slayton*, Ca. temp. Hardw. 376; *Priestley* v. *Fernie*, 3 H. & C. 977.

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will be in general a question of fact. Suing without recovering judgment, or merely filing an affidavit of proof against the estate of a bankrupt, will not operate as such election (*q*). An agent may, however, bind himself by an express undertaking (*r*). If he contract without disclosing that he has any principal, he is himself the person *primâ facie* responsible; though the other party may, in most cases, elect to charge the employer on discovering him, yet he need not do so, but may, if he please, continue to look to the agent (*s*); and by custom the agent's liability may be the same, where, at the time of contracting, he states himself to be an agent, but does not disclose his principal (*t*). As this subject has been discussed in a previous section, it is better to refer to it for further detail, than to fatigue the reader with a repetition of the authorities there cited (*u*).

It has also been mentioned (*x*) that where a British agent contracts for a foreign principal, the British agent is responsible (*y*). This is said to be for the benefit or convenience of trade, or perhaps it may be a branch of the following general rule, viz., that where there is no responsible employer, the agent shall be held personally liable. Thus, where A. agreed with B. and C. to pave the streets of Putney, and they *on behalf of the parish* agreed to pay him, they were held personally respon-

(*q*) *Curtis* v. *Williamson*, L. R. 10 Q. B. 57; *Smethurst* v. *Mitchell*, 1 E. & E. 622; *Meier* v. *Kuchenmeister*, 8 Sc. Sess. Cas. 4th Series, 642.

(*r*) *Blackburn*, J., in *Elbinger Actien Gesellschaft* v. *Claye*, L. R. 8 Q. B. at pp. 317, 318.

(*s*) See *Morgan* v. *Corder*, Paley on Principal and Agent, 372; *Magee* v. *Atkinson*, 2 M. & W. 440; *Higgins* v. *Senior*, 8 M. & W. 834; *Cooke* v. *Wilson*, 1 C. B. N. S. 153; *Williamson* v. *Barton*, 7 H. & N. 899.

(*t*) *Humfrey* v. *Dale*, 7 E. & B. 266; *Dale* v. *Humfrey*, E. B. & E. 1004; *Southwell* v. *Bowditch*, 1 C. P. D. 374; *Fleet* v. *Murton*, L. R. 7 Q. B. 126; *Hutchinson* v. *Tatham*, L. R. 8 C. P. 482; *Barrow* v. *Dyster*, 13 Q. B. D. 635; *Pike* v. *Ongley*, 18 Q. B. D. 708; *Imperial Bank* v. *London & St. Katherine's Dock Co.*, 5 Ch. D. 195.

(*u*) Ante, Sect. 4, pp. 153, 154.

(*x*) Ibid.; *Paterson* v. *Gandasequi*, 15 East, 62; *Thompson* v. *Davenport*, 9 B. & C. 78; and Lord *Kenyon's* judgment in *Owen* v. *Gooch*, 2 Esp. 567.

(*y*) *Elbinger Actien Gesellschaft* v. *Claye*, L. R. 8 Q. B. 313; *De Gaillon* v. *L'Aigle*, 1 B. & P. 368; *Thompson* v. *Davenport*, 9 B. & C. 78; *Houghton* v. *Matthews*, 3 B. & P. 485; B. N. P. 130; infra, p. 176. But see *Green* v. *Kopke*, 18 C. B. 549; *Mahony* v. *Kekulé*, 14 C. B. 390; *Deslandes* v. *Gregory*, 2 E. & E. 602. See as to Purchasers, ante, pp. 149 *et seq.*

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sible (*z*). There is an exception to this rule in favour of government officers acting for the public (*a*); and possibly this exception may extend to all *public* officers acting as such (*b*). A similar rule exists as to the agents of foreign governments. Such governments cannot be sued in the courts of this country, nor will their agents be liable to actions (*c*). The rule itself seems to be one of evidence, and all cases falling under it to be reducible to the question, *to whom was credit given?* For it seems, on the one hand, that if a party choose to give credit to irresponsible persons of any description acting by their agent, and it be manifestly intended that the agent's credit shall not be pledged, in such a case the agent will not be responsible (*d*); while, on the other hand, it is clear that if the agent contract for an irresponsible employer, a strong presumption will arise that he meant to pledge his own credit, and the party dealing with him meant to accept it, unless, indeed, he be a government or public officer acting in his public capacity.

There is another possible case, viz., that of a man contracting as agent for a person from whom he has in reality no authority, *e.g.*, an agent contracting for an alleged freighter. In such a case, if there were no principal existing at the time who could be bound, the person so contracting as agent may be sued on the contract (*e*).

"Speaking generally," said *Lindley*, L. J., in *Firbank's Executors* v. *Humphreys* (*f*), "an action for damages will not lie against a

(*z*) *Meriel* v. *Wymonsold*, Hardr. 205. See *Horsley* v. *Bell*, Amb. 770; 1 Bro. C. C. 101; *Eaton* v. *Bell*, 5 B. & Ald. 34; *Anon.*, 12 Mod. 559; *Burls* v. *Smith*, 7 Bing. 705. See the judgment in *Rew* v. *Pettet*, 1 Ad. & E. 196.

(*a*) *Macbeath* v. *Haldimand*, 1 T. R. 172; *Gidley* v. *Palmerstone*, 3 B. & B. 275; *R.* v. *Commissioners of Inland Revenue*, 12 Q. B. D. 461.

(*b*) See *Macbeath* v. *Haldimand*, 1 T. R. at p. 182, per *Buller*, J.; *Bowen* v. *Morris*, 2 Taunt. 374; per Lord *Wensleydale*, in *Mersey Docks Trustees* v. *Gibbs*, L. R. 1 H. L. 124.

(*c*) *Twycross* v. *Dreyfus*, 5 Ch. D. 605; *Smith* v. *Weguelin*, L. R. 8 Eq. 198.

(*d*) See *Hoskins* v. *Slayton*, Ca. temp. Hardwicke, 376; *Green* v. *Kopke*, and *Mahony* v. *Kekulé*, ubi sup.; supported by *Parrott* v. *Eyre*, 10 Bing. 283.

(*e*) *Kelner* v. *Baxter*, L. R. 2 C. P. 174; *Carr* v. *Jackson*, 7 Ex. 382; *Richardson* v. *Williamson*, L. R. 6 Q. B. 276; *Firbank's Executors* v. *Humphreys*, 18 Q. B. D. 54.

(*f*) *Firbank's Executors* v. *Humphreys*, 18 Q. B. D. at p. 62; *Derry* v. *Peek*, 14 App. Cas. 337.

person who honestly makes a misrepresentation which misleads another. But to this general rule there is at least one well established exception, viz., where an agent assumes an authority which he does not possess, and induces another to deal with him upon the fact that he has the authority which he assumes."

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On the other hand, if there were an existing person who might have been bound, the person thus contracting will be liable to an action on the case for his misrepresentation (*g*); unless, indeed, as in the case of *Smout* v. *Ilbery* (*h*), he had once had an authority, the determination of which could not be known to him. He would also be liable to an action on an implied promise that he had authority to make the contract (*i*); a person who makes as agent a contract or representation "warrants," it is said, that he has authority so to do. But if he fairly contracts as an agent on behalf of a named (*k*) existing principal, and professes to make that principal liable, he cannot be sued on the contract itself (*l*).

We have seen that the agent will be personally liable where he has expressly undertaken to be so. It is sometimes difficult to determine whether, upon the true construction of an agreement, the agent making it intended to bind himself or his principal (*m*). The nature of these difficulties will be best illustrated by a few examples: in *Appleton* v. *Binks* (*n*), a man

(*g*) *Thomas* v. *Edwards*, 2 M. & W. 215; *Lewis* v. *Nicholson*, 18 Q. B. 503; *Cherry* v. *Colonial Bank of Australasia*, L. R. 3 P. C. 24; Story on Agency, s. 264, also s. 269. Apparently the agent could not sue on such a contract: Pollock on Contracts, 4th ed. 103; *Schmaltz* v. *Avery*, 16 Q. B. 655; *Hollman* v. *Pullin*, 1 Cab. & El. p. 257.

(*h*) 10 M. & W. 1, a case difficult to defend.

(*i*) *Spedding* v. *Nevell*, L. R. 4 C. P. 212; *Collen* v. *Wright*, 8 E. & B. 647; *Cherry* v. *Colonial Bank of Australasia*, supra; *In re National Coffee Palace Co.*, 24 Ch. D. 367; *Richardson* v. *Williamson*, L. R. 6 Q. B. 276; *Hughes* v. *Graeme*, 33 L. J. Q. B. 335; *Fairlie* v. *Fenton*, L. R. 5 Ex. 169.

(*k*) See *Carr* v. *Jackson*, 7 Exch. 382.

(*l*) *Jenkins* v. *Hutchinson*, 13 Q. B. 744; *Lewis* v. *Nicholson*, 18 Q. B. 503; *Thomson* v. *Davenport*, 2 Smith's L. C. 9th edit. 395, note; per Lord *Campbell*, C. J., in *Collen* v. *Wright*, 7 E. & B. 312; *Deslandes* v. *Gregory*, 2 E. & E. 602, 610. See as to evidence, *Holding* v. *Elliott*, 5 H. & N. 117; *Trueman* v. *Loder*, 11 A. & E. 589; *Higgins* v. *Senior*, 8 M. & W. at p. 844; *McCollin* v. *Gilpin*, 6 Q. B. D. 516.

(*m*) *Reid* v. *Dreaper*, 6 H. & N. 813; *Redpath* v. *Wigg*, L. R. 1 Ex. 335; *Easterbrook* v. *Barker*, L. R. 6 C. P. 1; *Southwell* v. *Bowditch*, 1 C. P. D. 100, 374. See, in case of mistake, how he may get relief, *Wake* v. *Harrop*, 6 H. & N. 768.

(*n*) 5 East, 148. This was by deed,

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covenanted for himself, his heirs, &c., for and on the part and behalf of J. S. to do a certain act; and it was held that he, and not J. S., was answerable for its non-performance. On the other hand, in *Spittle* v. *Lavender* (*o*), Lavender entered into an *agreement*, as agent for and on the part and behalf of S. R., and signed it; at the foot of which agreement were these words: "I hereby sanction this agreement, and approve of Charles Lavender having entered into it on my behalf," and it was held that Lavender was not responsible. In *Paice* v. *Walker* (*p*) the defendants, who signed a contract in the following form; "Sold A. T. Paice, Esquire, London, about 200 quarters of wheat (as agent for John Schmidt & Co. of Dantzig), &c., (signed) Walker and Strange," were held personally liable; while in *Gadd* v. *Houghton* (*q*), no personal liability was held to be created by a sale note in the following form: "We have this day sold to you on account of James Morant & Co., &c." No doubt the general principle is that a person is personally liable on a contract which he signs, and that in order to escape the *primâ facie* liability there must be something very distinct in the contract.

If the agent exceed his authority, so that his principal is not bound, he will himself be liable for the damage thus occasioned to the other contracting party, although he may have been innocent of any intention to defraud (*r*), or if he represents that he has authority when he has in fact none.

but the same question may arise in parol contracts. *Tanner* v. *Christian*, 4 E. & B. 591; *Fleet* v. *Murton*, L. R. 7 Q. B. 126; *Paice* v. *Walker*, L. R. 5 Ex. 173, doubted in *Gadd* v. *Houghton*, 1 Ex. D. 357; *Hough* v. *Manzanos*, 4 Ex. D. 104.

(*o*) 2 B. & B. 452; *Jones* v. *Downman*, 4 Q. B. 235, n.; *Downman* v. *Williams*, 7 Q. B. 103. See *Hartop* v. *Juckes*, 2 M. & S. 438; *Hart* v. *White*, Holt, 376; *Deslandes* v. *Gregory*, 2 E. & E. 602, 610; *Evans* v. *Evans*, 3 A. & E. 132; and see *Green* v. *Kopke*, 18 C. B. 549.

(*p*) L. R. 5 Ex. 173.

(*q*) 1 Ex. D. 357; *Hough* v. *Manzanos*, 4 Ex. D. 104; *Southwell* v. *Bowditch*, 1 C. P. D. 374. "According to the authorities, as I understand them, where the contract is drawn up in this way (signed F. E. & Son, Brokers), and the signature is of the name of the person with 'brokers' added, and the contract is not signed 'as brokers,' they are personally bound; for it is said to be a signature on their own behalf, and the word 'brokers' is only a description": *Brett*, M. R., in *Hutcheson* v. *Eaton*, 13 Q. B. D. at p. 865.

(*r*) *Polhill* v. *Walter*, 3 B. & Ad. 114 (the case of a person not an agent acting as such); *Collen* v. *Wright*, 7 E.

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The question, whether an agent is personally liable for money paid to him for the use of his principal, under circumstances which would entitle some person to recover it from that principal, involves much difficulty. In the first place, it is clear that if the agent have, without notice to act otherwise, paid over the money to his principal, he never can be called on to refund it (*s*). But in *Cox* v. *Prentice* (*t*), it was laid down by the court, on the authority of *Buller* v. *Harrison* (*s*), that an agent who receives money for his principal is liable as a principal, so long as he stands in his original situation, and until there has been a change in circumstances by his having paid over the money to his principal, or done what is equivalent to it (*u*). In that case the defendant received a bar of silver from his principal, and sold it to the plaintiff at a price calculated with reference to the number of ounces which, on assay, it was thought to contain; it turned out afterwards, that it contained fewer ounces than had been supposed, and the plaintiff was held entitled to recover the money overpaid from the defendant, who had not yet handed it to his principal, although he had forwarded an account to him, in which he was credited with the full sum, but which was still unsettled. In *Buller* v. *Harrison* (*s*), the defendant was an insurance broker, and the money sought to be recovered was paid by the plaintiff, an underwriter, in discharge of a loss which turned out to be "a foul loss." It will be observed that in neither of these cases could the principal himself ever by possibility have claimed to retain the money for a single instant, had it reached his hands, the payment having been made by the plaintiff under pure mistake of facts, and being void *ab initio*, as soon as that mistake was discovered, so that the agent would not have been estopped from denying his principal's title to the money, any more than the factor of J. S. of Jamaica, who has received

& B. 301; 8 E. & B. 647; *Weeks* v. *Propert*, L. R. 8 C. P. 427; *Firbank's Exors.* v. *Humphreys*, 18 Q. B. D. 54, at p. 60. See ante, p. 175, note (*i*).

(*s*) *Buller* v. *Harrison*, Cowp. 565; *Horsfall* v. *Handley*, 8 Taunt. 136; *Greenway* v. *Hurd*, 4 T. R. 553; *Anon.*, 1 Vern. 136; *Potts* v. *Potts*, ib. 208; *Holland* v. *Russell*, 1 B. & S. 424; 4 B. & S. 14; *Shand* v. *Grant*, 15 C. B. N. S. 324.

(*t*) 3 M. & S. 344. See *Calland* v. *Loyd*, 6 M. & W. 26.

(*u*) See *Cary* v. *Webster*, 1 Str. 480; *M'Carthy* v. *Colvin*, 9 A. & E. 607.

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money paid to him under the supposition of his employer being J. S. of Trinidad, would be estopped from retaining that money against his employer, in order to return it to the person who paid it to him. Besides which, in *Buller* v. *Harrison*, had the agent paid the money he received from the underwriter, in discharge of the foul loss, over to his principal, he would have rendered himself an instrument of fraud, which, as we have already seen, no agent can be obliged to do. In *Newall* v. *Tomlinson* (*v*), a further exception was stated. The plaintiffs, cotton brokers, bought of the defendants, also cotton brokers, 74 bales of cotton. Both were acting for undisclosed principals; and, according to the usage of the market, each treated the other as a principal. By a mistake on the part of the defendants in adding up the weights, the plaintiffs paid too much. Before the mistake was discovered the defendants had allowed this sum in the accounts with their principals. The plaintiffs were held to be entitled to recover the money, on the ground that the defendants were not mere agents and did not receive the money to the use of their principals—they received it to their own use. Except in such cases as these, the maxim *Respondeat superior* has been applied, and the agent is held responsible to no one but his principal (*x*). Thus, in *Stephens* v. *Badcock* (*y*), the defendant, an attorney's clerk, having received, by his master's orders, rents for the plaintiff, a client, it was held that he was not responsible to the plaintiff, though his employer, the attorney, had since become a bankrupt. So it was held, that an attorney who had received cash for his principal upon a sale which went off, could not be sued by the intended vendee for it (*z*). Nor can an action for money had and received be brought against the agent, who has received it on behalf of his principal, for the purpose of trying the existence of a right in that principal, thus the right of a lord of the manor cannot be tried in an action against his steward for quit-rent voluntarily paid (*a*), and these decisions

(*v*) L. R. 6 C. P. 405.

(*x*) *Cobb* v. *Becke*, 6 Q. B. 930.

(*y*) 3 B. & Ad. 354; and see *Baird* v. *Robertson*, 1 M. & G. 981.

(*z*) *Bamford* v. *Shuttleworth*, 11 A. & E. 926.

(*a*) *Sadler* v. *Evans*, 4 Burr. 1984; *Staplefield* v. *Yewd*, cited Id. 1985, B. N. P. 130. See *Alexander* v. *Southey*, 5 B. & Ald. 247; *Wilson* v. *Anderton*, 1 B. & Ad. 450.

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are but just; since, as the agent is estopped from questioning the title of his principal, he would, but for this rule of *respondeat superior*, be frequently exposed, without any defence, to two different suits in respect of the same subject-matter (*b*).

But an agent cannot defend himself, even on the ground of payment over to his principal, if he receive money *illegally* from a party who is not prevented from suing him by the rule *in pari delicto potior est conditio defendentis* (*c*). This was decided in *Miller* v. *Aris* (*d*), where the money was received by a gaoler from a prisoner for rent of a room illegally let to him, and paid over by the gaoler to his employers (*e*). Neither do the foregoing remarks extend to cases in which the money gets into the agent's hands, in consequence of a tort committed by him under the directions of, or jointly with, his principal; for in that case the party aggrieved might have sued him in tort, and may, upon the ordinary principle, waive his right to proceed in that form and adopt assumpsit (*f*). Of course, if an agent pay money to his principal which was not entrusted to him for that purpose, or after the authority was withdrawn, he will not be discharged (*g*), *e. g.*, if a stakeholder pay over the deposit before the condition on which it was to become due is performed, or after receiving from the depositor a demand for the return of the money (*h*).

Although there must be special circumstances to render an agent liable on *contracts* made for his employer, yet it is otherwise if he commit *torts* while acting in his master's service. In such a case the principal will, it is true, often be liable, but then the agent will invariably be so (*i*). However, an agent is

(*b*) See *White* v. *Bartlett*, 9 Bing. 378. But see *Hardacre* v. *Stewart*, 5 Esp. 103.

(*c*) See *Smith* v. *Bromley*, 2 Dougl. 696, n.; *Sharland* v. *Mildon*, 15 L. J. Ch. 434.

(*d*) Selw. N. P. 13th edit. 123.

(*e*) Accord. *Townson* v. *Wilson*, 1 Camp. 396; *Wakefield* v. *Newbon*, 6 Q. B. 276.

(*f*) *Tugman* v. *Hopkins*, 4 M. & G. 389.

(*g*) *Sadler* v. *Evans*, supra; *Snowden* v. *Davis*, 1 Taunt. 359; *Edwards* v. *Hodding*, 5 Taunt. 815; *Sadler* v. *Smith*, L. R. 4 Q. B. 214; 5 Q. B. 40.

(*h*) *Diggle* v. *Higgs*, 2 Ex. D. 422; *Hampden* v. *Walsh*, 1 Q. B. D. 189; *Read* v. *Anderson*, 10 Q. B. D. 100.

(*i*) *Lane* v. *Collen*, 12 Mod. 488; Roll. Abr. 94, pl. 5; *Cranch* v. *White*, 1 Bing. N. C. 414; *Davies* v. *Vernon*, 6 Q. B. 443; *Perkins* v. *Smith*, Say, 40; 1 Wils. 328; *Barker*

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not answerable to third parties for mere nonfeasance, that is, for neglecting to do, as his master's agent, that which his master is bound and has deputed him to do. Thus, if the servant of a common carrier were to refuse to receive A.'s goods to be carried, on tender of the proper hire, he would not be liable to an action at the suit of A., although the carrier, his master, would, and although the servant would himself be liable to his master for a breach of duty as his agent (*k*).

We have thus gone through the chief rules which affect the relation of *Principal and Agent*. The subject of this chapter will, however, be further illustrated by some of those contained in *Book the Third*, in which it is proposed to treat of *Mercantile Contracts*. For instance, it is obvious that, in the description of contracts of affreightment, of insurance, or of sale, light must be cast upon the duties of the agents who are employed in the negotiation or execution of those contracts, and who are, of course, bound to know and act upon the rules which govern them. The duty of the agent thus depends, in great measure, upon that of his principal, and consequently upon the nature of those compacts from which the latter takes its origin.

v. *Braham*, 2 W. Bl. 866; *Goodwin* v. *Gibbons*, 4 Burr. 2108; *Bates* v. *Pilling*, 6 B. & C. 38; *Stephens* v. *Elwall*, 4 M. & S. 259; *Michael* v. *Alestree*, 2 Lev. 172; *Wilson* v. *Anderton*, 1 B. & Ad. 450; *Sharland* v. *Mildon*, 15 L. J. Ch. 434; *Hollins* v. *Fowler*, L. R. 7 H. L. 757; the answer by *Blackburn*, J., at p. 762, to questions put to the judges; *McEntire* v. *Potter*, 22 Q. B. D. p. 440. See *Nobel's Explosives Co.* v. *Jones*, L. R. 8 A. C. 1. In Roll. Abr. 95, it is laid down, that if the servant of a taverner sells wine that is corrupted, knowing it to be so, no action of deceit lies against the servant, for he did it but as a servant; whence it has been inferred, that a servant is not liable for fraud committed in his master's business; but surely this is difficult to be supported.

(*k*) As to the liability of public officers for acts of omission, see *Barry* v. *Arnaud*, 10 A. & E. 646; *Young* v. *Davis*, 7 H. & N. 760; and to the liability of a master of a ship, *Morse* v. *Slue*, 1 Vent. 238.

BOOK THE SECOND.

CHAPTER I.

INCIDENTS PECULIAR TO MERCANTILE PROPERTY.

Incidents peculiar to mercantile property.

THERE is one circumstance connected with the general law of property which it is fit here to remark: viz., that the law will not permit it to be rendered inalienable by any device whatever; for to permit this would, to use the words of Lord *Coke*, militate "*against trade and traffic*, and bargaining and contracting between man and man" (*a*). First, then, all property in the hands of a merchant becomes transferable by, and subject to, the operation of the bankrupt laws.

Secondly, it is known to be the ordinary rule of law that, where two or more persons are jointly possessed of property, the entire right to it, on the decease of any of them, remains to his survivors, and at length, to the last survivor, who thus becomes entitled to the whole; which incident to joint tenancy is called by our ancient writers the *jus accrescendi* (*b*). To this rule there is an exception in the case of partners, of whom Lord *Coke* says, that "the wares, merchandises, debts, or duties which they have as joint merchants or partners shall not survive, but shall go to the executors of him that deceaseth, and this is *per legem mercatoriam*, which is part of the laws of this realm, for the advancement and continuance of commerce and trade" (*c*).

(*a*) Co. Litt. 223 a. An exception to this rule is allowed in the case of property given or settled to the use of a married woman: *Tullett* v. *Armstrong*, 4 My. & Cr. 377; *Baggett* v. *Meux*, 1 Phill. 627; 1 Smith's Real and Personal Property, 113.

(*b*) Litt. 280, 281; 2 Bl. Com. 184.

(*c*) Co. Litt. 182 a; Comyn's Dig. "Merchant," D. It is observable that the doctrine of Lord *Coke*, in the above passage, extends to "*Debts and Duties*," the remedies for which survive, as it is apprehended, notwithstanding some contrary dicta in 2 Lev. 188, 228; Lut. 1493; Noy, 55; Salk. 444; Com. Dig. "Merch." D.

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The principle applies to manufacturers in partnership, and to every description of trade (*d*). Of the existence of this exception there is no doubt; but it has been questioned whether it could be enforced in courts of common law. It seems admitted on all hands that if real property be held in joint tenancy for the purposes of trade, its exemption from the common rule relating to survivorship can be enforced only through the medium of equity. Thus the legal estate of land of which partners are jointly seised will devolve on the death of any one to the survivors, who can deal with it. But they will be compelled as trustees to account to the persons entitled to the estate of the deceased partner (*e*). As to the joint tenancy of chattels, Baron *Parke*, in delivering the judgment of the court in *Buckley* v. *Barber* (*f*), after reviewing all the authorities, observed, "upon the whole, there is no satisfactory authority for the position that the title to partnership chattels survives at law, and the authorities the other way greatly predominate." The Court therefore held the title only survived in equity, but that the principle of this exception, which is for the encouragement of trade, extended to manufacturers in partnership, and to that portion of the partnership stock which consisted of trade fixtures and machinery fixed in their mill, but removeable by them as tenants.

This maxim, *Jus accrescendi inter mercatores locum non habet*, applies to real property held in partnership for the purposes of trade. Incident to its enforcement is the question which sometimes arises, whether the separate share of each partner is to be considered as real or as chattel property: such share having been always personal in its enjoyment, though freehold in its nature, and having usually been acquired, not as a matter of choice but of necessity, by the sacrifice of part of the chattel

(*d*) *Parke*, B., in *Buckley* v. *Barber*, 6 Ex. 164, at p. 181. See, as to the limitations of the principle, *Brown* v. *Dale*, 9 Ch. D. 78.

(*e*) Lindley, 5th ed. 341.

(*f*) 6 Exch. 164, at p. 180. Great doubts were also expressed in this case, whether the surviving partners have a power to sell and give a good *legal* title to the share of the deceased, *even* if they sell to pay a partnership debt. Certainly they have no power to deal with it for their own purposes. But see *Butchart* v. *Dresser*, 10 Hare, 453; 4 De G. M. & G. 542.

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property of the firm, which its owner would, had it been possible, have desired to continue in its original state of personalty. In the earlier cases on this subject, it appears to have been thought that freehold lands bought with the money, and used for the purposes of the firm, ought not to be considered in equity as converted into personal property, and therefore that, at the death of one of the partners, as equity allows no *jus accrescendi* among merchants, even in lands, the share of the deceased would descend to his heir, whose right thereto might be enforced in equity (*g*). This doctrine, however, is overturned (*h*); and the rule now is, that all property, of what nature soever, bought with the cash and for the purposes of a trading partnership concern, must in equity be looked upon as personal, unless there be an agreement to the contrary, and that as there can be no survivorship in it, a partner's share will on his death pass to his personal representative (*i*), for whose benefit the surviving partners, or their trustees, will hold it, since in this case the *jus accrescendi* takes place at law. If, indeed, the partners have stipulated that freehold lands purchased by them shall not be subject to the application of this equitable doctrine, but shall follow the ordinary rules respecting property of that description, or if they act so that such a stipulation may be reasonably inferred from their conduct—if the property is not partnership property—in such a case the rule of equity yields to the ordinary course of law coupled with the intention of the parties, for *quilibet potest renunciare juri pro se introducto* (*j*).

(*g*) *Thornton* v. *Dixon*, 3 Bro. 199; *Bell* v. *Phyn*, 7 Ves. 453; 2 Hov. Suppl. 61.

(*h*) *Phillips* v. *Phillips*, 1 My. & K. at p. 663; *Broom* v. *Broom*, 3 My. & K. 443; *Morris* v. *Barrett*, 3 Y. & J. 384; *Houghton* v. *Houghton*, 11 Sim. 491; *Ex parte M'Kenna*, 30 L. J. Bank. 25; *Waterer* v. *Waterer*, L. R. 15 Eq. 402; *Steward* v. *Blakeway*, L. R. 4 Ch. 603; *Davies* v. *Game*, 12 Ch. D. 813; *Att.-Gen.* v. *Brunning*, 8 H. L. C. 243; *Att.-Gen.* v. *Hubbuck*, 13 Q. B. D. 275.

(*i*) See Lord *Eldon's* observations in *Selkrig* v. *Davies*, 2 Dow. at p. 242; *Ripley* v. *Waterworth*, 7 Ves. 425; *Townshend* v. *Devaynes*, 1 Mont. on Part. Appendix, 96; *Elliott* v. *Browne*, referred to 9 Ves. at p. 597; *Holroyd* v. *Holroyd*, 28 L. J. Ch. 902.

(*j*) *Balmain* v. *Shore*, 9 Ves. 500; 2 Hov. Supp. 187; *Rowley* v. *Adams*, 7 Beav. 548. See *Smith* v. *Smith*, 5 Ves. 189; 1 Hov. Supp. 502; *Ex parte M'Kenna*, ubi sup. *Thornton* v. *Dixon*, above cited, seems to fall within this class of cases.

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This seems the proper place in which to notice a peculiar rule of law, established in order to favour trade, and concerning certain property in which traders are temporarily interested, viz., that goods delivered to a person exercising a trade, to be carried, wrought or managed in the way of his trade or employment, are for that time privileged from a distress for rent (*k*). Thus, goods in the hands of an agent, wharfinger, auctioneer, commission agent, or pawnbroker (*l*), or the carcase of a beast left at a butcher's to be slaughtered (*m*), are exempted from liability to distress. It has, however, been decided, that machinery bailed to a trader to work the material with is not so privileged (*n*); nor are horses standing at livery exempt (*o*). There must be a delivery of the goods by the owner to the trader or manufacturer in order that the goods may be exempted; if A. builds a ship for B., the landlord of A.'s premises may seize under a distress, though the property has passed to B. (*p*).

The exemption just described is absolute. The necessary implements of a man's trade are also privileged against distress for rent, but (if above the value of five pounds) only when there is sufficient of other distrainable goods to meet the landlord's claim (*q*). They are not exempt if there be no other sufficient distress except of growing crops; for to seize those might delay

(*k*) Co. Litt. 47 a; *Gisbourn* v. *Hurst*, 1 Salk. 249; *Clarke* v. *Milwall Dock Co.*, 17 Q. B. D. 494.

(*l*) *Gilman* v. *Elton*, 3 B. & B. 75; *Thompson* v. *Mashiter*, 1 Bing. 283; *Adams* v. *Grane*, 1 Cr. & M. 380; *Brown* v. *Arundell*, 10 C. B. 54; *Williams* v. *Holmes*, 8 Exch. 861; *Gibson* v. *Ireson*, 3 Q. B. 39; *Findon* v. *M'Laren*, 6 Q. B. 891 (carriage sent to coachmaker for sale); *Swire* v. *Leach* 18 C. B. N. S. 479 (goods in pawn); *Miles* v. *Furber*, L. R. 8 Q. B. 77 (goods at warehouse depository); see *Lyons* v. *Elliott*, 1 Q. B. D. 210 (goods sent to auctioneers not privileged from distraint when not on auctioneers' premises).

(*m*) *Brown* v. *Shevill*, 2 A. & E. 138. See *Muspratt* v. *Gregory*, 1 M. & W. 633.

(*n*) *Wood* v. *Clark*, 1 C. & J. 484; and see *Muspratt* v. *Gregory*, 1 M. & W. 633; *Joule* v. *Jackson*, 7 M. & W. 450; *Parsons* v. *Gingell*, 4 C. B. 545.

(*o*) *Parsons* v. *Gingell*, 4 C. B. 545. But see *Miles* v. *Furber*, ubi supra.

(*p*) *Clarke* v. *Milwall Dock Co.*, supra. In that case Lord *Esher*, M.R., and *Fry*, L. J., both admit that *constructive* delivery might in certain cases suffice.

(*q*) See *Simpson* v. *Hartopp*, Willes, 512; 1 Smith, L. C. 463, 9th edit.; 9 & 10 Vict. c. 95, s. 96; 51 & 52 Vict. c. 21, s. 4.

the landlord, and put him to inconvenience (*r*); and they are liable equally with other goods to a distress for poor rates, that being in the nature of an execution (*s*).

Incidents peculiar to mercantile property.

The Legislature has recently created a further exemption. The Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), by s. 45, enacts that live stock which a tenant has agreed with their owner to take in and feed shall not be distrained by the landlord for rent where there is other sufficient distress.

There is another privilege which will be most appropriately noticed along with that against distress afforded to the chattels above mentioned. It is conferred on certain fixtures, which, if set up for ordinary purposes, would not be severable from the freehold by the owner of a particular estate or by his representative, but which, in order to encourage commerce, are removeable when set up by a tenant (*t*) for commercial purposes. Such is the greater part of the machinery set up by manufacturers, which is now of a description so expensive, that to prohibit its removal from their landlord's premises would be a serious discouragement to persons exercising the trade in which it is used (*u*). Thus a tenant may remove a fire engine though fixed to the freehold (*x*), or a fixed engine with boilers and shafting (*y*). The tenant must remove such fixtures during the term. Between heir and executor the exemption as to trade fixtures does not seem to hold good.

The question whether trade fixtures pass under a mortgage of realty is important as to the Bills of Sale Acts. Sect. 7 of the Bills of Sale Act, 1878, enacts that—

"No fixtures or growing crops shall be deemed under this Act

(*r*) *Piggott* v. *Birtles*, 1 M. & W. 441.

(*s*) *Hutchins* v. *Chambers*, 1 Burr. 579.

(*t*) *Climie* v. *Wood*, L. R. 3 Ex. 257; L. R. 4 Ex. 328.

(*u*) See *Elwes* v. *Maw*, 3 East, 38; 2 Smith's Leading Cases, 182, 9th edit.; *Poole's case*, 1 Salk. 368; *Lawton* v. *Lawton*, 3 Atk. 13; *Lawton* v. *Salmon*, 1 H. Bl. 259 a; *Penton* v. *Robart*, 2 East, 88; *Dean* v. *Allaley*, 3 Esp. 11; *Trappes* v. *Harter*, 2 C. & M. 153; *Hellawell* v. *Eastwood*, 6 Exch. at p. 312; *Walmsley* v. *Milne*, 7 C. B. N. S. 115. And see 14 & 15 Vict. c. 25, s. 3, and 46 & 47 Vict. c. 61, ss. 44—52. See also Bills of Sale Act, 41 & 42 Vict. c. 31, s. 4; Bills of Sale Act, 45 & 46 Vict. c. 43, s. 6 (2), as to mortgages or assignments passing fixtures.

(*x*) *Lawton* v. *Lawton*, supra; *Climie* v. *Wood*, L. R. 4 Ex. 328.

(*y*) *Mather* v. *Fraser*, 2 K. & J. 536; *Bain* v. *Brand*, 1 App. Cas. 762.

Incidents peculiar to mercantile property.

to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed, or from the land on which they grow, without otherwise taking possession of or dealing with such land or building, or land, if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed, or in the land on which such crops grow, is also conveyed or assigned to the same persons or person."

CHAPTER II.

SHIPPING.

SECT. 1. *Privileges of a British Ship.*
2. *What Ships are British.*
3. *Title to them, how acquired and transmitted.*
4. *Rights of Part Owners.*

SECTION I.—*The Privileges of a British Ship* (*a*).

The privileges of a British ship.

THESE, which formerly (*b*) were very extensive, secured to British ships the exclusive right to import for use into the United Kingdom and the colonies, almost every species of foreign goods, as well as the whole of the coasting trade, and the trade between the United Kingdom and the Channel Islands. But these privileges have been entirely abrogated (*c*),

(*a*) The subject of British ships is now chiefly regulated by the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), and the Acts amending it. See them in the Appendix.

Numerous minute regulations for the survey and equipment of passenger ships sailing from ports in Great Britain for certain destinations, and regulations for preventing the sending of unseaworthy ships to sea from such ports, are contained in the statutes 18 & 19 Vict. c. 119; 26 & 27 Vict. c. 51; 35 & 36 Vict. c. 73; and 39 & 40 Vict. c. 80 (as to which see *Thompson* v. *Farrer*, 9 Q. B. D. 372); but as these are not confined to British ships, and a detail of them is beyond the compass of a work like this, it is not attempted.

(*b*) By way of compensation for the repeal of the privileges formerly secured to British ships, a power is given, by sections 324 and 325 of the statute 16 & 17 Vict. c. 107, to the Queen, if British ships, or the articles imported by them, are subject to any prohibitions, restrictions, duties, or charges, in a foreign state, to impose, by an Order in Council, such prohibitions, restrictions and duties upon the ships of that state and the articles imported by them, as to place their ships in British ports on a similar footing, and to countervail the disadvantages to which British trade and navigation are subjected.

(*c*) As to foreign trade, by 12 & 13 Vict. c. 29; and as to the coasting trade, by 17 & 18 Vict. c. 5.

The privileges of a British ship.

and the right to assume the national flag and character, and the protection that affords, are the only peculiar privileges which a British ship now enjoys (*d*). The Queen, however, may by Order in Council impose restrictions upon the vessels of countries which do not extend reciprocity to British vessels (*e*).

Section II.—*What Ships are, properly speaking, British.*

What ships are, properly speaking, British.

In order that a ship may be entitled to the name and privileges of a *British vessel*, she must be *owned and registered* as one (*f*).

No ship is deemed British unless she belongs wholly to owners of one or more of three classes (*g*). The first of these are natural-born British subjects. But even a natural-born subject, who has taken the oath of allegiance to any foreign sovereign or state, is disqualified from being an owner, unless he has subsequently taken the oath of allegiance to Her Majesty, and is, and continues to be, during the whole period of his being an owner, resident within her dominions, or, if not so resident, a member of a British factory, or partner in a firm carrying on business within them. The second class are persons made denizens by letters of denization, or naturalized by or pursuant to any Act of Parliament (*h*), or any Act or Ordinance of the

(*d*) 17 & 18 Vict. c. 104, s. 106.

(*e*) 16 & 17 Vict. c. 107, ss. 324 and 325.

(*f*) 17 & 18 Vict. c. 104, ss. 18 and 19; *Leary* v. *Lloyd*, 3 E. & E. 178. By 12 & 13 Vict. c. 29, s. 7, she must likewise have been navigated by a British master and a certain proportion of British seamen; but this provision was repealed by 16 & 17 Vict. c. 131, s. 31. A British ship may now therefore be navigated by any crew. A temporary pass, entitling a vessel to the privileges of a British ship, may be obtained in certain events: 17 & 18 Vict. c. 104, s. 98; *The Annandale*, 2 P. D. 218. As to evidence of the nationality of a British ship, and as to criminal jurisdiction over unregistered British ship, see *R.* v. *Seberg*, L. R. 1 C. C. R. 264; *R.* v. *Allen*, 10 Cox, C. C. 405.

(*g*) 17 & 18 Vict. c. 104, s. 18. It will be observed that this section considerably qualifies the former enactment, which it supersedes; see 17 & 18 Vict. c. 120. East India ships are excepted from the operation of the Merchant Shipping Act, 1854, by s. 108. As to what is a ship within the meaning of that statute, see 24 Vict. c. 40, s. 2, and *The Mac*, 7 P. D. 126.

(*h*) See the reservation in the Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 14.

Legislature in a British possession, provided they are and continue, during the whole term of their being owners, resident in Her Majesty's dominions, or, if not so resident, members of a British factory, or partners in a house actually carrying on business within those dominions, and they have taken the oath of allegiance to Her Majesty, after being made denizens or naturalized. Thirdly, bodies corporate (*i*) established under, and subject to the laws of, and having their principal place of business in, the United Kingdom, or some British possession.

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In the next place a ship must, except in a few instances, presently mentioned, be registered as *British*, as follows: A ship may be registered (*k*) at any British port, which will then be deemed her port of registry, or the port to which she belongs. If a ship become the property of British owners at a foreign port, the British consular officer of the port may grant her a provisional certificate, which will have the same force for six months, or until her earlier return to a port where there is a British registrar, as a certificate of registration (*l*).

The persons by whom registration is to be made are (*m*):—at any port or other place in the United Kingdom or Isle of Man, approved by the Commissioners of Customs for the registry of ships,—the collector, comptroller, or other principal officer of customs; in the Islands of Guernsey and Jersey,—the principal officers of her Majesty's customs, together with the governor, lieutenant-governor, or other person administering the government of those Islands; in Malta, Gibraltar, and Heligoland,—the governor, lieutenant-governor, or other person administering the government; at any port or place so approved formerly (*n*) within the limits of the charter, but not under the government of the East India Company, and at which no custom house is established,—the collector of duties, together with the governor,

(*i*) Even though some of the members composing these bodies may be foreigners: *Reg.* v. *Arnaud*, 9 Q. B. 806.

(*k*) 17 & 18 Vict. c. 104, ss. 30, 33. And by that statute (ss. 89 and 90), the registry may be transferred from one port to another.

(*l*) 17 & 18 Vict. c. 104, s. 54. See also Merchant Shipping Act, 1872, s. 4.

(*m*) 17 & 18 Vict. c. 104, s. 30.

(*n*) By the Government of India Act, 1858 (21 & 22 Vict. c. 106), India was governed by and in the name of Her Majesty.

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lieutenant-governor, or other person administering the government. At the ports of Calcutta, Madras, and Bombay,—the master attendants; and at any other port or place so approved formerly within the limits of the charter and under the government of the East India Company,—the collector of duties, or any other person of six years' standing in the civil service appointed to act for this purpose. At every other port or place so approved within Her Majesty's dominions abroad,—the collector, comptroller, or other principal officer of customs or of navigation laws; or, if there be no such officer resident at such port or place,—the governor, lieutenant-governor, or other person administering the government of the possession. The functions which (as will be seen) are vested in the commissioners of customs, may be performed by the governor, lieutenant-governor, or person administering the government in any possession where ships are registered (*o*).

The application for registry must be (*p*), made by one of the owners, or their agent under a written authority; and before registry the ship must be surveyed by a surveyor appointed by the Board of Trade (*q*), who is to grant a certificate specifying her form and build, and other descriptive particulars, so as to secure her identification.

Before registry, too, every British ship must be thus permanently and conspicuously marked to the satisfaction of the Board of Trade: Her name on each of her bows, her name and port of registry on her stern and on the ship's boats (*r*); her official number and her registered tonnage on her main beam; and a scale of feet denoting her draught of water on her stem, and each side of her stern posts. These marks must be continued, and no alteration is to be made in them, except the particulars are altered in conformity with the Merchant Shipping Acts. An owner or master who neglects these regulations, or who conceals, removes, alters, defaces, or obliterates any of these marks, save to avoid capture by an enemy, becomes liable to a

(*o*) 17 & 18 Vict. c. 104, s. 31.
(*p*) Id. s. 35.
(*q*) Id. ss. 29, 36; 35 & 36 Vict. c. 73, s. 3.
(*r*) 39 & 40 Vict. c. 36, s. 175 (Boats).

penalty of 100*l.* (*s*). But the Board of Trade may exempt any class of ships from any of these regulations (*t*).

What ships are, properly speaking, British.

The ship, also, must not be described by any other name, and no change of her name shall be allowed without the permission of the Board of Trade, and if she has ceased to be on the register, and an application be made to re-register her, this must be in her old name, unless a change be permitted by the Board of Trade (*u*). When a ship has ceased to be registered for any other reason than capture or transfer to a person not qualified to own a British ship, before she is registered again she must have been surveyed by a Board of Trade surveyor and certified to be seaworthy (*x*).

Where, too, an application is made to register as a British ship a ship theretofore foreign, she must, unless with the permission of the Board of Trade, be registered by the name she bore, immediately before the application, as a foreign ship (*y*). The mode in which the tonnage of the vessel is to be ascertained by measurement is prescribed by the statute, and when once so ascertained is to be deemed to be her tonnage ever after until she has been remeasured (*z*).

In order to obtain registry, a declaration must be made (*a*) by every owner (*b*), and subscribed by him before the registrar of

(*s*) 36 & 37 Vict. c. 85, s. 3. See the Act in Appendix. All British ships must be thus marked, unless exempted by the Board of Trade. By 39 & 40 Vict. c. 80, ss. 25 to 28, the position of each deck must be permanently marked on every British ship by a line on the outside; also before entering her outwards from any port in the United Kingdom or immediately afterwards, or, if she be a coaster, before leaving a port, she must be marked with a load line in a prescribed manner under a penalty not exceeding 100*l.*

(*t*) 36 & 37 Vict. c. 85, s. 3.

(*u*) 34 & 35 Vict. c. 110, s. 6.

(*x*) 36 & 37 Vict. c. 85, s. 6.

(*y*) Ibid. s. 5.

(*z*) 17 & 18 Vict. c. 104, ss. 20 to 26; 18 & 19 Vict. c. 91, s. 14; *City of Dublin S. Packet Co.* v. *Thompson*, L. R. 1 C. P. 355; *The Lord Advocate* v. *Clyde Steam Navigation Co.*, L. R. 2 H. L. (Sc.) 409. See 35 & 36 Vict. c. 73, ss. 3 and 4; and as to the measurement of foreign vessels, 25 & 26 Vict. c. 63, s. 60, and *The Franconia*, 3 P. D. 164.

(*a*) 17 & 18 Vict. c. 104, s. 38. By s. 103, a wilfully false declaration on this point entails forfeiture; and even a bonâ fide purchaser for consideration will not acquire a title from a person who has made such false declaration: *The Annandale*, 2 P. D. 218, at p. 219. By 18 & 19 Vict. c. 91, s. 9, any wilful false statement of title made to the registrar is a misdemeanor.

(*b*) The registrar, with the sanction of the Commissioners of Customs, has

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the port of registration, if he be resident within five miles of the custom house of that port, but if beyond, in the presence of any registrar or justice of the peace.

This declaration sets forth the name, port, and description of the ship; the name and residence of the owner, with other circumstances tending to prove him a subject of Her Majesty, and qualified to own a share in a British ship; a statement of the time and place of her being built, or, if she be foreign built, and these particulars are unknown, that she is foreign built and they are unknown, and her foreign name, or, if condemned, the time, place, and court of condemnation: the name of the master; the share of the declarant in the ship, and a denial that any unqualified person is interested in her (*c*). If the ship belong to a corporation, the declaration is to be made by the secretary or other duly appointed public officer (*d*), and the corporate name substituted for the names of the owners (*e*).

Upon the first registry of a ship the applicant for registry must produce (*f*), if she be British-built, a certificate (which the builder is required to grant under his hand) containing a true account of her proper denomination and tonnage as estimated by him, and of the time when, and place where she was built, together with the name of her first purchaser; and if any further sale have taken place, the bill or bills of sale under which the ship or share in her has become vested in the party requiring to be registered. If she be foreign-built, the

the power of dispensing with a declaration under special circumstances upon terms: 17 & 18 Vict. c. 104, s. 97. A provision is also made, by s. 99, for the substitution of a declaration by a guardian, committee, or person appointed by a court or judge in the case of an infant, lunatic, or person under disability, being the party who ought to make it.

(*c*) 17 & 18 Vict. c. 104, s. 38, Sched. B., where see the form of declaration.

(*d*) Ibid. s. 39. This declaration must be made before the registrar of the port of registration, and must state such circumstances of the constitution and business of the corporation as prove it to be qualified to own a ship. See the form, Sched. C.

(*e*) Ibid. s. 37. And see *Reg.* v. *Arnaud*, 9 Q. B. 806, in which case it was held that a corporate company established in England was entitled to register, though some of the members were aliens, and resided abroad.

(*f*) Ibid. s. 40.

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same evidence must be produced (*g*), unless the applicant declares that the time or place of her building is unknown, or the builder's certificate cannot be procured, in which case only the bill or bills of sale under which the ship or share in her became vested in the applicant for registry are required. In the case of a ship condemned by any competent court (*h*), an official copy of her condemnation must be produced.

The above requisites being complied with, the ship is registered, and a *certificate of registry* delivered to the applicant (*i*). This certificate (*k*) contains the name of the ship and of the port to which she belongs; the details as to her tonnage, build, and description, comprised in the certificate given by the surveyor, which are extremely full and precise; the name of her master; the several particulars as to her origin, stated in the declaration of ownership (*l*); the name and description of every registered owner, and, if there be more than one, the proportions in which they are interested (*m*), endorsed upon the certificate. All the above particulars are entered in a book, which the registering officer is required to keep (*n*); every registry is numbered in progression, and a full return thereof is transmitted by the registrar to the Registrar-General of Shipping and Seamen (*o*).

(*g*) If the English rules of measurement of tonnage have been adopted by any foreign country, an Order in Council may direct that its ships need not be re-measured here. See 25 & 26 Vict. c. 63, s. 60.

(*h*) 17 & 18 Vict. c. 104, s. 40.

(*i*) By 31 & 32 Vict. c. 129, s. 1, in the colonies a terminable certificate for a period not less than six months may be granted.

(*k*) 17 & 18 Vict. c. 120, and c. 104, s. 44, Sched. D., Form I. This is to be used solely for the navigation of the ship, and it cannot be made the subject of any lien (17 & 18 Vict. c. 104, s. 50); and even though deposited for good consideration, must be restored when demanded for the purposes of navigation: *Gibson* v. *Ingo*, 6 Hare, 112; *The St. Olaf*, 35 L. T. N. S. 428; *Wiley* v. *Crawford*, 1 B. & S. 253; but see *Lacon* v. *Liffen*, 32 L. J. Ch. 25.

(*l*) Ante, pp. 191, 192. As to evidence of ownership, see *The Princess Charlotte*, Br. & Lush. 75; *Myers* v. *Willis*, 17 C. B. 77; *The Horlock*, 47 L. J. Ad. 5.

(*m*) As to the number of shares in a ship, and the number of owners who may be registered in respect of them, see post, p. 200.

(*n*) 17 & 18 Vict. c. 104, s. 32. A copy of this is primâ facie evidence that the vessel was in the possession of the persons registered as owners: *Hibbs* v. *Ross*, L. R. 1 Q. B. 534.

(*o*) 17 & 18 Vict. c. 104, s. 94; 35 & 36 Vict. c. 73, s. 4.

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In the event of the master being changed (*p*), if the change be made in consequence of the sentence of any naval court, its presiding officer, or, if the change take place from any other cause, the registrar, or, if there be no registrar, the British consular officer resident at the port where the change happens, is to endorse and sign on the certificate of registry a memorandum of the change, and forthwith report it to the Registrar-General. And the officers of customs at any port in Her Majesty's dominions may refuse to admit any person to do any act as master of the ship, unless his name be inserted in, or indorsed upon, the certificate as her last appointed master.

In some cases a ship must be registered *de novo*. Formerly it was necessary to go through that ceremony whenever the ship had been altered, so as no longer to correspond with the particulars in her certificate (*q*), but now (*r*), if she be altered so as not to correspond with the particulars relating to her tonnage or description contained in the register book, when the alteration is made at a port where there is a registrar, the registrar of that port, and when it is made elsewhere, the registrar of the first port having a registrar at which she arrives, on the receipt of a certificate from the proper surveyor specifying the nature of the alteration, either retains the old certificate of registry, and grants a new one containing a description of the ship as altered, or indorses and subscribes on the existing certificate a memorandum of the alteration. If he be the registrar of the ship's port, he is to enter in his register book the particulars of the alteration, and the fact that a new certificate has been granted, or an indorsement has been made on the existing certificate; but if he be not such registrar, he is forthwith to report the particulars and facts to the registrar of the ship's port, who is to enter them in his register book, and retain the old certificate, which is to be sent to him when a new one has been granted. When this application is made to the registrar of the ship's

(*p*) 17 & 18 Vict. c. 104, s. 46; 35 & 36 Vict. c. 73, s. 4.

(*q*) 8 & 9 Vict. c. 89, s. 31 (repealed).

(*r*) 17 & 18 Vict. c. 104, ss. 84, 85, 86, 87.

port, he may, if he thinks fit, instead of registering the alteration, require the ship to be registered *de novo*. If it be made to any other registrar, he may likewise require this; but in that case he is to grant a provisional certificate, or make a provisional indorsement of the alteration, and report it to the registrar of her port, and then the ship must, on her arrival in the United Kingdom, if registered there, or in the British possession where she is registered, be registered *de novo*, or she will cease to be registered as British. On any change of property in a ship, the owners *may*, if they think fit, have her registered *de novo* (*s*).

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It remains to enumerate the cases *in which registry is dispensed with*, viz.:—

First. Ships not exceeding fifteen tons burden, employed solely on the rivers or coasts of the United Kingdom, or of some British possession within which their managing owners reside (*t*).

Secondly. Ships not exceeding thirty tons burden, and not having a whole or fixed deck employed solely in fishing or trading coastwise on the shores of Newfoundland or parts adjacent, or in the Gulf of St. Lawrence, or on such portion of the coast of Canada, Nova Scotia, or New Brunswick as lie bordering on such gulf (*u*).

Finally. It is to be observed that no ship is absolutely required to be registered (*x*). No ship will be recognized as a British ship unless registered. Though unregistered, she will be liable to the payment of dues, and offences committed on board her may be punished (*y*); but no officer of customs shall grant a clearance or transire to enable her to proceed to sea as a British vessel unless the master produces, upon being required to do so, a certificate of registry; and such officer may retain the ship until the certificate be produced (*z*).

(*s*) 17 & 18 Vict. c. 104, s. 88.

(*t*) Ibid. s. 19. See *Benyon* v. *Cresswell*, 12 Q. B. 899.

(*u*) Ibid. s. 19.

(*x*) Ibid. ss. 19 and 106.

(*y*) *R.* v. *Seberg*, L. R. 1 C.C. R. 264. See *The Andalusian*, 3 P. D. 182 (ship not registered at the time of collision not entitled to limitation of liability under 25 & 26 Vict. c. 63, s. 54).

(*z*) 17 & 18 Vict. c. 104, s. 102.

What ships are, properly speaking, British.

A British ship ceases to be considered such, and her certificate of registry must be delivered up, if she be actually or constructively lost, taken by the enemy, burnt, or broken up; or if she be transferred to persons not qualified to be owners of British ships (*a*); but in the latter case she may (*b*) be registered again and restored to her privileges upon her being transferred to persons qualified to be owners of British vessels.

The assumption of the privileges of a British ship contrary to these regulations entails in some instances forfeiture. Thus, if any person use the British flag, and assume the British national character, on board any ship owned wholly or in part by any person not entitled by law to own British ships, for the purpose of making such ship appear to be British, she becomes forfeited; and various officers of Her Majesty may seize and bring her for adjudication before an Admiralty Court, which may deal with her accordingly (*c*). The concealment of the British character of a ship, or the assumption of a foreign character by a British ship by her master or owners, is a cause of forfeiture (*d*). The forfeiture takes place when the offence is committed; and even a *bonâ fide* purchaser for value cannot acquire after that event a good title (*e*).

If, too (*f*), any unqualified person, except in the case of interests transmitted otherwise than by transfer, acquires as owner any interest, either legal or beneficial, in a ship using the British flag and assuming the British character, such interest becomes forfeited, and the vessel may be seized in like manner.

(*a*) 17 & 18 Vict. c. 104, s. 53.

(*b*) Ibid. s. 38.

(*c*) Ibid. s. 103; *The Annandale*, 2 P. D. 218. Except in the case of escaping capture by an enemy, or foreign ship of war under a belligerent right.

(*d*) Sect. 103. See *The Sceptre*, 35 L. T. N. S. 429.

(*e*) *The Annandale*, 2 P. D. 218.

(*f*) *The Sceptre*, 33 L. T. 109; 17 & 18 Vict. c. 104, s. 103. As to the course to be pursued in case of a transmitted interest becoming vested in an unqualified person, see ss. 62, 63, 64; 24 & 25 Vict. c. 10, s. 12.

SECTION III.—*How Title to British Ships may be acquired and transmitted.*

How title to British ships may be acquired and transmitted.

Having shown what ships have a right to be called British, we proceed to consider how the title to such ships may be acquired and transmitted.

A ship is a personal chattel, and therefore, generally speaking, subject to the rules which govern that description of property. It may be originally acquired—

1. By building it.

2. By capture from an enemy in time of war, sanctioned by condemnation by a competent court of the capturing power, constituted according to the law of nations. The capture may be either by a Government vessel, or merchant vessel having letters of marque, or, it would appear, by an uncommissioned merchant vessel (*g*).

Although such capture and condemnation suppose a pre-existing right in some one to the vessel captured, this is enumerated as a mode whereby property in it may be *originally acquired*, because we are, as must be recollected, treating only of *British shipping;* and its right to be registered, and consequently to be called British, does not accrue till sentence of condemnation (*h*). Respecting the court in which this sentence is passed, there is the following rule: That a legal sentence of condemnation cannot, according to the law of nations (which regulates all cases of prize), be passed by the consul or minister of the belligerent power in the country of a neutral power to which the prize has been taken (*i*). But States in alliance with the captors, and at war with the country to which the prize belongs, are considered as forming one community with the captors; and

(*g*) 1 Maude & Pollock, 4th edit. 65.

(*h*) This rather had reference to the old state of the law, which did not allow foreign-built ships ever to be registered, except in case of condemnation. See the repealed statute, 3 & 4 Will. 4, c. 55, s. 5.

(*i*) *The Flad Oyen*, 1 Rob. Adm. Rep. 135; *The Kierlighett*, 3 Rob. Adm. Rep. 96; *Havelock* v. *Rockwood*, 8 T. R. 268.

How title to British ships may be acquired and transmitted.

a prize carried into such a State may be condemned, either there by a consul belonging to the nation of the captors (*k*), or in the country of the captors (*l*).

3. By purchase from a foreigner, or other owner not registered (*m*). "The purchaser," said *Turner*, L. J., in *Hooper* v. *Gumm* (*n*), "is bound to make inquiry into the title. A ship is not like an ordinary personal chattel; it does not pass by delivery, nor does the possession of it prove the title to it. There is no market overt for ships."

The title to a British ship may be transmitted by the operation of the bankrupt law, or by death, or by marriage of a female owner (*o*), or it may be taken and sold in execution, being, as we have seen, a chattel personal.

But the ordinary mode of acquiring property in shipping is by conveyance from a person authorized to dispose of it. Such a person may be—

1st. *The Master.*

In a case of extreme necessity, the master may sell the ship for the benefit of the owners, though nothing but necessity will justify such a step (*p*). "Suppose, for instance," said Lord *Stowell*, in the case of *The Fanny and Elmira* (*q*), "a ship in a foreign country, where there is no correspondent of the owners,

(*k*) *The Betsy*, 2 Rob. Adm. Rep. 210, n.; *Oddy* v. *Bovill*, 2 East, 473.

(*l*) *The Christopher*, 2 Rob. Adm. Rep. 209. As to sale of a pirate ship transferred to innocent purchaser before conviction, see *Reg.* v. *McCleverty*, L. R. 3 P. C. 673.

(*m*) By 17 & 18 Vict. c. 104, ss. 38, 40, if she become the property of persons qualified to be registered as owners at any foreign port, the British consular officer may grant a provisional certificate, which will have the same effect as a certificate of registry for six months, or until her earlier arrival at a port where there is a registrar: 17 & 18 Vict. c. 104, s. 54.

(*n*) L. R. 2 Ch. at p. 290.

(*o*) 17 & 18 Vict. c. 104, ss. 58, 59, 60, and see the course there directed to be pursued in such cases. If the ship or any shares in her become vested, by transmission on death, or by marriage of a female, in an unqualified person, he may promptly apply to the Court of Chancery in England, or the Court of Admiralty, for an order authorizing a sale by a nominee: 17 & 18 Vict. c. 104, ss. 62, 63, 64; 24 & 25 Vict. c. 10, s. 12.

(*p*) See, on this subject, Abbott on Shipping, Part I., Ch. I., and the case cited in Pritchard's Digest of Admiralty Law, 3rd ed., 1220, 1221.

(*q*) Edw. Adm. Rep. 117.

and no money to be had on hypothecation to put her into repair. Under these circumstances what is to be done? The ship may rot before the master can hear from his owners; and, therefore, if the necessity were clearly shown, with full proof that everything was done *optimâ fide*, and for the real benefit of the owners, the Court might be disposed to sustain a purchase so made.—But there must be the clearest proof of the necessity; it must be shown not only that the vessel was in want of repair, but likewise that it was impossible to procure the money for that purpose."

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The master may in foreign ports hypothecate the ship, freight, or cargo, if that be necessary in order to raise money for her (*r*). If money cannot be otherwise obtained for repairs, he may sell part of the cargo (*s*); and may in cases of necessity dispose even of the cargo or ship itself for the benefit of all concerned (*t*). It lies on those who claim a title through the master to prove the necessity of the sale (*u*). In *Arthur* v. *Barton* (*x*), it was held that even in an English port a master may, in a case of necessity, borrow money for the use of the ship (*y*). But this, as is explained hereafter (*yy*), is on the supposition not merely that the supply of money is necessary, but that the owner cannot be communicated with; and the rule is the same as to goods (*z*).

In hypothecating the goods the master acts as agent for the owner of them (*a*). He may tranship goods with which the ship is freighted (*b*). The extent and nature of the master's agency are determined by the law of the flag (*c*). The master has also authority over all persons in the ship in matters relating to her navigation and the preservation of good order on board,

(*r*) *The Gratitudine*, 3 Rob. Adm. Rep. 240; *Benson* v. *Duncan*, 3 Exch. 644; *Stainbank* v. *Fenning*, 11 C. B. 51; *The Olivier*, 31 L. J. Ad. 137; *The Lizzie*, L. R. 2 A. & E. 254; *The Karnak*, ib. 289; *The Onward*, L. R. 4 A. & E. 38; *The Pontida*, 9 P. D. 177.

(*s*) Abbott, 12th ed. p. 120.

(*t*) *Hunter* v. *Parker*, 7 M. & W. 322; *Vlierboom* v. *Chapman*, 13 M. & W. 230; *Ireland* v. *Thompson*, 4 C. B. 149.

(*u*) *Atlantic Mutual Insurance Co.* v. *Huth*, 16 Ch. D. 474.

(*x*) 6 M. & W. 138; *Weston* v. *Wright*, 7 M. & W. 396.

(*y*) *Beldon* v. *Campbell*, 3 Ex. 886; *Australian Steam Navigation Co.* v. *Morse*, L. R. 4 P. C. 222; *Acatos* v. *Burns*, 3 Ex. D. 282.

(*yy*) Infra, pp. 358, 514—517.

(*z*) *Johns* v. *Simons*, 2 Q. B. 425; *Stonehouse* v. *Gent*, ib. 431, n.; *Beldon* v. *Campbell*, ubi sup.

(*a*) *Benson* v. *Duncan*, 3 Ex. 644.

(*b*) *Cannan* v. *Meaburn*, 1 Bing. 243.

(*c*) *Lloyd* v. *Guibert*, 6 B. & S. 100; *Gaetano and Maria*, 7 P. D. 137.

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and he may, in case of disobedience or disorder, administer reasonable correction, his authority in this respect resembling that of a parent over his child, or a master over his apprentice or scholar. But he must take care that there be a sufficient cause for chastisement, and that the chastisement be reasonable, otherwise he will be punishable (*d*).

2ndly. *The Owner.*

The conveyance of property in British ships is almost entirely regulated by the provisions of the Merchant Shipping Act, 1854 (*e*). We have already seen how a ship is registered in the first instance; the nature of the *book of registry*, which the public officers are required to keep; and of the *certificate of registry* which they deliver to the owners. The property of every British ship is considered by law as divided into sixty-four equal parts, and no person can be registered as owner in respect of any proportion not being a sixty-fourth part (*f*). Subject to the provisions as to joint-owners or owners by transmission presently mentioned, not more than sixty-four individuals are entitled to be registered at the same time as legal owners of a ship (*g*). But any number of persons, not exceeding five, may be registered as joint-owners of the ship or any shares in her; and these, whether entitled by purchase or transmission, are to be considered as constituting one person in reckoning the number of persons entitled to be registered. They cannot, however, dispose in severalty of their interest; and no person is to be registered as owner of any fractional part of a share. This rule does not affect the beneficial (*h*) title of any number of persons, or any company represented by, or claiming through, any registered owner or owners; but no notice of any trust whatever can be entered on the register, or is receivable by the

(*d*) Abbott, 12th ed. p. 124; Macdonell on Master and Servant, p. 33.

(*e*) 17 & 18 Vict. c. 104, Part 2.

(*f*) See 17 & 18 Vict. c. 104, s. 37, infra.

(*g*) 43 & 44 Vict. c. 18 (Merchant Shipping Amendment Act, 1880), s. 2.

(*h*) 43 & 44 Vict. c. 18, s. 2, and 25 & 26 Vict. c. 63, s. 3.

registrar (*i*). The actual number of persons, therefore, registered in respect of the whole of the shares in the ship may far exceed sixty-four; but every owner must be registered by name, and the style of a firm cannot be used. It is, however, provided that a corporation may be registered by its corporate name (*j*).

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Keeping these rules in mind, we will proceed to consider the mode which the Legislature has pointed out for the transfer (*k*) of a ship, or any shares in it, from one person to another. By the Merchant Shipping Act, 1854, every transfer of a *registered* (*l*) ship to a person qualified to be an owner of a British ship shall be by bill of sale (*m*), according to a prescribed form, which is under seal, and which specifies the number and date of registry, the name, build, port of registry, and nature of the ship, with her full description and tonnage. This is to be executed (*n*) in the presence of, and attested by at least one witness (*o*). A transferee cannot be registered until he has made a declaration in a given form (*p*), corresponding with that of an original owner, stating his qualification to be registered, and containing

(*i*) 17 & 18 Vict. c. 104, s. 43; 25 & 26 Vict. c. 63, s. 3. See *Armstrong* v. *Armstrong*, 21 Beav. 78; *Liverpool Borough Bank* v. *Turner*, 30 L. J. Ch. 379; and *Chapman* v. *Callis*, 9 C. B. N. S. 769; *Lacon* v. *Liffen*, 32 L. J. Ch. 25.

(*j*) 17 & 18 Vict. c. 104, s. 37.

(*k*) These provisions are only applicable to vessels requiring registration, consequently vessels under fifteen tons, falling within the exception in 17 & 18 Vict. c. 104, s. 19, are not within them; and such vessels, though they be actually on the register, may be transferred like any other chattel: *Benyon* v. *Cresswell*, 12 Q. B. 899. These provisions, too, do not include a sale to a person not qualified to be registered.

(*l*) As to what ships require to be regietered, ante, pp. 188, 189, 195.

(*m*) Sect. 55. A bill of sale seems always to have been the usual mode of transfer of a ehip: *The Sisters*, 5 Rob. Adm. Rep. at p. 159. A transfer or assignment of any ehip, or of any share thereof, is not "a bill of sale" within the Bills of Sale Act, 1878: *Ex parte Winter, Re Softley*, 44 L. J. Bank. 107; *Union Bank of London* v. *Lenanton*, 3 C. P. D. 243. No stamp duty is payable on it: 17 & 18 Vict. c. 104, s. 9.

(*n*) At which instant, it eeems, and not before (though an agreement to purchaee has been executed before the bill of sale), the transferee becomee owner: *Chapman* v. *Callis*, 9 C. B. N. S. 769.

(*o*) 17 & 18 Vict. c. 104, s. 55, Sched. Form E. See the Form now issued by the Commissioners of Customs. No registrar shall be required to register any bill of sale in any other form: 18 & 19 Vict. c. 91, s. 11.

(*p*) 17 & 18 Vict. c. 104, s. 56, Sched. Forms F. and G. As to cases in which this may be dispensed with, and of disabilities, see s. 97, and ante, p. 191, note (*b*).

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a denial that any unqualified person is interested in her. If the declarant reside within five miles of the port of registry, this must be made in the presence of the registrar of the ship's port; but if he reside elsewhere, before any registrar or magistrate. In the case of a body corporate, the declaration also states circumstances showing it to be qualified to own a ship, and is to be made by its secretary, or other public officer, in the presence of the registrar of the port of registry. The bill of sale, together with the declaration, is to be produced (*q*) to the registrar of the port at which she is to be registered, and he enters the name of the transferee as owner in the register book, and indorses the fact of the entry on the bill of sale, with the date and hour thereof. The provisions do not apply to the transfer of a vessel which is not a British vessel and not registered; and an assignment of such a vessel need not be registered under the Merchant Shipping Act or the Bills of Sale Acts (*r*).

All bills of sale are to be entered on the register in the order of their production; and the registrar will not be compelled to register a transfer not in the form of a bill of sale (*s*). Lastly, it is to be observed that the object of the Merchant Shipping Act, 1854, in prescribing registration, being only to give the ship or shares in the ship a visible owner, who should have absolute authority to dispose of his interests, both at law and in equity, to a *bonâ fide* transferee (*t*), the bare fact of registration does not give any title in equity, though it does at law, to one who has no actual title to a ship or shares in a ship; and, therefore, such a person can be compelled to execute a re-transfer and account for the earnings to the rightful owner (*u*). The fact of a person's name appearing on the re-

(*q*) 17 & 18 Vict. c. 104, s. 57. In case of change of ownership, the master is also required to produce the certificate of registry to the registrar of her port, or the registrar of the next port she touches at may require him to produce it, in order that the change may be indorsed upon it. See 17 & 18 Vict. c. 104, s. 45.

(*r*) *Union Bank of London* v. *Lenanton*, 3 C. P. D. 243. See *Gapp* v. *Bond*, 19 Q. B. D. 200 (a dumb barge).

(*s*) *Chasteauneuf* v. *Capeyron*, 7 App. Cas. 127.

(*t*) Under the old Act, 8 & 9 Vict. c. 89, non-registration by the first purchaser did not affect the title of a subsequent bonâ fide purchaser: *Laprait* v. *Burrows*, 13 Moore, P. C. Ca. 132.

(*u*) *Holderness* v. *Lamport*, 29 Beav.

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gister as owner is not conclusive of his liability for work done or orders given at the instance of the master (*v*); and a transfer which is on the face of it absolute and unconditional may be shown to be in reality a mortgage (*x*). It seems clear that an instrument not registered as a bill of sale—*e. g.*, an agreement to transfer a ship—may be enforced (*y*).

In this statute, too, are contained peculiar provisions (*z*), enabling the registrar to grant to the owner of a ship (*a*) a certificate of sale, which will authorise persons specified in it to dispose of the entire ship by sale, in any place out of the United Kingdom, if the ship be registered there, or if she be registered in any British possession, in any other country. This power is revocable, upon notice being given by the registrar granting the certificate to the registrar or consular officer of the place at which the power is to be exercised (*b*). No sale *bonâ fide* made to a purchaser for a valuable consideration is to be impeached by reason of the death of the donor of the power before the sale, or by his bankruptcy or insolvency, if the certificate specify the place and time, not exceeding twelve months, within which the power is to be exercised, and the purchaser be without notice. If the sale be made to a person qualified to own a British ship, she must be registered anew; but this may be done upon a declaration being made by the purchaser, as in the ordinary case of a transfer, without a fresh survey. The registrar making this new registration is to indorse the fact on

129; *M'Larty* v. *Middleton*, 4 L. T. N. S. 852; see 25 & 26 Vict. c. 63, s. 3; *The Innisfallen*, L. R. 1 A. & E. 72; and *The Horlock*, 2 P. D. 243.

(*v*) *Myers* v. *Willis*, 18 C. B. 886.

(*x*) *Ward* v. *Beck*, 13 C. B. N. S. 668.

(*y*) *Batthyany* v. *Bouch*, 50 L. J. Q. B. 421. In *Liverpool Borough Bank* v. *Turner*, 30 L. J. Ch. 379, decided upon s. 66 of 17 & 18 Vict. c. 104, an agreement to assign a mortgage was held invalid; but see 25 & 26 Vict. c. 63, s. 3.

(*z*) 17 & 18 Vict. c. 104, ss. 76 to 83. If exercised, it must be in close conformity with the directions contained in the certificate, as, otherwise, the bill of sale which professes to be made under it will be utterly invalid, even though registered: *Orr* v. *Dickinson*, 28 L. J. Ch. 516; *Hooper* v. *Gumm*, L. R. 2 Ch. 282.

(*a*) By s. 81, no such certificate is to be granted, except for the sale of an entire ship; but, by s. 76, it seems that such a certificate may be granted to the several owners of the whole of the shares in her.

(*b*) Sect. 83.

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the certificates of sale and former registry, which are to be delivered up to, and transmitted by him to the registrar of her former port, who is to enter the sale in his register. If the ship be sold to a person not qualified to hold a British ship, the purchaser is to produce the certificates of sale and registry to some registrar or consular officer, who is to indorse the fact of the sale and forward them to the registrar of her former port, and he is to enter it in his register. In the case, too, of a sale to such unqualified person, if default be made in the production of these certificates, the purchaser acquires no title, and the owner and the persons to whom the power was granted are liable to a penalty not exceeding 100*l.* If no sale be made, the certificate of sale is to be delivered to the registrar who granted it, and he is to cancel it, and enter the cancellation in his book.

In case of Mortgage.

The above considerations are applicable to every instance in which property in British shipping is transferred, but there are one or two regulations peculiar to cases of mortgage.

A mortgage of a British ship, or any share in her, must be in a specified form, under seal and attested, which states, as in the case of a transfer, the number and date of the registry and the other particulars of the ship, and "mortgages" the ship as a security for a loan or other valuable consideration (*c*). An assignment absolute in its terms may operate as a mortgage, if the real nature of the transaction shows it to have been so intended. The mortgage is to be produced to the registrar of the ship's port, who is to record it in the order of time in which he receives it, and to indorse upon it the date and hour of its record (*d*). As the entire property does not pass to the mortgagee, there of course remains a portion in the mortgagor which he can transfer to a purchaser or second mortgagee. An unregistered mortgage does not appear to be void; but it will

(*c*) 17 & 18 Vict. c. 104, s. 66, Sched. Form I.; *Ward* v. *Beck*, 13 C. B. N. S. 668; *Langton* v. *Horton*, 5 Beav. 9; *Gardner* v. *Cazenove*, 1 H. & N. 423; *Hutchinson* v. *Wright*, 25 Beav. 444; *The Innisfallen*, L. R. 1 A. & E. 72.

(*d*) Sect. 67.

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be postponed to a registered mortgage or transfer (*e*). If more than one mortgage be registered, the mortgagees, notwithstanding any express, implied, or constructive notice, have priority over one another according to the date at which each instrument is recorded in the register book, and not of each instrument itself (*f*). Every registered mortgagee has power absolutely to dispose of the ship or share mortgaged; but if there be several registered mortgagees, a subsequent mortgagee, except under the order of some Court, cannot do this without the concurrence of every prior mortgagee (*g*). The mortgagee is not to be deemed an owner, nor is the mortgagor to be deemed to have ceased to be the owner, save so far as is necessary for the purpose of making the ship available as a security (*h*). His contracts, therefore, for the employment of the vessel, made providently and not to the material injury of the mortgagee's security, while he is in possession, will be valid as against the mortgagee (*i*).

The effect of the mortgage is to give the mortgagee, as against the mortgagor, the right to the immediate possession (*j*) of the ship, and thereupon to her earnings whensoever they accrue (*k*).

(*e*) *Bell* v. *Blyth*, L. R. 4 Ch. 136; *Keith* v. *Burrows*, 1 C. P. D. 722; 2 App. Cas. 636.

(*f*) Sect. 69. By 24 & 25 Vict. c. 10, s. 11, the Admiralty Court is empowered to settle any claim arising out of a registered mortgage. The mortgagee generally has priority over material men: *The Pacific*, Brown. & Lush. 243; *The Scio*, L. R. 1 A. & E. 353; *The Two Ellens*, L. R. 4 P. C. 161; *The Rio Tinto*, 53 L. J. P. C. 54. But a bottomry bondholder takes precedence of a mortgagee: 1 Maude and Pollock, 4th ed. 375.

(*g*) 17 & 18 Vict. c. 104, s. 71. He is entitled to deduct from the proceeds the amount due on the mortgage and the expenses of the sale, but, it would seem, no other expenses, either against the mortgagor or subsequent mortgagees: *Tanner* v. *Heard*, 23 Beav. 555.

(*h*) Sect. 70; *Gardner* v. *Cazenove*, 1 H. & N. 423.

(*i*) *Collins* v. *Lamport*, 4 De G. J. & S. 500; *The Innisfallen*, L. R. 1 A. & E. 72; *The Fanchon*, 5 P. D. 173.

(*j*) *The European and Australian R. M. Co.* v. *The Royal Mail S. P. Co.*, 30 L. J. C. P. 247; *Dickinson* v. *Kitchen*, 8 E. & B. 789. Subject, however, to any equities between them: 25 & 26 Vict. c. 63, s. 3; *The Cathcart*, L. R. 1 A. & E. 314.

(*k*) The rights of a mortgagee who takes possession are subject, however, to all legal liens of third parties: *The Royal Arch*, 1 Swab. 269; *Williams* v. *Allsup*, 10 C. B. N. S. 417; and to a lien by seamen for their wages; *The Sydney Cove*, 2 Dods. 13; *The Neptune*,

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"The mortgagee of a ship does not, ordinarily speaking, or by a mortgage such as existed in the present case, obtain any transfer by way of contract or assignment of the freight; nor does the mortgagor of a ship undertake to employ the ship in any particular way, or indeed to employ the ship so as to earn freight at all.

"When a mortgagee takes possession he becomes the master or owner of the ship, and his position is simply this: from that time everything which represents the earnings of the ship, which had not been paid before, must be paid to the person who then is the owner, who is in possession. The owner then in possession happens to be the mortgagee, and it is in consequence of his filling that position, and not by virtue of any contract, or any antecedent right, that he becomes the person entitled to receive the freight. But that right is itself checked by another consideration. All that he can receive is that which the ship was in the course of earning, either by way of express contract or, which is the same thing, by carrying goods upon a *quantum meruit*" (*l*).

If, therefore, the mortgagee takes possession of the ship (*m*), or does an act equivalent to it (*n*), as he may, during a voyage, he is entitled to receive the freight earned in that voyage (*o*). He may employ the ship in whatever manner he pleases, provided it be *bonâ fide* and provident (*p*); and so long as he remains in possession the only effect of the act seems to be to preserve to the mortgagor his equitable and insurable (*q*) interests and a right to a re-transfer of his ship, as soon as the mortgagee shall have recouped himself out of her earnings, or he shall have been repaid the sum agreed to be secured (*r*), unless he have exercised his power of sale.

1 Hagg. 227, 238, 239. As to the master's rights, see 52 & 53 Vict. c. 46, s. 1, and *infra*, p. 707. As to the priority of certain equitable rights, see *Bristowe* v. *Whitmore*, 9 H. L. 391; *Rusden* v. *Pope*, L. R. 3 Ex. 269; *Wilson* v. *Wilson*, L. R. 14 Eq. 32; and *Tanner* v. *Phillips*, 42 L. J. Ch. 125.

(*l*) Lord *Cairns* in *Keith* v. *Burrows*, 2 App. Cas. at pp. 645, 646.

(*m*) *Gardner* v. *Cazenove*, 1 H. & N. 423; *Willis* v. *Palmer*, 7 C. B. N. S. 340; *Liverpool Marine Credit Co.* v. *Wilson*, L. R. 7 Ch. 507.

(*n*) *Rusden* v. *Pope*, L. R. 3 Ex. 269.

(*o*) *Keith* v. *Burrows*, 2 App. Cas. 636; *Kerswill* v. *Bishop*, 2 C. & J. 529; *Cato* v. *Irving*, 5 De G. & S. 210.

(*p*) *De Mattos* v. *Gibson*, 30 L. J. Ch. 145; *Marriott* v. *The Anchor R. Society*, 30 L. J. Ch. 571.

(*q*) *Hutchinson* v. *Wright*, 25 Beav. 444.

(*r*) *Marriott* v. *Anchor R. Society*, 30 L. J. Ch. 571.

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Although under an enactment similar to this it was doubted (*s*) whether a mortgagee had sufficient interest to entitle him to recover more than the amount of the mortgage debt, upon a policy of insurance for the entire value of the ship, unless at the time of executing the policy it was his intention to include the interest of the mortgagor for the sake of the latter, it may, nevertheless, be questioned whether a mortgagee, either in or out of possession, may not recover the full value insured, quite irrespective of any intention he may have had when effecting the policy (*t*). On the whole, it would seem that the mortgagee will be able to recover only to the extent of his debt, unless it appear that he intended to cover not only his own interest, but that of the mortgagor (*u*). There can be no doubt that in equity, and possibly at law (*x*), he would be liable as trustee for the excess of the sum recovered beyond his debt, and perhaps the premium.

The mortgagee is preferred (*y*) to the trustee of the mortgagor in case of bankruptcy, and protected from having the mortgaged property considered as in the bankrupt's order and disposition.

A certificate of mortgage, corresponding in many respects with a certificate of sale (*z*), may be granted by the registrar; and similar provisions, as in the case of a certificate of sale, are enacted, rendering a mortgage under it valid, notwithstanding the death, bankruptcy, or insolvency of the owner. The mortgage is to be indorsed by a registrar or British consular officer on the certificate of mortgage, and is to have priority over all

(*s*) *Irving* v. *Richardson*, 2 B. & Ad. 193.

(*t*) *Godin* v. *The London Ass. Co.*, 1 Burr. 490; *De Mattos* v. *Gibson*, 30 L. J. Ch. 145; *Dobbyn* v. *Comerford*, 10 Ir. Ch. Rep. N. S. 327; *Ebsworth* v. *Alliance M. I. Co.*, L. R. 8 C. P. 596; *Provincial Insurance Co.* v. *Leduc*, L. R. 6 P. C. 224; and see the analogous cases of fire insurance: *Waters* v. *The Monarch Assurance Co.*, 5 E. & B. 870. See *The L. & N. W. R. Co.* v. *Glyn*, 1 E. & E. 652; *North British In. Co.* v. *Moffatt*, L. R. 7 C. P. 25; *Martineau* v. *Kitching*, L. R. 7 Q. B. 436.

(*u*) 1 Arnould, 6th ed. p. 85; 1 Phillips, s. 289.

(*x*) *Ward* v. *Beck*, 13 C. B. N. S. 668.

(*y*) 17 & 18 Vict. c. 104, s. 72. See *Boyson* v. *Gibson*, 4 C. B. 121; *Rusden* v. *Pope*, L. R. 3 Ex. 269; and *Campbell* v. *Thompson*, 2 Hare, 140. A transfer or mortgage of a ship is not within the Bills of Sale Acts. See note (*r*), ante, p. 202.

(*z*) 17 & 18 Vict. c. 104, ss. 76 to 80. A share or shares in a ship may be mortgaged under this certificate: see ss. 76 and 80.

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mortgages subsequent to the date of the entry of the certificate in the register. If there be more than one mortgage under the certificate, the mortgagees are to have priority according to the dates of the indorsement of their charges on the certificate.

A mortgage may be transmitted or transferred by death, bankruptcy, &c., and such transmission or transfer is to be registered (*z*). A mortgage may be the subject of an equitable deposit, and such deposit will prevail against the trustee under a bankruptcy (*a*). Upon the discharge of any mortgage, satisfaction is likewise to be entered in the registry (*b*).

Section IV.—*Rights of Part Owners.*

Rights of part owners.

It remains to consider the rights of part owners of a ship amongst themselves.

It is possible that joint tenancy may be created in a ship, as well as in any other chattel, by grant to several persons jointly; and if it be, the rule *jus accrescendi inter mercatores locum non habet* will apply to it (*c*). But if several persons be registered as joint owners of shares in a ship, it would seem that, at least at law, they would survive, as by s. 37 of the Merchant Shipping Act, 1854, no person can be registered as owner of a fractional part of a share. The operation of the Act occasions this sort of property to be usually conveyed in distinct shares of one or more sixty-fourth parts, the owners of which are tenants in common of the vessel, and would hold it subject to the general rule of the common law, which permits any one tenant in common to seize upon the chattel, and regulate the mode of its enjoyment, to the exclusion of the rest (*d*), were it not that public policy steps in and exempts this sort of property from a rule, which, if applied to it, might prove injurious to commerce. Accord-

(*z*) Sects. 73, 74, 75. If transferred, the transfer is to be indorsed on the mortgage: see Sched. 2.

(*a*) *Lacon* v. *Liffen*, 32 L. J. Ch. 25.

(*b*) Sect. 68. *Chasteauneuf* v. *Capeyron*, 7 App. Cas. 127; *Bell* v. *Blyth*, L. R. 4 Ch. 136.

(*c*) See *R.* v. *Philp*, 1 Moo. Cr. Ca. 274.

(*d*) *Graves* v. *Sawcer*, T. Raym. 15; 1 Lev. 29; *Strelley* v. *Winson*, 1 Vern. 297; *Anon.*, Skinner, 230.

Rights of part owners.

ingly, if the owners themselves have not precluded all dispute by agreeing in the choice of a *ship's husband*, or managing owner, and delegating the care of their interests to him, the Court of Admiralty (*e*) interferes by arresting the ship, and preventing the majority of owners from sending her abroad against the will of the minority, without first entering into a stipulation, in a sum equal in value to the shares of the dissentients, either to bring back the ship or pay the value of their shares (*f*). On giving this security they are permitted to send the ship to sea (*g*), and if the minority are in possession of it, may take it out of their hands for that purpose by a warrant of the Court. But the dissentient owners bear no part of the expense, and are entitled to no part of the profit of the voyage to which they have disagreed (*h*). In case the owners be equally divided in opinion, either half may apply to the Court to interfere in the manner above stated (*h*).

As the Court of Admiralty may arrest the ship for the protection of one part of the owners against another, so it may for the protection of the owner or owners against a wrong doer (*i*). The Court may order the ship to be sold (*k*).

The ordinary mode for part owners to obtain an adjustment of the ship's accounts was by suit in a Court of equity, or, since the Admiralty Court Act, 1861, by suit in the Court of Admiralty (*l*), and now by action in the High Court of Justice (*m*); they may, however, by naming a ship's husband, and inserting special provisions in his appointment (*n*), entitle themselves to an action against him, in case he fail in making up his account,

(*e*) Its jurisdiction is now extended by 24 & 25 Vict. c. 10. See *The Tigress*, 32 L. J. Ad. 97. By s. 8, that Court may decide all questions, and settle all accounts between co-owners. As to sale of ship by the Court, see *The Nelly Schneider*, 3 P. D. 152; *The Marion*, 10 P. D. 4.

(*f*) *The Talca*, 5 P. D. 169.

(*g*) See Abb. on Shippg., Part 1, c. 3.

(*h*) *Davis* v. *Johnston*, 4 Sim. 539; *The Apollo*, 1 Hagg. Ad. Rep. 306; Abb. on Shippg., Part 1, c. 3.

(*i*) Per cur. *In re Blanshard and others*, 2 B. & C. 244.

(*k*) 24 & 25 Vict. c. 10, s. 8.

(*l*) Ibid.

(*m*) 36 & 37 Vict. c. 66, s. 16. A receiver may be appointed in a co-ownership suit: *The Ampthill*, 5 P. D. 224.

(*n*) A formal appointment is not necessary; it is enough if he has acted, and the owners of the ship have acquiesced in his acting, in this capacity: *Chappell* v. *Bray*, 6 H. & N. 145.

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and dividing the profits (*o*); while, on the other hand, the ship's husband, if he have advanced money for outfits, may sue each of the owners for his proportion (*p*). Sect. 36 of 39 & 40 Vict. c. 80, requires the name of the managing owner to be registered (*q*). Part owners resemble partners with respect to the concerns of the ship, and are therefore, generally speaking, all liable to the full extent for debts contracted for its repair and other necessary expenses, which can be shown or presumed to have been incurred with their assent (*r*). But this liability arises in every case out of contract, and is not an incident inseparable from the registered ownership of the vessel; and therefore, if the registered owners can show that the expense was not incurred on their credit, they will not be liable for it. And, in like manner, any one of them will be exempted who can show that he has not pledged his responsibility; for the mere legal ownership, *per se*, is in no case sufficient to render an owner liable (*s*).

Where the ship is under the management of the master and the owners divide the profits, the master is, with respect to her concerns, *primâ facie* (*t*) agent for them all. There will be a

(*o*) *Owston* v. *Ogle*, 13 East, 538; *Servante* v. *James*, 10 B. & C. 413. See *Radenhurst* v. *Bates*, 3 Bing. 463; *Davies* v. *Hawkins*, 3 M. & S. 488. As to the rights of the ship's husband against the shipowners, see *Helme* v. *Smith*, 7 Bing. 709; *Vanner* v. *Frost*, 39 L. J. Ch. 626.

(*p*) See as to his interest, *Beynon* v. *Godden*, 3 Ex. D. 263.

(*q*) This Act makes no difference in the authority of the managing owner to pledge the credit of the other owners: *Frazer* v. *Cuthbertson*, 6 Q. B. D. 93.

(*r*) *Green* v. *Briggs*, 6 Hare, 395; *Chappell* v. *Bray*, 6 H. & N. 145. As to the liability for repairs ordered by a charterer, who is also ship's husband, see *Preston* v. *Tamplin*, 2 H. & N. 363; ib. 684; *Whitwell* v. *Perrin*, 4 C. B. N. S. 412; *Frazer* v. *Cuthbertson*, 6 Q. B. D. 93; and as to necessaries supplied to a foreign vessel, see *The Heinrich Bjorn*, 11 App. Cas. 271.

(*s*) *Briggs* v. *Wilkinson*, 7 B. & C. 30; *The Great Eastern*, L. R. 2 A. & E. 88; *Cox* v. *Reid*, R. & M. 199; *Curling* v. *Robertson*, 7 M. & G. 336; *Frost* v. *Oliver*, 2 E. & B. 301; *Brodie* v. *Howard*, 17 C. B. 109; *Hackwood* v. *Lyall*, ib. 124; *Mitcheson* v. *Oliver*, 5 E. & B. 419; *Myers* v. *Willis*, 17 C. B. 77; 18 C. B. 886; *Hibbs* v. *Ross*, L. R. 1 Q. B. 534. But see *Barker* v. *Highley*, 15 C. B. N. S. 27; *Coulthurst* v. *Sweet*, L. R. 1 C. P. 649; *Mitchell* v. *Tarbutt*, 5 T. R. 649.

(*t*) *Briggs* v. *Wilkinson*, 7 B. & C. 34; *Jennings* v. *Griffiths*, R. & M. 42; *Young* v. *Brander*, 8 East, 10; *Frazer* v. *Marsh*, 13 East, 238; *Reeve* v. *Davis*, 1 A. & E. 312; *Frost* v. *Oliver*, 2 E. & B. 301; *Myers* v. *Willis*, 17 C. B. 77; 18 C. B. 886. But see *Mitcheson* v. *Oliver*, 5 E. & B. 419; *Mackenzie* v. *Pooley*, 11 Exch. 638.

right to contribution in the event of any one of them being obliged to pay damages for collision or negligence in the management of the ship (*u*). But although their connection in this respect resembles that of partners, yet it is clearly not a partnership (*x*). The admission of one is not binding upon the other (*y*); each may transfer his share without the consent of the others, nor is it liable to confiscation for acts done by the others without his privity, thus, if one part owner be the proprietor of the cargo, condemnation thereof involves the condemnation of his share of the ship, but not that of the shares of other part owners, who knew nothing of the contraband commodities (*z*). Rights of part owners.

(*u*) *Frazer* v. *Cuthberteon*, ubi sup.

(*x*) See *supra*, p. 11; *Wilson* v. *Dickson*, 2 B. & Ald. 2; *Helme* v. *Smith*, 7 Bing. 709; *Briggs* v. *Wilkinson*, 7 B. & C. 34; *Williams* v. *Thomas*, 6 Esp. 18; *Robinson* v. *Gleadow*, 2 Bing. N. C. 156; *Wedderburn* v. *Wedderburn*, 4 M. & Cr. 41; *The Vindobala*, 58 L. J. P. D. & A. 50.

(*y*) *Jaggers* v. *Binninge*, 1 Stark. 64.

(*z*) *The Jonge Tobias*, 1 Rob. 329.

CHAPTER III.

GOODWILL AND TRADE MARKS.

Goodwill and trade marks.

THERE is another sort of property, if property it can be called, of a nature so exclusively mercantile as to deserve a separate mention. I mean the *goodwill of a business*, which, though arising from various and often accidental circumstances —such as the situation of a house, the changes in a neighbourhood, and even the prejudices of customers—has been often recognised in Courts of equity and law as an existing and valuable interest (*a*); and therefore, when property to which it attaches is sold under their decrees, they will direct that steps be taken to impress the purchaser with a just notion of its value (*b*). On a dissolution of partnership the goodwill, if any, is sold as partnership assets for the benefit of the partners collectively (*c*). But where the profits of the business result almost entirely from confidence placed in the personal skill of the party employed, as

(*a*) "Goodwill, I apprehend, must mean every advantage—every positive advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself—that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business." Per *Wood*, V.-C., in *Churton* v. *Douglas*, John. at p. 188, cited by *Jessel*, M. R., in *Ginesi* v. *Cooper*, 14 Ch. D. at p. 600. See *Steuart* v. *Gladstone*, 10 Ch. D. at p. 658; *Reynolds* v. *Bullock*, 47 L. J. Ch. 773; *Cooper* v. *Metropolitan Board of Works*, 25 Ch. D. at p. 479; Sebastian on Trade Marks, 2nd ed. 271.

The assignment of a goodwill and business conveys the exclusive right as between the vendor and the purchaser to use the trade name under which the business was carried on: *Levy* v. *Walker*, 10 Ch. D. at p. 448, per *James*, L. J. It is recognised as partnership assets: *Smith* v. *Everett*, 27 Beav. 446; *Mellersh* v. *Keen*, 28 Beav. 453; *Hall* v. *Barrows*, 4 De G. J. & S. 150.

(*b*) *Cook* v. *Collingridge*, Jac. 607; and note to Collyer on Partn. p. 215.

(*c*) *Reynolds* v. *Bullock*, 47 L. J. Ch. 773; *Taylor* v. *Neate*, 60 L. T. 179. See *Steuart* v. *Gladstone*, 10 Ch. D. 626, as to the nature of goodwill of a partnership.

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in the case of surgeons or solicitors (*d*), the goodwill is too insignificant to be taken notice of. By the conveyance of a shop the goodwill passes, although not specifically mentioned (*e*), and the goodwill of trade premises, as distinguished from goodwill, the result of personal reputation, passes to a mortgagee (*f*). A sale of stock *and* goodwill for 60*l.* requires a stamp, not being a mere sale of goods (*g*).

The sale of a *goodwill*, in the absence of any express stipulation (*h*), does not preclude the seller from setting up the same kind of business again in the same neighbourhood (*i*), if he do not describe himself as setting up the identical business that has been purchased, or interfere with the customers in the old business (*k*), or a solicitor (*l*) from soliciting or dealing with (*m*) the customers of the old business. In *Labouchere* v. *Dawson* (*n*), *Romilly*, M. R., laid down the law differently, and his view was adopted in *Ginesi* v. *Cooper* (*o*) by *Jessel*, M. R. This doctrine was subsequently extended by the latter, in *Walker* v. *Mottram* (*p*), to a sale by a trustee in bankruptcy. But the Court of Appeal held that the doctrine, if correct in a voluntary sale, did not extend to compulsory sales; and in the later case of *Pearson* v. *Pearson* (*q*), the same Court (*Lindley*, L. J., dissenting) held, that the doctrine could not be supported in voluntary sales, and that *Labouchere* v. *Dawson* was wrongly decided.

Upon the sale of a goodwill it is usual for the vendor to undertake not to carry on the same business within prescribed limits: such a stipulation, if the limits be reasonable according

(*d*) *Arundell* v. *Bell*, 52 L. J. Ch. 537; *Farr* v. *Pearce*, 3 Madd. 74; *Spicer* v. *James*, Rolls, M. T. 1830, reported Coll. on Partn. 2nd and 3rd ed. p. 104; *Bozon* v. *Farlow*, 1 Mer. 459. See per Lord *Langdale*, *Whitaker* v. *Howe*, 3 Beav. 390; *Austen* v. *Boys*, 2 De G. & J. 626; 24 Beav. 598.

(*e*) *Chissum* v. *Dewes*, 5 Russ. 29; *Shipwright* v. *Clements*, 19 W. R. 599; *Pearson* v. *Pearson*, 27 Ch. D. at p. 158, per *Lindley*, L. J.

(*f*) *Chissum* v. *Dewes*, supra.

(*g*) *South* v. *Finch*, 3 Bing. N. C. 506.

(*h*) *Rannie* v. *Irvine*, 7 M. & G. 969; *Cruttwell* v. *Lye*, 17 Ves. 335.

(*i*) *Churton* v. *Douglas*, John. 176.

(*k*) *Farr* v. *Pearce*, 3 Madd. 74; *Cruttwell* v. *Lye*, 17 Ves. 335; *Churton* v. *Douglas*, Johns. 176; *Labouchere* v. *Dawson*, L. R. 13 Eq. 322.

(*l*) *Churton* v. *Douglas*, Johns. 176.

(*m*) *Pearson* v. *Pearson*, 14 Ch. D. 145.

(*n*) L. R. 13 Eq. 322.

(*o*) 14 Ch. D. 596.

(*p*) 19 Ch. D. 355.

(*q*) 27 Ch. D. 145 (1884). See also *Taylor* v. *Neate*, 60 L. T. N. S. 179.

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to the nature of the business, is perfectly valid (*r*); and the circumstance that the restraint is unlimited in point of time will not vitiate it (*s*). Upon the sale of a lease with such a covenant, there is no implied term that it is to cease at the expiration of the lease, or on the purchaser ceasing by himself or his assigns to carry on the business (*t*).

A somewhat similar right is that to trade marks, *i.e.*, marks intended to denote the makers of articles or certain qualities of goods (*u*). The sale of a business includes not only the goodwill, but any trade mark belonging to it (*x*). The right to be protected against infringement of trade marks was to a certain extent recognized at common law; and before there was any legislation on the subject it was well settled that—

"When any one adopted a mark so closely resembling the trade mark of the plaintiff that it would be likely to be mistaken for it, and put it on his goods and sold them, knowing that though the persons to whom he sold them were well aware that they were not the plaintiff's make, yet that they were meant to be sold to others who would see only the trade mark, and were likely to be deceived by its resemblance to that of the plaintiff, he might be properly found to have knowingly and fraudulently sold the goods as and for the plaintiff's goods: *Sykes* v. *Sykes* (*y*). And, so far, there was no difference between law and equity. But at law it was necessary to prove that an injury had been actually done. In equity it was enough to show that the defendant threatened to do, and would if not prevented do that injury" (*z*).

Trade marks are now regulated by the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57) (*a*). One at least of the following particulars is required by sect. 64 for a trade mark (*b*):—

(a.) A name of an individual or firm, printed, impressed, or woven in some particular and distinctive manner; or

(*r*) See ante, pp. 2, 3, and note to *Mitchel* v. *Reynolds*, 1 Smith's L. C., 9th edit. 430.

(*s*) *Hitchcock* v. *Coker*, 6 Ad. & E. 438.

(*t*) *Elves* v. *Crofts*, 10 C. B. 241.

(*u*) Patents, &c. Act, 1883, s. 64; *Singer Manufacturing Co.* v. *Wilson*, 3 App. Cas. 376.

(*x*) *Levy* v. *Walker*, 10 Ch. D. 436.

(*y*) 3 B. & C. 541.

(*z*) Lord *Blackburn*, in *Singer Manufacturing Co.* v. *Loog*, 8 App. Cas. p. 30; *Borthwick* v. *The Evening Post*, 37 Ch. D. 449.

(*a*) See Appendix.

(*b*) See sect. 10 of the Act of 1875.

(b.) A written signature, or copy of a written signature, of the individual or firm applying for registration thereof as a trade mark; or

(c.) A distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use (*c*).

Proceedings cannot be instituted for infringement of a trade mark, which can be registered under this Act, unless the trade mark has been so registered (*d*). Registration under the Act is equivalent to public use of the trade mark (*e*), and is *primâ facie* evidence of the proprietor's right to the exclusive use of the trade mark (*f*). After the expiration of five years registration is *conclusive* evidence of the right (*g*), unless the trade mark having been in common use at the time of registration ought not to have been registered (*h*). Sects. 103 and 104 of the Act (as amended by 48 & 49 Vict. c. 63, s. 6), make provisions for the making of international and colonial arrangements for the protection of registered trade marks. A trade mark may pass to the trustee in bankruptcy as "goods and chattels," unless it owes its sole value to the proprietor's personal skill. It may be assigned and transmitted, but only in connection with the goodwill of the business concerned with the goods to which it relates (*i*), and trade marks registered as a series can be transferred only as a whole (*k*). The assignee of a registered trade mark may take proceedings to prevent its use without having registered the assignment (*l*). Being of the nature of property, it is immaterial whether a registered trade mark has been fraudulently or innocently infringed; there is a remedy in either case (*m*).

(*c*) See as to the former Act, *Ex parte Stephens*, 3 Ch. D. 659; and as to the present law, *In re Van Duzer's Trade Mark*, 34 Ch. D. 623; *Waterman* v. *Ayres*, 39 Ch. D. 29; *In re Arbenz*, 35 Ch. D. 248; *Re Burgoyne's Trade Mark*, 61 L. T. N. S. 39; and as to refusal to register, on the ground of similarity of name, *In re Australian Wine Importers, Limited*, 41 Ch. D. 278; and *In re Dunn's Trade Marks*, 41 Ch. D. 439.

(*d*) Sect. 77. Unless in the case of a trade mark in use before August 13, 1875, the registration of which under the Act has been refused: Ibid.

(*e*) Sect. 75.

(*f*) Sect. 76.

(*g*) Sect. 76. See *Edwards' Trade Mark*, 30 Ch. D. 454.

(*h*) *In re Wragg's Trade Mark*, 29 Ch. D. 551.

(*i*) Sect. 70.

(*k*) Sect. 66.

(*l*) *Ihlee* v. *Henshaw*, 31 Ch. D. 323.

(*m*) Sect. 76; *Singer Manufacturing Co.* v. *Wilson*, ubi supra.

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Forging or causing to be forged a trade mark registered or protected under the Act, or falsely applying, or causing to be applied, to goods any trade mark or mark so nearly resembling a registered or protected trade mark as to be calculated to deceive, or making or causing to be made any die or instrument for the purpose of forging or being used in forging a registered or protected trade mark, is an offence, and punishable under the Merchandise Marks Act, 1887 (*n*).

(*n*) 50 & 51 Vict. c. 28, ss. 2, 3. See Appendix.

CHAPTER IV.

PROPERTY IN NEGOTIABLE INSTRUMENTS.

Property in negotiable instruments.

THE common and well-known rule of the law is, that property in a chattel personal cannot, except by sale in market overt, be transferred to a vendee, however innocent, by a party who does not himself possess it (*a*). The contrary, however, is the case with respect to negotiable instruments, a transfer of which, when in that state in which by law and the usage of trade they accustomably pass from one man to another by delivery, causes the property in them, like that in coin, to pass along with the possession (*b*), provided that the transferee has been guilty of no fraud (*c*) in taking them, in which case he would be forced to bear the loss (*d*). Gross negligence, unless amounting to evidence of *mala fides*, will not be a sufficient answer when consideration has been given for a bill of exchange or other negotiable security.

An instrument is, properly speaking, negotiable when the *legal* right to the property secured by it is transferable from one man to another by its delivery. Of this description are bills of exchange and promissory notes payable to bearer or indorsed in blank (*e*), and exchequer bills (*f*). Such were held a bond, whereby the King of Prussia bound himself and his successors to every person who should for the time being be the holder of

(*a*) See *Peer* v. *Humphrey*, 2 Ad. & E. 495; *Gurney* v. *Behrend*, 3 E. & B. 622; *Whistler* v. *Foster*, 32 L. J. C. P. 161; *Miller* v. *Race*, 1 Sm. L. C. 9th ed. 491; *Crouch* v. *Crédit Foncier of England*, L. R. 8 Q. B. at p. 381.

(*b*) See *Grant* v. *Vaughan*, 3 Burr. 1516; *Lang* v. *Smyth*, 7 Bing. 284; *Gorgier* v. *Mieville*, 3 B. & C. 45.

(*c*) *Goodman* v. *Harvey*, 4 Ad. & E. 870; *Uther* v. *Rich*, 10 Ad. & E. 784; *Raphael* v. *Bank of England*, 17 C. B. 161; *Jones* v. *Gordon*, 2 App. Cas. at p. 628, per Lord *Blackburn*; as to the onus of proof, Ibid. at pp. 627, 628.

(*d*) *Solomons* v. *Bank of England*, 13 East, 135, n.; *Gill* v. *Cubitt*, 3 B. & C. 466; *Snow* v. *Peacock*, 3 Bing. 406; *Down* v. *Halling*, 4 B. & C. 330; *Beckwith* v. *Corral*, 3 Bing. 444; *Eosley* v. *Crockford*, 10 Bing. 243; *Burn* v. *Morris*, 2 C. & M. 579; *Haynes* v. *Foster*, 2 C. & M. 237; *Fancourt* v. *Bull*, 1 Bing. N. C. 681; *Seal* v. *Dent*, 8 Moore, P. C. Ca. 319.

(*e*) See below.

(*f*) *Brandao* v. *Barnett*, 6 M. & G. 630; 12 Cl. & F. 86.

Property in negotiable instruments.

the bond, and which was proved to be usually negotiated in the English market by delivery (*g*); and scrip in a foreign loan, also shown to be in this country negotiable by delivery, according to the custom of merchants (*h*). On the other hand, Prussian Consolidated 4½ per cent. bonds, proved to be negotiable *in Prussia*, were held not to be so *here* in the absence of any custom in this country (*i*).

"The common law of England does not allow a party to a contract to transfer his right under the contract to another person, except in certain cases. Such a transfer of a chose in action could, of course, be made under the provisions of a statute: and in the case of instruments, which by the custom of merchants, recognized by the law of England, had become negotiable instruments. But it appears to me that in order to establish such an exception to the common law rule, some custom of merchants obtaining in this country must be proved, or some English statute must be relied upon"(*k*).

According to the judgment of *Cockburn*, C. J., in *Goodwin* v. *Robarts* (*l*), and apparently according to the opinion of the Court of Appeal in *Picker* v. *The London and County Banking Co.* (*m*), the custom of merchants may make any instrument negotiable. But that is at variance with the opinion expressed by *Blackburn*, J., in *Crouch* v. *Crédit Foncier* (*n*), which, though often doubted, has never been expressly overruled. The plaintiff had purchased for value without notice a debenture issued by the defendants from a person who had stolen it. It was held that it was not competent to the defendants to attach to the instrument the incident of negotiability; the alleged custom being of recent origin did not make the instrument negotiable.

"Incidents," says *Blackburn*, J., "which the parties are competent by express stipulation to introduce into their contracts, may be annexed by custom, however recent, provided that it be general, on the ground that they are tacitly incorporated in the contract. If the wording of an instrument is such as to exclude this tacit

(*g*) *Gorgier* v. *Mieville*, 3 B. & C. 45.

(*h*) *Goodwin* v. *Robarts*, L. R. 10 Ex. 337; 1 App. Cas. 476; *Rumball* v. *Metropolitan Bank*, 2 Q. B. D. 194.

(*i*) *Picker* v. *London and County Banking Co.*, 18 Q. B. D. 515.

(*k*) Ibid. at pp. 517, 518, per Lord *Esher*, M. R.

(*l*) L. R. 10 Ex. 337; 1 App. Cas. 476.

(*m*) Supra.

(*n*) L. R. 8 Q. B. 374.

Property in negotiable instruments.

incorporation, no usage can annex the incident. But where the incident is of such a nature that the parties are not themselves competent to introduce it by express stipulation, no such incident can be annexed by the tacit stipulation arising from usage. It may be so annexed by the ancient law merchant, which forms part of the law, and of which the Courts take notice. Nor, if the ancient law merchant annexes the incident, can any modern usage take it away. Thus, in *Edie* v. *East India Co.* (*o*) there was a verdict of the jury, founded on strong evidence, that, according to usage *in London*, an indorsement to an indorsee by name without any further words was restrictive; but the Court of King's Bench decided that the evidence should not have been admitted, the law merchant being known to the Court to be that it was not restrictive. And in *Partridge* v. *Bank of England* (*p*) there was the exact converse. There the dividend warrants of the Bank of England were in the form of cheques payable to a particular person, Partridge, without any words to make them transferable, which, therefore, were by the general law merchant not transferable. The Court of Exchequer Chamber gave judgment *non obstante veredicto*, on a plea on which it had been found that by custom for sixty years such dividend warrants were negotiable. We have already intimated our opinion that it is beyond the competency of the parties to a contract by express words to confer on the assignee of that contract a right to sue in his own name. And we also think it beyond the competency of the parties by express stipulation to deprive the assignee of either the contract, or the property represented by it, of his right to take back his property from any one to whom a thief may have transferred it, even though that transferee took it *bonâ fide* and for value. As these stipulations, if express, would have been ineffectual, the tacit stipulations implied from custom must be equally ineffectual."

But it may be doubted whether these observations would strictly be followed. Apparently if an instrument, for example, scrip, purporting or representing that it passes from hand to hand by delivery, is deposited with an agent who passes it to a *bonâ fide* holder for value, the owner will be estopped from denying that the security is, what it appears to be, negotiable (*r*).

(*o*) 2 Burr. 1216.

(*p*) 9 Q. B. 396; 15 L. J. Q. B. 395.

(*r*) *Goodwin* v. *Robarts*, 1 App. Cas. 476; *Rumball* v. *Metropolitan Bank*, 2 Q. B. D. 194; *The Earl of Sheffield* v. *London Joint Stock Bank*, 13 App. Cas. 333. But see *Fine Art Society*

Property in negotiable instruments.

I call those instruments negotiable, by delivery of which the *legal* right to the property which they secure may be conveyed. For there are other instruments (*s*), which, though saleable in the market by the usage of merchants, can yet only be put in suit in the name of the original contractee, and are not, properly speaking, *negotiable*. Bills of lading, dock warrants, delivery orders and wharfingers' certificates are sometimes called negotiable; and by custom and statute law they have acquired some of the incidents of negotiability. But, as will be subsequently pointed out, they do not possess all. Instruments which in one state would be *negotiable*, may, by being put into another, cease to be so. Thus, though a bill or note will be *negotiable* if indorsed in blank, yet the holder may, by a special or restrictive indorsement, determine its negotiability (*t*). So a cheque may be rendered not negotiable by crossing (*u*).

By 24 & 25 Vict. c. 96, s. 100, negotiable securities are excepted from the general rule as to the restoration of stolen property on the conviction of the thief.

v. *Union Bank of London*, 17 Q. B. D. 705. The following is a list of the chief decisions on the subject:—INSTRUMENTS HELD NEGOTIABLE: *Miller* v. *Race*, 1 Burr. 452 (bank notes); and see the notes to that case, 1 Smith's Leading Cases, 9th ed. 491; *Solomons* v. *Bank of England*, 13 East, 135; *Grant* v. *Vaughan*, 3 Burr. 1516 (cheques on bankers); *Collins* v. *Martin*, 3 B. & P. 649; *Peacock* v. *Rhodes*, Dougl. 636; *Wookey* v. *Pole*, 4 B. & Ald. 1 (exchequer bill in blank); *Lang* v. *Smyth*, 7 Bing. 284 (Neapolitan bonds, with coupons to bearer); *Goodwin* v. *Robarts*, 1 App. Cas. 476 (scrips of foreign loan); *Rumball* v. *Metropolitan Bank*, 2 Q. B. D. 196 (scrip certificates); *London & Co. Bank* v. *London & River Plate Bank* (1889), 61 L. T. N. S. 37 (Egyptian bonds, &c.). NOT NEGOTIABLE: *Glyn* v. *Baker*, 13 East, 509 (East India bonds before the statute of 51 Geo. 3, c. 64, s. 4); *Taylor* v. *Kymer*, 3 B. & Ad 321; *Partridge* v. *Bank of England*, 9 Q. B. 396 (dividend warrants); *Dixon* v. *Bovill*, 3 Macq. 1 (iron scrip notes); *Crouch* v. *Crédit Foncier Co.*, L. R. 8 Q. B. 374; *London and County Banking Co., Limited* v. *London and River Plate Bank*, 20 Q. B. D. 232 (share certificates of an American railway with a blank power of transfer); *Colonial Bank* v. *Hepworth*, 36 Ch. D. 36; *Williams* v. *Colonial Bank*, 38 Ch. D. 388 (share certificates with blank indorsement); *Picker* v. *London and County Banking Co.*, 18 Q. B. D. 515 (Prussian Consolidated Bonds). Compare the remarks of *Lindley*, L. J., in *Williams* v. *London Chartered Bank of Australia*, 38 Ch. D. at p. 406.

(*s*) See *Glyn* v. *Baker*, 13 East, 509; *Crouch* v. *Crédit Foncier of England*, L. R. 8 Q. B. 374; *Taylor* v. *Kymer*, 3 B. & Ad. 321; *Taylor* v. *Trueman*, M. & M. 453; *Thompson* v. *Dominy*, 14 M. & W. 403; *Partridge* v. *The Bank of England*, 9 Q. B. 396. See *Ford* v. *Hopkins*, 1 Salk. 283; *Ekins* v. *Macklish*, Ambl. 184; and *Turner* v. *Cruikshank*, there cited.

(*t*) *Sigourney* v. *Lloyd*, 8 B. & C. 622; Bills of Exchange Act, ss. 34, 35.

(*u*) Bills of Exchange Act, ss. 76–81.

BOOK THE THIRD.

MERCANTILE CONTRACTS.

CHAPTER I.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

SECT. 1. *Their Definition, Requisites, and Form.*
2. *Parties to.*
3. *Negotiation of.*
4. *Acceptance.*
5. *Presentment.*
6. *Notice.*
7. *Payment.*
8. *Resistance against Payment.*
9. *Foreign Bills.*
10. *Remedy on lost Bills and Notes.*

SECTION I.—*Their Definition, Requisites, and Form.*

Their definition, requisites, and form.

AN Act to codify the law relating to bills of exchange, cheques, and promissory notes (The Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61), was passed on the 18th August, 1882, and came at that date into operation. It includes the greater portion of the common and statute law relating to the subject, and it assimilates the law of England and Scotland. Some new terms, such as "holder in due course" (sect. 29), are introduced and defined. The statute makes a few alterations in the law, and it sets at rest several doubtful points. Except so far as inconsistent with the express provisions of the Act, the rules of the common law continue to apply (*a*).

(*a*) Sect. 97 (2). See as to the construction of the statute, Lord *Blackburn* in *McLean* v. *Clydesdale Banking Co.*, 9 App. Cas. at p. 106; and *Leeds and County Bank* v. *Walker*, 11 Q. B. D. 84; and *Vagliano* v. *Bank of England*, see infra.

Their definition, requisites, and form.

A bill of exchange is defined as follows:—

"*A bill of exchange* is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer" (*b*).

He who makes or gives the order is called the *drawer;* he to whom it is addressed to pay is called the *drawee*, and, if he accepts it in the manner specified in sect. 17 of the Act, the *acceptor*. *Bearer* is defined by sect. 2 as "the person in possession of a bill or note which is payable to bearer"; "*holder*" is defined by sect. 2 as "the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof," and "*holder in due course*," by sects. 29 (1) and 30 (2), "as one who has taken a bill complete and regular on the face of it, before it was overdue and without notice that it had been previously dishonoured, in good faith and for value, and without notice at the time the bill was negotiated to him of any defect in the title of the person who negotiated it."

A promissory note is thus defined:—

"An unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money, to or to the order of a specified person or to bearer.

"An instrument in the form of a note payable to maker's order is not a note within the meaning of this section, unless and until it is indorsed by the maker" (*c*).

He who promises to pay is called the *maker*, he to whom the promise is made the *payee*. A bank note is a promissory note issued by a banker and payable on demand (*d*). A cheque is defined to be "a bill of exchange drawn on a banker payable on demand" (*e*).

Bills of exchange derived their peculiar properties from the custom of merchants; promissory notes from the stat. 3 & 4 Ann.

(*b*) Sect. 3 (1). See *Vagliano* v. *Bank of England*, 23 Q. B. D. p. 247.

(*c*) Sect. 83 (1).

(*d*) As to the differences between bankers' notes and promissory notes, see *Lichfield Union* v. *Greene*, 26 L. J. Ex. at p. 142; *Leeds and County Bank* v. *Walker*, 11 Q. B. D. 84.

(*e*) Sect. 73.

c. 9 (*f*), which placed them on the same footing with bills of exchange. That Act was passed in consequence of the refusal of Lord *Holt*, C. J., to concede to the custom which had sprung up among merchants, of treating promissory notes as negotiable, the effect which would, at a somewhat later period, probably have been attributed to it. His Lordship, departing, perhaps, somewhat from that excellent good sense which usually characterised him, treated the endeavour to uphold the negotiability of notes with some indignation, saying that it proceeded from the obstinacy and opinionativeness of the merchants, who were endeavouring to set the law of Lombard Street above the law of Westminster Hall (*g*).

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Although a promissory note, while in its original shape, bears no resemblance to a bill, yet when indorsed it is similar to one; for then it is an order by the indorser of the note upon the maker to pay to the indorsee. The indorser is, as it were, the drawer; the maker, the acceptor; and the indorsee, the payee (*h*). The reader, bearing this similitude in his mind, and the exceptions stated in sect. 89 (3), will easily be able to apply to notes the decisions hereinafter cited concerning bills, and *vice versâ*.

Sect. 55 (1), states that the drawer of a bill by drawing it—

"(a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured, he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken;

"(b) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse."

If the drawee refuse to accept, the contract is broken, and the Statute of Limitations begins to run from that period (*i*), for the

(*f*) Repealed: 45 & 46 Vict. c. 61, s. 96.

(*g*) *Clerke* v. *Martin*, 2 Ld. Raym. 757. See remarks of *Cockburn*, C. J., in *Goodwin* v. *Robarts*, L. R. 10 Ex. at p. 349.

(*h*) Sect. 89 (1); see *Heylyn* v. *Adamson*, 2 Burr. 669; *Carlos* v. *Fancourt*, 5 T. R. 482; and *Tindal*, C. J., in *Gibb* v. *Mather*, 2 Cr. & J. at pp. 262, 263.

(*i*) *Whitehead* v. *Walker*, 9 M. & W. 506. In one case, *Cooper* v. *Turner*, 2 Stark. 497, the lapse of thirteen years was held sufficient to raise a presumption of the claim being satisfied. But this is not a presumption of law: *Brown* v. *Rutherford*, 14 Ch. D. p. 690.

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engagement is not a double one; *first*, that the drawee shall accept upon presentment for acceptance; and *secondly*, pay upon presentment for payment; but single, namely, in the case of a bill payable after sight, that the drawee shall, upon the bill being presented to him in a reasonable time after date, accept the same, and having accepted, shall pay it when duly presented for payment (*k*); and in the case of a bill payable after date, that the drawee shall accept it, if it is presented to him before the time of payment, or if it is not presented for acceptance at all, then that he shall pay it when duly presented for payment (*l*).

Time runs in favour of an indorser or drawer from the time when he becomes liable to an action at the suit of the holder, that is, in general, when notice of non-acceptance or non-payment is given. In the case of a cheque payable on demand or undated, time runs from the date when it is given (*m*). But when a note is payable three months after demand or notice, time runs from the date at which it is payable. With reference to a note payable three months after demand, the Court of Appeal decided that the admission by the payee of the receipt of interest was an acknowledgment that money was payable, and that there had been a demand, and that the statute ran from the date of the payment of the interest (*n*).

No particular form of words is required to constitute a bill or note (*o*); and, if it appear doubtful for which of the two any instrument was intended, it may be treated as either (*p*). But there must be an *order* or *promise* to pay—the mere *acknowledgment* of a debt, such as an I O U, is not a promissory note (*q*);

(*k*) *In re Boyse*, 33 Ch. D. at p. 623.

(*l*) Ibid.; *Whitehead* v. *Walker*, 9 M. & W. 506.

(*m*) *Castrique* v. *Bernabo*, 6 Q. B. 498; *Robinson* v. *Hawksford*, 9 Q. B. 52; *In re Bethell*, 34 Ch. D. 561; *Thorpe* v. *Coombe*, 8 D. & R. 347; *Broddelius* v. *Grischotti*, 14 Sc. Sess. Cas. 4th series, 536.

(*n*) *Brown* v. *Rutherford*, 14 Ch. D. 687.

(*o*) *Chadwick* v. *Allen*, Str. 706; *Morris* v. *Lee*, Ld. Raym. 1396; Str. 629; *Shuttleworth* v. *Stephens*, 1 Camp. 407; *Gray* v. *Milner*, 8 Taunt. 739; *Starke* v. *Cheeseman*, Carth. 509; *Dehers* v. *Harriot*, Show. 163; *Robinson* v. *Bland*, 2 Burr. 1077; *Ridout* v. *Bristow*, 1 C. & J. 231; *Green* v. *Davies*, 4 B. & C. 235; *Block* v. *Bell*, 1 M. & R. 149; *Ellison* v. *Collingridge*, 9 C. B. 570; *In re Imperial Land Co. of Marseilles*, L. R. 11 Eq. 478.

(*p*) *Edis* v. *Bury*, 6 B. & C. 433. See *Dickenson* v. *Teague*, 4 Tyr. 450; *Block* v. *Bell*, 1 M. & Rob. 149; *Lloyd* v. *Oliver*, 18 Q. B. 471.

(*q*) *Fisher* v. *Leslie*, 1 Esp. 426;

nor does a supplication to the drawee that he will pay, amount to a bill of exchange: for that purpose there must be an *order* (*r*). Again, it must be for the payment of *money* alone (*s*). Thus, an order *or* promise to pay "in cash *or* Bank of England notes," was formerly held insufficient (*t*). And that money must be a

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Childers v. *Boulnois*, 1 Dowl. & R. N. P. C. 8; *Ellis* v. *Ellis*, Gow, 216; *Israel* v. *Israel*, 1 Camp. 499. In *Cashborne* v. *Dutton*, Selw. N. P., 13th edit. 329, the following instrument was, after solemn argument, held to be a good note:—

"I do acknowledge myself to be indebted to A. in £ *to be paid* on demand for value received." The words *to be paid* being held to amount to a promise to pay.

"I have received the imperfect books, which, together with the cash overpaid on the settlement of your account, amounts to 80*l.*, which sum I will pay in two years," was held to be a note: *Wheatley* v. *Williams*, 1 M. & W. 533. "John Mason, 18th February, 1836, borrowed of his sister M. A. M., the sum of 14*l.* in cash as per loan, in promise of payment of which I am truly thankful for and shall never be forgotten by me, John Mason, your affectionate brother, 14*l.*" Held to be *a note: Ellis* v. *Mason*, 7 Dowl. 598. But "I have received the sum of 20*l.* which I borrowed from you, and I have to be accountable for the said sum with interest," was held to be an agreement, *not a note: Horne* v. *Redfearn*, 4 Bing. N. C. 433. So,

"11th November, 1839.

"I O U 45*l.* 13*s.*, which I borrowed of Mrs. Melanotte, and to pay her five per cent. till paid.

"Robert Teasdale,"

was held *not a note*, and not to require a stamp as an agreement: *Melanotte* v. *Teasdale*, 13 M. & W. 216; S. P. *Cory* v. *Davie*, 14 C. B. N. S. 370.

"Memorandum. Mr. Sibree has this day deposited with me 500*l.* on the sale of 10,300*l.* 3 per cent. Spanish, to be returned on demand.

"James T. Tripp,"

was held *not to be a note: Sibree* v. *Tripp*, 15 M. & W. 23. And see *White* v. *North*, 3 Exch. 689.

"11th September, 1839.

"I undertake to pay to Mr. Robert Jarvis the sum of 6*l.* 4*s.* for a suit of clothes *ordered* by Daniel Page.

"S. W. Wilkins."

Held a guarantee, *not a note: Jarvis* v. *Wilkins*, 7 M. & W. 410; Baron *Parke* said, that had "*supplied*" been inserted instead of "*ordered*" it would have been a *note*.

"At twelve months after date I promise to pay R. & Co. 500*l.*, to be held by them as a collateral security for any monies now owing them by J. M., which they may be unable to receive on realizing the securities they now hold, and others which may be placed in their hands by him."

Held *not a note: Robins* v. *May*, 11 Ad. & E. 213. See further, *Brooks* v. *Elkins*, 2 M. & W. 74, and *Mortgage Ins. Corp. Limtd.* v. *Commissioners of I. Revenue*, 21 Q. B. D. 352.

(*r*) Sect. 3 (1). *Little* v. *Slackford*, M. & M. 171. A mere authority to pay is not a bill: *Norris* v. *Solomon*, 2 M. & Rob. 266; *Russell* v. *Powell*, 14 M. & W. 418. And see *Hamilton* v. *Spottiswoode*, 4 Exch. 200. But see *Lloyd* v. *Oliver*, 18 Q. B. 471.

(*s*) Sect. 3 (1). *Martin* v. *Chauntry*, Str. 1271; *Moor* v. *Vanlute*, B. N. P. 272; *Ex parte Imeson*, 2 Rose, 225; *Ex parte Davidson*, Buck. 31; *R.* v. *Wilcox*, Bayl. 6th edition, p. 11; *Bolton* v. *Dugdale*, 4 B. & Ad. 619.

(*t*) *Ex parte Imeson*, 2 Rose, 225. But now see 3 & 4 Will. 4, c. 98, s. 6,

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certain sum: for a promise to pay J. E. "65*l.*, with all other sums that may be due to him," or to pay 13*l.*, *and all fines according to rule*, is not a promissory note (*u*). Moreover, the money must be payable *unconditionally*. If it contain any condition precedent, or defeasance, or be payable at an uncertain time, or out of an uncertain fund, it is no bill or note (*x*). In one case on this subject, the instrument was in the following form:—

"£1,200. "*Warrington, 4th March*, 1824.

"On demand, we promise to pay to Mr. George Clarke, or his order, Twelve Hundred Pounds, for value received in stock of ale, brewing vessels, &c., this being intended to stand against me, the undersigned Mary Perceval, as a set-off for that sum left me in my father's will above my sister Ann's share.

Thomas Perceval.

(Witness) *William Hall.* *Mary Perceval.*"

It was held that the 1,200*l.* was not payable *at all events*, and the instrument therefore not a promissory note (*y*).

"An order to pay out of a particular fund is not unconditional (*z*) within the meaning of this section (sect. 3); but an unqualified order to pay, coupled with an indication of a particular fund out of which the drawee is to reimburse himself, or a particular account to be debited with the amount, or a statement of the transaction which gives rise to the bill, is unconditional" (*a*).

An order by B. to the Bank of England "Please pay to my order the sum of 7,000*l.* sterling, which sum is on account on

continued by 7 & 8 Vict. c. 32, s. 27, which makes Bank of England notes legal tender.

(*u*) *Smith* v. *Nightingale*, 2 Stark. 375; *Ayrey* v. *Fearnsides*, 4 M. & W. 168.

(*x*) Sect. 3 (1). *Colehan* v. *Cooke*, Willes, at p. 396; *Appleby* v. *Biddulph*, B. N. P. 272; *Roberts* v. *Peake*, Burr. 323; *Beardsley* v. *Baldwin*, Str. 1151; *Josselyn* v. *Lacir*, 10 Mod. 294, 316; *Haydock* v. *Lynch*, Lord Raym. 1563; *Dawkes* v. *Deloraine*, W. Bl. 782; *Jenny* v. *Herle*, Lord Raym. 1361; Str. 591; *Hill* v. *Halford*, 2 B. & P. 413; *Leeds* v. *Lancashire*, 2 Camp. 204; *Hartley* v. *Wilkinson*, 4 Camp. 127; 4 M. & S. 25; *Williamson* v. *Bennett*, 2 Camp. 417; *Crowfoot* v. *Gurney*, 9 Bing. 372; *Clarke* v. *Percival*, 2 B. & Ad. 660; *Worley* v. *Harrison*, 3 Ad. & E. 669; *Wheatley* v. *Williams*, 1 M. & W. 533; *Drury* v. *Macaulay*, 16 M. & W. 146; *Moffat* v. *Edwards*, Car. & M. 16; *Alexander* v. *Thomas*, 16 Q. B. 333; *Crouch* v. *Crédit Foncier of England*, L. R. 8 Q. B. 374.

(*y*) *Clarke* v. *Percival*, 2 B. & Ad. 660. See also *Robins* v. *May*, 11 Ad. & E. 213.

(*z*) *Ex parte Moss*, 14 Q. B. D. 310.

(*a*) Sect. 3 (3); *In re Boyse*, 33 Ch. D. 612.

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the dividends and interest due on the capital and dividends registered in the books (of the Bank) in the name of C. and B.," was held a bill of exchange (*b*).

An order *by the freighter* of a ship to pay money *on account of freight* (*c*), an order to pay so much as *the drawer's quarter's half-pay by advance* (*d*), or to pay 25*l.*, *a portion of value deposited as security for the payment thereof* (*e*), or I promise to pay M. A. on demand £—— *by giving up clothes and papers* (*f*), or *as per memorandum of agreement* (*g*), or *when J. S. comes of age, to wit, June* 12, 1750 (*h*), or *six weeeks after the death of A. B.* (*i*),— have been held payable at all events, and therefore good; for, to use the words of *Willes*, C. J., in the last case, "If a bill of exchange be made payable at never so distant a day, yet if it be a day that must come, it is no objection to the bill." Therefore a note payable *within two months after his Majesty's ship A. B. shall be paid off*, is good; for, it is said, the paymaster being Government, it is morally certain that payment will be made (*k*).

Sect. 88 provides that the maker of a note by making it engages that he will pay it according to its tenour; and he is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

A bill of exchange must be in writing, which the interpretation clause of the Act declares includes print (*l*). It may be partly written or partly printed or wholly printed. The *signa-*

(*b*) *In re Boyse*, 33 Ch. D. 612.

(*c*) *Pierson* v. *Dunlop*, Cowp. 571, for it admits so much freight to be due. It was held that an order from the owner to the freighter to pay so much on account of freight, is no bill: *Banbury* v. *Lisset*, Str. 1211. But this case seems irreconcileable with *Griffin* v. *Weatherby*, L. R. 3 Q. B. 753, where an order to pay so much "on account of moneys advanced by me for the Isle of Man Slate Quarry, &c.," was held to be a bill of exchange.

(*d*) *M'Cleod* v. *Snee*, Ld. Raym. 1481.

(*e*) *Haussoullier* v. *Hartsinnk*, 7 T. R. 733.

(*f*) *Dixon* v. *Nuttall*, 6 C. & P. 320. See also *Shenton* v. *James*, 5 Q. B. 199: *Fox* v. *Frith*, Car. & M. 502.

(*g*) *Jury* v. *Barker*, E. B. & E. 459. But it did not appear that the agreement rendered the payment uncertain.

(*h*) *Goss* v. *Nelson*, Burr. 226.

(*i*) *Colehan* v. *Cooke*, Willes, 393; *Roffey* v. *Greenwell*, 10 Ad. & E. 222.

(*k*) *Andrews* v. *Franklin*, Str. 24; *Colehan* v. *Cooke*, Willes, 399. But see s. 11 (2). "I promise to pay, *or* cause to be paid," is a good note, the two expressions meaning the same thing: *Lovell* v. *Hill*, 6 C. & P. 238.

(*l*) Sect. 2.

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ture of any person signing a bill may be by a mark (*m*). A person signing need not do so with his own hand; it is sufficient if the signature is written on the bill by another person by or under his authority; and in the case of a corporation it is sufficient that the instrument be sealed with the corporation seal (*n*). An instrument is not the less a note because it contains a memorandum that the maker has deposited title deeds with the payee as a collateral security (*o*). But an instrument, the effect of which was—I promise to pay 600*l.* by instalments, and I agree to set off 95*l.*, was held not to be a note; for besides its complexity, the 95*l.* could not be payable to an indorsee (*p*).

"An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect" (*q*).

"(1) When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable" (*r*).

"(4) A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable."

This adopts the rule of Scotch law on the subject. Before the Act a bill or note without the addition of words authorizing transfer was not negotiable (*s*).

"Where a bill purports to be indorsed conditionally, the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not" (*t*).

This alters the old law, according to which an indorsement, if written on a bill or note *at the time of making it*, and rendering it payable only on certain conditions, deprived it of the character of negotiability, and turned it into an agree-

(*m*) *George* v. *Surrey*, M. & M. 516; *Baker* v. *Dening*, 8 A. & E. 94.

(*n*) Sect. 91 (2).

(*o*) Sect. 83 (3); *Wise* v. *Charlton*, 4 Ad. & E. 786; *Fancourt* v. *Thorne*, 9 Q. B. 312.

(*p*) *Davies* v. *Wilkinson*, 10 Ad. & E. 98.

(*q*) Sect. 11.

(*r*) Sect. 8 (1).

(*s*) *Plimley* v. *Westley*, 2 Bing. N. C. 249.

(*t*) Sect. 33.

ment as between the parties privy to it (*u*). The indorsement on a note of a mere reference to an agreement for the purpose of earmarking it as the note named in that agreement, does not make it conditional (*v*). Nor can such an instrument ever be rendered conditional by a contemporaneous *parol* agreement; for it is one of the first principles of the law of evidence, that oral testimony shall never be permitted to vary or contradict the terms of any written contract (*x*). A written contemporaneous agreement, also, by the payee with the makers and third persons, that payment shall be postponed, will not control the operation of a note (*y*). But it may be shown, as between the immediate parties to the bill and others than a holder in due course, that the delivery was conditional for a special purpose only, and not with the intention of passing the property (*z*).

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Although conformity with one of the above definitions is in general strictly required, yet if a word be fraudulently inserted by the maker or drawer, in order to prevent the instrument from acquiring the legal properties of a bill or note, as where the maker of a note worded it thus—"I promise *not* to pay," the Court will reject the word so fraudulently introduced, and read the instrument without it (*a*).

"(1) An inland bill is a bill which is, or on the face of it purports to be, both drawn and payable within the British Islands, or drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill" (*b*).

(*u*) *Robertson* v. *Kensington*, 4 Taunt. 30; *Leeds* v. *Lancashire*, 2 Camp. 205.

(*v*) *Brill* v. *Crick*, 1 M. & W. 232. See *Cholmeley* v. *Darley*, 14 M. & W. 344.

(*x*) *Foster* v. *Jolly*, 1 C. M. & R. 703; *Besant* v. *Cross*, 10 C. B. 895.

(*y*) *Webb* v. *Spicer*, 13 Q. B. 886; *Salmon* v. *Webb*, 3 H. L. Ca. 510; *Abrey* v. *Crux*, L. R. 5 C. P. 37. And see *Ford* v. *Beech*, 11 Q. B. 852. But now it will afford a good defence against a party to, or cognizant of it, when he took the note.

(*z*) Sect. 21 (2); *Castrique* v. *Buttigieg*, 10 Moore, P. C. 94.

(*a*) Sect. 64. Per Lord *Macclesfield*, cited by Lord *Hardwicke* in *Simpson* v. *Vaughan*, 2 Atk. at p. 32; Bayley, 6th edit. p. 6; *Allan* v. *Mawson*, 4 Camp. 115.

(*b*) Sect. 4 (1), which reproduces the repealed 19 & 20 Vict. c. 97, s. 7. This does not regulate the stamp, as to which, see *post*, *Griffin* v. *Weatherby*, L. R. 3 Q. B. 753, in which a bill drawn in Scotland upon a resident in the Isle of Man was held to be a foreign bill in the sense of the Stamp Act. Before that Act, a bill drawn in England on a person residing abroad, but payable in England, was an inland bill: *Amner* v. *Clarke*, 2 C. M. & R. 468.

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FORM OF AN INLAND BILL OF EXCHANGE.

£100 : 0 : 0 *London, January* 1, 1889.

[Stamp.] *At sight,* [*or* on *demand, or at* —— *days after sight, or at* —— *days after date*], *pay to Mr.* ——, *or order* [*or bearer*], *One Hundred Pounds, for value received.*

JOHN WOOD.

To Mr. Thomas Jones, Merchant,
at Liverpool.

FORM OF A PROMISSORY NOTE.

£100 : 0 : 0 *London, January* 1, 1889.

[Stamp.] *Two months after date I promise to pay to Mr.* ——, *or order, One Hundred Pounds, for value received.*

JOHN WOOD.

The principal parts of these instruments are the *amount, stamp, date, time for payment, place of payment, designation of payee, name of drawer, and name of drawee.* We will consider these in order.

Amount.—It is usual to specify this in figures on the upper left-hand corner of the instrument as well as in writing in the body. Where a difference appears between the words and figures, the Act (*b*) states, in accordance with the decision of the Court of Common Pleas in *Saunderson* v. *Piper* (*c*), that the sum denoted by the words is the amount payable.

A bill of exchange may now be drawn for any amount; 48 Geo. 3, c. 88, s. 2, which made void all negotiable bills or notes made in England, if for less than 20*s.*, is repealed by the second schedule of the Bills of Exchange Act. A promissory note for less than 20*l.* must by 7 Geo. 4, c. 6, s. 10, be payable where issued, although it may also be payable elsewhere. And promissory notes in England for less than 5*l.*, if payable to bearer on demand, are void (*d*).

(*b*) Sect. 9 (2).

(*c*) 5 Bing. N. C. 425. See *Garrard* v. *Lewis*, 10 Q. B. D. 30; *Hutley* v. *Marshall*, 46 L. T. N. S. 186, as to effect of marginal words in bills.

(*d*) See Chalmers on Bills of Exchange, 3rd ed. p. 244.

Their definition, requisites, and form.

Stamp.—The stamp is an essential part of every inland bill and note, and formerly though a *note* purported to have been drawn abroad, and were in the hands of an innocent holder, yet any party might show that it was actually made in this country, and insist upon the want of a stamp (*e*). If unstamped, a bill or note is inadmissible in evidence (except in criminal proceedings), and unavailable, even as an admission of a debt from one of the parties therein mentioned to the other (*f*). The duty of 1*d.* on a bill for the payment of money on demand may be denoted by an adhesive stamp (*g*), which is to be cancelled by the person by whom the bill is signed before he delivers it out of his custody (*h*). But in all other cases the paper on which a bill or note made in Great Britain, unless (*i*) it purports to be made abroad, is written, must have the stamp *previously* impressed upon it, for if that be neglected, it cannot afterwards be stamped (*k*), except in the single case of its having been impressed with a stamp of sufficient amount but of improper denomination, when it may be done upon payment of a penalty (*l*). Where stamp duty is payable, its amount will not be increased by the circumstances of interest being reserved from the date of the bill or note (*m*), or even from a day prior to the date (*n*).

A bill or note *drawn* abroad, or at sea, requires no stamp under any English Act of Parliament (*o*). Thus, where a person

(*e*) *Jordaine* v. *Lashbrooke*, 7 T. R. 601; *Steadman* v. *Duhamel*, 1 C. B. 888.

(*f*) *Wilson* v. *Vysar*, 4 Taunt. 288; *Jardine* v. *Payne*, 1 B. & Ad. 663; *Cundy* v. *Marriott*, 1 B. & Ad. 696; *Parmiter* v. *Parmiter*, V.-C. *Wood*, 30 L. J. Ch. 508. 33 & 34 Vict. c. 97, s. 17. A note was not stamped at the time of presentation, but was so at the time of action brought; the Court of Sessions held that the holder might nevertheless sue: *Brodellius* v. *Grisechotti*, 14 Sc. Sess. Cas. 4th ser. 536. This is in accordance with *Wright* v. *Riley*, Peake, 173. But compare *Green* v. *Davis*, 1 C. & P. 451.

(*g*) 33 & 34 Vict. c. 97, s. 50: *In re Boyse*, 33 Ch. D. at p. 616, where it was held that s. 51 (2) applied to a bill drawn abroad. But *quære*.

(*h*) See also 45 & 46 Vict. c. 72, s. 14, as to writing initials over the stamp.

(*i*) 33 & 34 Vict. c. 97, s. 52.

(*k*) 33 & 34 Vict. c. 97, s. 23; *Wright* v. *Riley*, Peake, 173; *Roderick* v. *Hovil*, 3 Camp. 103; *Rapp* v. *Allnutt*, Id. 106, n.; *Green* v. *Davies*, 4 B. & C. 235; *Abrahams* v. *Skinner*, 12 Ad. & E. 763.

(*l*) 33 & 34 Vict. c. 97, s. 53.

(*m*) *Pruessing* v. *Ing*, 4 B. & Ald. 204.

(*n*) *Wills* v. *Noott*, 4 Tyr. 726.

(*o*) *Boehm* v. *Campbell*, Gow, N. P.

Their definition, requisites, and form.

resident at Antwerp desired his correspondent in England to fill up a bill of exchange, and return it to him, which was done, and he then signed it as drawer at Antwerp, this bill was held to have been virtually drawn abroad, and to require no stamp (*p*). But if expressed to be payable, or it be actually paid, or endorsed, or in any manner negotiated in the United Kingdom, every person into whose hands it shall there come unstamped, before he presents it for payment, indorses, transfers, or in any manner negotiates or pays it, must affix on it and cancel an *ad valorem* adhesive stamp (*q*). So, if a bill or note purport to be made abroad, though in reality it be made in Great Britain, an adhesive stamp must be used (*r*). The bill will be presumed to have been stamped at the proper time (*s*). Though the foreign country in which a bill is issued may have a law requiring it to bear a particular stamp, it will not be invalid solely on that account (*t*).

Foreign bills are usually drawn in sets; it is only necessary that one of the set should be duly stamped (*u*). The whole constitute one bill (*x*).

The following are the rates of duty on bills and notes (*y*), except bank notes, which bear a different rate :—

	£	*s.*	*d.*
Bill of Exchange payable on demand	0	0	1
Bill of Exchange of any other kind whatsoever, and Promissory Note of any kind whatsoever, drawn or expressed to be payable, or actually paid or endorsed,			

C. 56; *Snaith* v. *Mingay*, 1 M. & S. 87; *Crutchly* v. *Mann*, 5 Taunt. 529; see *Ximenes* v. *Jacques*, 1 Esp. 311; *Hamelin* v. *Bruck*, 9 Q. B. 306.

(*p*) *Boehm* v. *Campbell*, ubi sup. See *Abrahams* v. *Skinner*, 12 Ad. & E. 763; *Snaith* v. *Mingay*, and *Hamelin* v. *Bruck*, ubi sup.

(*q*) 33 & 34 Vict. c. 97, s. 51, Sched. *Pooley* v. *Brown*, 11 C. B. N. S. 566; *Griffin* v. *Weatherby*, L. R. 3 Q. B. 753. But not for acceptance: *Sharples* v. *Rickard*, 2 H. & N. 57.

(*r*) 33 & 34 Vict. c. 97, ss. 51, 52.

(*s*) *Bradlaugh* v. *De Rin*, L. R. 3 C. P. 286.

(*t*) Bills of Exchange Act, s. 72 (1) (a), in accordance with *James* v. *Catherwood*, 3 D. & R. 190. See *Alves* v. *Hodgson*, 7 T. R. 241, and the distinction, as suggested by *Rolfe*, B., in *Bristow* v. *Sequeville*, 5 Ex. 275, between cases in which the Stamp Laws make an unstamped instrument void, and those in which they make it inadmissible in evidence.

(*u*) 33 & 34 Vict. c. 97, s. 55: unless the parts be issued or negotiated apart.

(*x*) Sect. 71 (1).

(*y*) See the schedule to 33 & 34 Vict. c. 97.

	£	s.	d.
or in any manner negotiated in the United Kingdom, where the amount, or value of the money for which the bill or note is drawn or made does not exceed £5 .	0	0	1
Exceeds £5, and does not exceed £10	0	0	2
,, £10 ,, ,, £25	0	0	3
,, £25 ,, ,, £50	0	0	6
,, £50 ,, ,, £75	0	0	9
,, £75 ,, ,, £100	0	1	0
,, £100.— for every £100, and also for any fractional part of £100, of such amount or value	0	1	0

Their definition, requisites, and form.

There is a proviso in stat. 9 Geo. 4, c. 14, usually called Lord Tenterden's Act, sect. 8, which enacts that "no memorandum or other writing made necessary by this Act shall be deemed to be an *agreement* within the meaning of any statute relating to the duties of stamps." Under this proviso, however, an unstamped note cannot be given in evidence for the purpose of *avoiding* the statute (*a*), though an unstamped agreement may (*b*).

There are some instruments, which, though not properly speaking bills or notes, because payable out of an uncertain fund, or upon a condition or contingency, yet require stamps by the words of the statute 33 & 34 Vict. c. 97, ss. 48 and 49 (*c*). If coming within the words of this section, and not a mere assignment of a debt, such instruments cannot be stamped after being made (*d*).

With regard to drafts, orders, and cheques, these are bills of exchange for the purpose of the Stamp Act. Therefore, if they be payable on demand they bear the stamp duty of 1*d.*, which may be denoted by an adhesive stamp (*e*). If payable otherwise, they must be stamped beforehand with an *ad valorem* stamp.

(*a*) *Jones* v. *Ryder*, 4 M. & W. 32.

(*b*) *Morris* v. *Dixon*, 4 Ad. & E. 845.

(*c*) See *Hutchinson* v. *Heyworth*, 9 Ad. & E. 375; *Jones* v. *Simpson*, 2 B. & C. 318; *Emly* v. *Collins*, 6 M. & S. 144; *Lord Braybrooke* v. *Meredith*, 13 Sim. 271; *Firbank* v. *Bell*, 1 B. & Ald. 36; *Butts* v. *Swann*, 2 B. & B. 78; *Mortgage Ins. Corp.* v. *Commissioners of I. Revenue*, 20 Q. B. D. 645.

(*d*) *Ex parte Shellard*, L. R. 17 Eq. 109; *Buck* v. *Robson*, 3 Q. B. D. 686.

(*e*) 33 & 34 Vict. c. 97, s. 48. Post-dated cheques, if tendered in evidence after the date they bear, are only subject to 1*d.* duty: *Gatty* v. *Fry*, 2 Ex. D. 265. Such cheques are valid: *Hitchcock* v. *Edwards*, 6C L. T. N. S. 636.

Their definition, requisites, and form.

Date.—A bill is not invalid because it is not dated (*f*). The date of a bill, acceptance, or indorsement, is presumed, until the contrary be proved, to be the true date (*g*). The holder of a bill, expressed to be payable at a fixed period after date, and issued undated, or of a bill payable at a fixed period after sight, with the acceptance undated, may insert the true date of the issue or acceptance (*h*). If the holder in good faith and by mistake inserts a wrong date (*i*), and in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course, the bill is payable as if the date so inserted had been the true date (*j*).

Time for Payment.—When the word "month" is used in specifying the time of payment, it is, as in other mercantile contracts, to be understood as a calendar month (*k*). The time for payment is generally expressed to be *on demand*, or *at sight*, or a certain time *after sight*, or a certain time *after date*. The effect of these and other words in regulating the time at which the instrument should be presented for payment will be discussed hereafter, when we come to treat, in the fifth section, on presentments. If no time of payment be specified, the instrument is payable *upon demand* (*l*). The rule as to computing time of payment, in case of a bill not payable on demand, is as follows:—

"(1.) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace. Provided that (a) When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by royal proclamation as a public fast, or thanksgiving day, the bill is, except in the case hereinafter provided for, due and payable on the preceding business day. (b) When the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under

(*f*) Sect. 3 (4) (a).

(*g*) Sect. 13 (1). *Sinclair* v. *Baggaley*, 4 M. & W. 312.

(*h*) Sect. 12. *Gilles* v. *Bourne*, 6 M. & S. 73.

(*i*) *Roberts* v. *Bethell*, 12 C. B. 778.

(*j*) Sect. 12. *Way* v. *Hearne*, 32 L. J. C. P. 34; *Roberts* v. *Bethell*, 12 C. B. 778.

(*k*) Sect. 14 (4).

(*l*) Sect. 10 (1) (b); see *Whitlock* v. *Underwood*, 2 B. & C. 157. Such a bill includes a bill accepted or indorsed when overdue: s. 10 (2).

Their definition, requisites, and form.

the Bank Holidays Act, 1871, and Acts amending or extending it, or when the last day of grace is a Sunday, and the second day of grace is a bank holiday, the bill is due and payable on the succeeding business day (*m*).

"(2.) Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the day of payment (*n*).

"(3.) Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance, if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance, or for non-delivery" (*o*).

Place of Payment.—Although, in the forms above given, no particular place of payment is specified, and the omission does not invalidate the bill (sect. 3 (4) (c)), the drawee may, if he think proper, specify one; and if he does so a presentment must be made at the place mentioned in order to charge him or an indorser with the acceptor's default (*p*). Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, the bill must be there presented (*q*). Where no place of payment is specified, and no address given, the bill must be presented at the drawee's or acceptor's place of business, if known, or, if not, at his ordinary residence, if known (*r*).

In any other case it is properly presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence (*s*). The same rule holds good of a note, which in the body of it is made payable at a particular place; presentment at that place is necessary to make an indorser liable. It is otherwise when a place of payment is indicated by way of memorandum only; presentment at that place will render the indorser liable, but presentment to the maker elsewhere, if sufficient in other respects, will suffice (*t*).

(*m*) Sect. 14 (1).
(*n*) Sect. 14 (2).
(*o*) Sect. 14 (3); *Campbell* v. *French*, 6 T. R. 200.
(*p*) Sect. 45 (4) (a).
(*q*) Sect. 45 (4) (b).
(*r*) Sect. 45 (4) (c).
(*s*) Sect. 45 (4) (d).
(*t*) Sect. 87 (3). *Roche* v. *Campbell*, 3 Camp. 247.

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Designation of Drawee and Payee.—The drawee and payee must be named, or otherwise indicated with reasonable certainty (*t*). A bill or note may be drawn payable to a particular individual, or to a particular individual or his order, or generally to the bearer. Formerly, if an instrument were made payable to an individual without further words, it was not negotiable. But now a bill expressed to be payable to a specified individual is payable to him or his order, in the absence of the words indicating an intention that it should not be transferable (*u*). If it be so payable to an individual, he may transfer his right to a third party by indorsing his name upon it (*v*); if to *bearer* generally, or to a specified individual or *bearer*, it may be transferred by mere delivery; and in the last case it matters not, though the individual named never existed, and could not possibly exist. Thus a draft payable to the ship Fortune or bearer is negotiable by delivery (*x*). Where the bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty (*y*). If payable to a fictitious person or non-existing person (*z*) or his order, although no order can be made by the payee who is not in existence, yet if the instrument be issued into the world with an indorsement in blank (the nature of which will presently be explained), purporting to be made by such fictitious or non-existing person, it will, as against the drawer or maker, be considered payable to bearer; and so will a bill drawn in a fictitious name, as against an acceptor, who is precluded from denying the existence of the drawer (*a*). Explaining sect. 7,

(*t*) Sect. 6 (1): *R.* v. *Box*, 6 Taunt. 325; *Soares* v. *Glyn*, 8 Q. B. 24.

(*u*) Sect. 8 (4), (5).

(*v*) An instrument payable to the maker's order is valid: *Flight* v. *Maclean*, 16 M. & W. 51; and, if endorsed in blank, it is payable to bearer: *Wood* v. *Mytton*, 10 Q. B. 805.

(*x*) *Grant* v. *Vaughan*, Burr. 1516.

(*y*) Sect. 7 (1); *Cowie* v. *Stirling*, 6 E. & B. 333. But see *Holmes* v. *Jaques*, L. R. 1 Q. B. 376.

(*z*) *Vagliano* v. *Bank of England*, supra.

(*a*) Sect. 7 (3) and s. 54: *Tatlock* v. *Harris*, 3 T. R. 174; *Vere* v. *Lewis*, Id. 182; *Minet* v. *Gibson*, Id. 481; 1 H. Bl. 569; *Phillips* v. *Im Thurn*, L. R. 1 C. P. 464; 18 C. B. N. S. 694; *Collis* v. *Emett*, 1 H. Bl. 313; *Ashpitel* v. *Bryan*, 3 B. & S. 474; *Vagliano* v. *Bank of England*, supra.

sub-sect. 3, which re-enacts the common law, *Bowen*, L. J., said:— Their definition, requisites, and form.

"If the drawer is the person against whom the bill is to be treated as a bill payable to bearer, the term fictitious may be satisfied if it is fictitious as regards himself—or, in other words, fictitious to his knowledge. If the obligations of the acceptor are in question, and the acceptor is the person against whom the bill is to be so treated, fictitious must mean fictitious as regards the acceptor, and to his knowledge" (*b*).

A bill or note may be made payable to two or more payees jointly, or, in the alternative, to one of two or one or some of several payees, or to the holder of an office for the time being (*c*). A note may be made payable *to the trustees acting under A.'s will*, and parol evidence will be admissible to show who they are, and what the trusts are (*d*); and the same law applies to the case of a bill or note payable to the manager of a bank (*e*), or other person designated in like manner (*f*).

When a bill of exchange is wanting in any material particular—for example, when the drawer has not inserted the amount, or when the name of the payee is not inserted—the holder has, *primâ facie*, an authority to fill up the blank; in the former case he may insert any amount which the stamp will cover (*g*).

In *Montague* v. *Perkins* (*h*) the acceptor was held liable to an indorsee on a blank acceptance filled up after the lapse of twelve years. Though the possessor of a bill defective in any material particular has a *primâ facie* authority to fill up the omission any way he thinks fit, this must be done within a reasonable time (for this purpose a question of fact) and strictly in accordance with the authority given. The name may be inserted after the death of the acceptor; the authority to do so

(*b*) *Vagliano* v. *Bank of England*, 23 Q. B. D. p. 261.
(*c*) Sect. 7 (2).
(*d*) *Megginson* v. *Harper*, 2 C. & M. 322; *Holmes* v. *Jaques*, ubi sup.
(*e*) *Robertson* v. *Sheward*, 1 M. & G. 511.
(*f*) *Soares* v. *Glyn*, 8 Q. B. 24; *Holmes* v. *Jaques*, ubi supra.
(*g*) Sect. 20 (1).
(*h*) 22 L. J. C. P. 188.

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is not withdrawn by death (*i*). If negotiated to a holder in due course, such an instrument in his hand is effectual for all purposes. The blank stamped paper must be delivered for the purpose of being made a bill; delivered for any other purpose, or stolen or lost, such a paper, even if filled up, will be of no effect (*k*). In *Baxendale* v. *Bennett* (*kk*) the defendant gave his blank acceptance on a stamped paper, and authorized H. to fill in his name as drawer. H. returned the blank acceptance to the defendant in the same state as he received it. The defendant put it into a drawer of a writing table, which was unlocked. The bill was lost or stolen, and C. afterwards, without the defendant's authority, filled in his own name. An action on the bill was brought by the plaintiff as indorsee for value. It was held that the defendant was not liable on the bill on the ground, as stated by *Bramwell*, L. J., that the defendant was not estopped from setting up the true facts, and that if he had been guilty of negligence, it was not the proximate or effective cause of the fraud. Lord Justice *Brett* arrived at the same conclusion on the ground that after the acceptance by H. the defendant had never authorized any one to fill in a drawer's name, and that he had never issued the acceptance intending it to be used.

A bill may be drawn payable to the drawer himself; and such an instrument may be treated as a bill of exchange or note (*l*). And an instrument will not be less a bill, because, instead of being addressed to a particular person, it is addressed to a particular house, at least as far as the person who accepts it is concerned (*m*), nor because the word *at* is prefixed to the drawee's name (*n*); but, as has been already stated, the drawee must be named or otherwise indicated in the bill with

(*i*) Sect. 20 (1), (2); *Carter* v. *White*, 25 Ch. D. 666.

(*k*) Sect. 20 (1).

(*kk*) 3 Q. B. D. 525.

(*l*) Sect. 5 (2); *Miller* v. *Thomson*, 3 M. & G. 576, where a bill drawn by a bank on its own branch was treated as a note; and see where it was addressed to the payee, *Fielder* v. *Marshall*, 9 C. B. N. S. 606.

(*m*) *Gray* v. *Milner*, 8 Taunt. 739; explained in *Peto* v. *Reynolds*, 9 Ex. 410.

(*n*) *Shuttleworth* v. *Stephens*, 1 Camp. 407; *Allan* v. *Mawson*, 4 Camp. 115. See *R.* v. *Hunter*, R. & R. C. C. 511.

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reasonable certainty (*o*). If a person be so designated, he is the only person who can be made liable as acceptor, unless it be for honour (*p*). It is not, however, necessary that he should sign in the same name; and, therefore, if his wife or an agent, authorized so to accept, should sign her or his own name, this, it is said, will bind the drawee (*q*).

Name of Maker or Drawer.—The name of the maker or drawer must be inserted or subscribed by himself or his agent (*r*). As there must be no uncertainty about the payee, so neither must there be about the maker or drawer. Thus a note must not be signed A. B. *or else* C. B. (*s*). The name of the drawer may be inscribed before it is certain what will be the exact form of the instrument.

A bill or note is deemed to have been made on behalf of a registered joint stock company if it be made in its name (*t*) by any person acting under its authority, or if it be made by or on behalf or on account of the company by any person acting under its authority. This section confers no power to issue bills of exchange on companies which have no capacity to do so; it merely regulates the mode in which companies having such capacity become liable (*u*).

(*o*) Sect. 6 (1).

(*p*) *Davis* v. *Clarke*, 6 Q. B. 16; or one of several drawees, *Owen* v. *Van Uster*, 10 C. B. 318; *Mare* v. *Charles*, 5 E. & B. 978; *Steele* v. *McKirby*, 5 App. Cas. at p. 779. See in case of a bill on a limited joint-stock company, 25 & 26 Vict. c. 89, s. 42; *Penrose* v. *Martyn*, E. B. & E. 499, which was decided under the corresponding terms of s. 31 of 19 & 20 Vict. c. 47.

(*q*) *Lindus* v. *Bradwell*, 5 C. B. 583; *Jenkins* v. *Morris*, 16 M. & W. 877. See sect. 19 (2).

(*r*) Sect. 23.

(*s*) Sect. 3 (1); *Ferris* v. *Bond*, 4 B. & Ald. 679; *Baxendale* v. *Bennett*, 3 Q. B. D. 525.

(*t*) 25 & 26 Vict. c. 89, s. 47. What is "in the name of the company" is left in doubt by the cases. An acceptance of a bill directed to the company by directors in the words: "J. S. and H. T., directors of the B. Co., Limited," was deemed an acceptance by a company: *Okell* v. *Charles*, 34 L. T. N. S. 822. On the other hand, "accepted on behalf of the company" (*Harold* v. *Connor*, 34 L. T. N. S. 885), was held to make the acceptor personally liable, where the bill was directed to him. So directors were held personally liable on a note in this form: "We, the directors of the I. S. M. Co., do promise to pay J. D.," signed by the directors with the company's seal attached: *Dutton* v. *Marsh*, L. R. 6 Q. B. 361.

(*u*) *Re Peruvian Rys. Co.*, L. R. 2 Ch. 617.

Their definition, requisites, and form.

The following is the form of a foreign bill of exchange :—

London, January 1, 1890.

For Rs. 550.

At sixty days after sight of this first of Exchange (second and third unpaid) pay to the order of Messrs. ——, Five Hundred and Fifty Rupees, value received of them, and place the same to account.

James Hood.

To ——, Calcutta.

Foreign bills are usually drawn in *sets*, that is, copies of the bill are made on separate pieces of paper, each part containing a condition that it shall continue payable only so long as the others remain unpaid, a method which considerably diminishes the chances of losing the bill. The holder whose title first accrues is deemed the true owner of the bill (*z*).

Section II.—*Parties to a Bill or Note.*

Parties to a bill or note.

Sect. 22 (1) of the Bills of Exchange Act, 1882, enacts :—

"Capacity to incur liability as a party to a bill is co-extensive with capacity to contract."

The incapacity of one or more of the parties to a bill of exchange does not diminish the liability of the other parties to it (*a*).

Though an infant may be an agent to indorse, he incurs no liability by drawing, indorsing, or accepting a bill, even, it is said, though given for necessaries (*b*); though in that case he may be liable on the consideration (*c*).

At common law, a married woman incurred no liability by drawing or accepting a bill (*d*), unless she was a trader in the

(*z*) Sect. 71 (3).

(*a*) Sect. 22 (2).

(*b*) *Ex parte Kibble*, L. R. 10 Ch. 373; *Williamson* v. *Watts*, 1 Camp. 552; *Ex parte Jones*, 18 Ch. D. 109.

(*c*) Chalmers on Bills of Exchange, 56; *Trueman* v. *Hurst*, 1 T. R. 40.

(*d*) *Marshall* v. *Rutton*, 8 T. R. 545.

Parties to a bill or note.

city of London, or her husband was under a civil incapacity of residing here (*e*). But in equity a *feme covert* who had separate estate was liable to its extent by drawing, accepting, or indorsing a bill or note (*f*). A married woman who was divorced or judicially separated from her husband became capable of being a party to a bill (*g*). Now, by the Married Women's Property Act, 1882, a married woman, married either before or after the Act, can be sued on a bill as if she were a single woman (*h*). But judgment can be enforced only against her separate estate, if any. A married woman, as agent for her husband, may indorse a note payable to her in her own name (*i*). The effect of bills or notes to which agents, mercantile corporations, or firms, are parties, has already been discussed in the First Book under their respective heads.

It will be proper in this place to mention some peculiar rules respecting *banking corporations and partnerships*, who, together with bankers carrying on business individually, have been the objects of certain special legislative enactments.

There are three classes of banks existing in England—

1. The Bank of England.
2. Banks of six, or fewer than six persons.
3. Banking corporations, and companies of more than six persons.

Nothing in the Bills of Exchange Act affects the provisions of the Act relating to joint-stock banks or companies, or any Act relating to or confirming the privileges of the Bank of England or the Bank of Ireland (sect. 97).

(*e*) *Derry* v. *Duchess of Mazarine*, Ld. Raym. 147. As to cases of bills or notes payable to order of a feme covert, and not reduced into possession by the husband in his lifetime, *Sherrington* v. *Yates*, 12 M. & W. 855; *Hart* v. *Stephens*, 6 Q. B. 937.

(*f*) *La Touche* v. *La Touche*, 3 H. & C. 576; *McHenry* v. *Davies*, L. R. 10 Eq. 88; *Davies* v. *Jenkins*, 6 Ch. D. 728.

(*g*) 20 & 21 Vict. c. 85, ss. 21—26. *Johnson* v. *Lander*, L. R. 7 Eq. 228.

(*h*) 45 & 46 Vict. c. 75, supra.

(*i*) *Cotes* v. *Davis*, 1 Camp. 485.

Parties to a bill or note.

1. *The Bank of England* (*k*), which is a corporation (*l*), can issue bills or notes *unstamped*, with the exclusive privilege of doing so within three miles of London (*m*), and may re-issue its notes after payment thereof *ad libitum* without being liable to any stamp duty (*n*). Its notes, payable *to bearer on demand*, are, like cash, a legal tender except by the Bank itself or its branches (*o*); but if issued out of London, they must be made payable where issued (*p*); they are not legal tender in Ireland or Scotland (*q*).

2. *Banks of six, or fewer than six persons*, who on the 6th of May, 1844, were carrying on the business of a banker in England or Wales, having obtained a licence and given security by bond, may, except within the city of London or three miles thereof, issue *on unstamped paper* promissory notes for five pounds or upwards, payable to *bearer on demand*, or *to order, at any period not exceeding seven days after sight;* and also draw and issue on *unstamped paper* bills of exchange, payable *to order on demand*, or any period not exceeding seven days after sight or twenty-one days after date: provided such bills of exchange be drawn on a bank in London, Westminster, or

(*k*) The history of the Bank of England and of its exclusive privileges, which are now chiefly regulated by 3 & 4 Will. 4, c. 98, and 7 & 8 Vict. c. 32, is given, and the statutes creating them set out at large, in *Bank of England* v. *Anderson*, 3 Bing. N. C. 589. Mr. Walker (Treatise on Banking Law, 2nd edit. p. 11) divides banks of deposit into the following thirteen classes: (1) banks formed under 7 Geo. 4, c. 46; (2) such banks as reconstituted under 7 & 8 Vict. c. 113; (3) banks formed under 7 Geo. 4, c. 46, and registered under 20 & 21 Vict. c. 49; (4) banks formed under 7 Geo. 4, c. 46, and registered under 25 & 26 Vict. c. 89; (5) banks formed under 3 & 4 Will. 4, c. 98; (6) banks formed under 1 & 2 Vict. c. 73, and 47 & 48 Vict. c. 56; (7) banks formed under 7 & 8 Vict. c. 113, and registered under 20 & 21 Vict. c. 49, or under 21 & 22 Vict. c. 91; (8) banks formed and registered under 20 & 21 Vict. c. 49, and 21 & 22 Vict. c. 91; (9) banks formed under the Companies Act, 1862; (10) banks registered as unlimited under the Companies Act, 1862, and registered as limited under 42 & 43 Vict. c. 76, and limited companies registered under 42 & 43 Vict. c. 76; (11) private banks composed of any number of persons not exceeding ten; (12) trustees' savings banks; (13) Post Office savings banks.

(*l*) 39 & 40 Geo. 3, c. 28, s. 15; 3 & 4 Will. 4, c. 98, s. 1.

(*m*) 9 Geo. 4, c. 23, s. 1.

(*n*) 33 & 34 Vict. c. 97, ss. 45, 46.

(*o*) 3 & 4 Will. 4, c. 98, s. 6.

(*p*) Ibid. s. 4.

(*q*) 8 & 9 Vict. c. 37, s. 6, and 8 & 9 Vict. c. 38, s. 15.

Parties to a bill or note.

Southwark, or by bankers at a town or place where they are licensed to issue unstamped notes and bills upon themselves, or their copartners, payable at any other town or place where those bankers shall also be licensed to issue such notes and bills (*r*).

3. *Banking* (*s*) *corporations and companies of more than six persons* are forbidden to issue in London, or within sixty-five miles of London, any bill or note for the payment of money on demand, or upon which any person holding it may obtain payment on demand; or to borrow, owe or take up any sum on their notes, payable upon demand or at any less time than six months from the borrowing thereof, during the continuance of the exclusive privileges of the Bank of England; but if they carry on business in or within sixty-five miles of London, they may draw, accept, or indorse *bills of exchange*, provided they be not payable to the bearer on demand (*t*). Such a body, however, having an establishment more than sixty-five miles from London, provided it carried on the business of banking and issued notes on the 6th of May, 1844, may, subject to the restrictions presently specified, issue bills or notes payable on demand or otherwise *at the place where they are issued and also at London* (*u*), and have an agent in London or any other place where they shall be made payable for the purpose of such payment only. But such a bill or note must not be for less than five pounds, or re-issued in or within sixty-five miles of London.

Even beyond this distance of sixty-five miles such a corporation or company can only issue such bills or notes subject to the regulations prescribed by stat. 7 Geo. 4, c. 46, which directs that their bills and notes shall be made payable at some place or places specified thereon, exceeding the limited distance (subject, however, to the licence given by 3 & 4 Will. 4, c. 98, s. 2; 3 &

(*r*) 9 Geo. 4, c. 23, s. 1. See also 7 & 8 Vict. c. 32, s. 26, as to other *bills*. As to the licence, see 55 Geo. 3, c. 184; 9 Geo. 4, c. 23, s. 4; and 7 & 8 Vict. c. 32, s. 22.

(*s*) Stats. 3 & 4 Will. 4, c. 98, s. 2; 39 & 40 Geo. 3, c. 28; 7 Geo. 4, c. 46; *Bank of England* v. *Anderson*, 3 Bing. N. C. 589; *Booth* v. *Bank of England*, 6 Bing. N. C. 415. As to banking companies established since May 6th, 1844, see 7 & 8 Vict. c. 113, and 25 & 26 Vict. c. 89.

(*t*) 7 & 8 Vict. c. 32, s. 26.

(*u*) 3 & 4 Will. 4, c. 98, s. 2, and 3 & 4 Will. 4, c. 83, s. 2. The licence given by the latter section seems more extensive than that by the former.

Parties to a bill or note.

4 Will. 4, c. 83, s. 2; and 7 & 8 Vict. c. 32, ss. 11 and 22); that the body shall have no establishment as bankers in, or within sixty-five miles of London; that every member of it shall be responsible for the payment of bills and notes issued, such person being a member at the date of the bills or notes, or becoming so before they are payable, or while any sum on any of them is unpaid; and that they shall deliver into the Stamp Office, between February 28th and March 25th, an account in a specified form. The account sets forth the true name of the body, and of every bank established by them, and the names and abodes of two members resident in England, who have been appointed public officers of the corporation or partnership. A further account is also to be delivered within the year, if there be any change in the officers or members.

The co-partnership, unless it be incorporated, must sue and be sued (*z*) in the name of one of these officers, of whose appointment (though it may be otherwise proved (*a*)) a copy of the account certified by one of the Commissioners of Stamps is evidence; this copy also proves that all persons named therein were members at the period of its date (*b*). A decree or judgment against a public officer binds the co-partnership, and execution may be taken out against any member for the time being, and if that proves ineffectual (*c*), against any person who was a member at the time of the contract, or became a member before it was executed, or was a member at the time of judgment obtained.

These remedies are now, however, practically superseded by proceedings to wind up the company, under which the Court will

(*z*) 7 Geo. 4, c. 46, s. 4, and 27 & 28 Vict. c. 32, s. 1. *Steward* v. *Greaves*, 10 M. & W. 711; *Chapman* v. *Milvain*, 5 Exch. 61; hence a petition in bankruptcy cannot be filed against an individual member in the first instance: *Davison* v. *Farmer*, 6 Exch. 242. The officer is not allowed to plead his individual bankruptcy, at all events when the plaintiff will undertake not to sue out execution against his person, lands, or goods: *Steward* v. *Dunn*, 11 M. & W. 63.

(*a*) *Edwards* v. *Buchanan*, 3 B. & Ad. 788.

(*b*) As to the effect of such a copy as evidence, see *Dossett* v. *Harding*, 1 C. B. N. S. 524.

(*c*) See as to this, *Harvey* v. *Scott*, 11 Q. B. 92; *Field* v. *M'Kenzie*, 4 C. B. 705; *Bank of England* v. *Johnson*, 3 Exch. 598; and *Quain*, J., in *Swift* v. *Winterbotham*, L. R. 8 Q. B. p. 250. As to execution against a company, see Rules of Supreme Court, 1883, Ord. XLII. r. 23.

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restrain any process against members (*d*). The right of suing and being sued by their own members through the medium of their public officer is extended to them by 1 & 2 Vict. c. 96, and members are prohibited from setting off their shares in any such suit.

The issue of bank notes or bills, whether by banks of many or few partners, is now subject to restrictions imposed by the present Bank Charter Act (*e*), which provides (*f*) that no person, other than a banker who on May 6th, 1844, was lawfully issuing his own bank notes, shall make or issue them in the United Kingdom, and that

"It shall not be lawful for any banker to draw, accept, make, or issue in England or Wales any bill of exchange, or promissory note, or engagement for the payment of money payable to bearer on demand, or to borrow, owe, or take up in England or Wales any sums or sum of money on the bills or notes of such banker payable to bearer on demand" (*g*):

Except that any banker, who was on May 6th, 1844, lawfully issuing his own bank notes under the authority of a licence, may continue such issue, but only to the extent and under the conditions presently mentioned. It declares that the right of any company or partnership to continue the issue shall not be prejudiced by any change in the personal composition of the body, either by transfer of shares, or the admission of any new partner, or the retirement of any member (*gg*): Provided that any company or partnership, then consisting of only six or less than six persons, shall not issue such notes after the number of partners exceeds six. If a banker becomes bankrupt, or ceases to carry on business (*h*), or discontinues the issue of bank notes, he may not afterwards issue them (*i*). Every banker (*j*) who claimed

(*d*) 25 & 26 Vict. c. 89, s. 197.

(*e*) 7 & 8 Vict. c. 32.

(*f*) Ib. s. 10. See the statute in Appendix. The term "banker" applies to all corporations, societies, partnerships, and persons, and every individual person carrying on the business of banking, except the Bank of England: sect. 28.

(*g*) 7 & 8 Vict. c. 32, s. 11.

(*gg*) Country banks entitled to a composition under 7 & 8 Vict. c. 32, s. 23, do not lose the right by change of their place of business, or amalgamation with other banks: *Capital & Counties Bank* v. *Bank of England*, 61 L. T. N. S. 516.

(*h*) *Att.-Gen.* v. *Birkbeck*, 12 Q. B. D. 605.

(*i*) 7 & 8 Vict. c. 32, s. 12.

(*j*) Ib. s. 13.

Parties to a bill or note.

the right of issuing such notes was required to give notice of his claim to the Commissioners of Stamps and Taxes, who were to ascertain whether he was, on the 6th May, 1844, a banker lawfully issuing his own notes, and if he were, to ascertain the average amount of the bank notes of such banker, or of united banks (*k*), in circulation during twelve weeks preceding April 12th, 1844, and to certify and publish in the "Gazette" the amount thus ascertained (*l*). The statute then declares that such banker shall not have in circulation upon the average of four weeks (for the ascertainment of which there are special provisions (*m*)), a greater amount of notes than the amount so certified. A bank exceeding this limit forfeits a sum equal to the excess (*n*); but in the event of two banks, each of which consists of not more than six members, uniting, the commissioners may make a fresh certificate of the aggregate of the amounts they were entitled to issue, and the united body may then issue notes to the extent thus certified (*o*).

No limited bank having a note issue is entitled to limited liability in respect of its notes. The Companies Act, 1879 (*p*), repeals sect. 182 of the Companies Act, 1862, and in place thereof enacts that:—

"A bank of issue registered as a limited company, either before or after the passing of this Act, shall not be entitled to limited liability in respect of its notes; and the members thereof shall continue liable in respect of its notes in the same manner as if it had been registered as an unlimited company; but in case the general assets of the company are, in the event of the company being wound up, insufficient to satisfy the claims of both the note-holders and the general creditors, then the members, after satisfying the remaining demands of the note-holders, shall be liable to contribute towards payment of the debts of the general creditors a sum equal to the amount received by the note-holders out of the general assets of the company."

Banking companies established since the 2nd day of November, 1862, consisting of seven or more members, *may* be, and if consisting of more than ten members *must* be, formed and

(*k*) 7 & 8 Vict. c. 32, s. 14.
(*l*) Ib. s. 15.
(*m*) Ib. ss. 18, 19, 20.
(*n*) Ib. s. 17.
(*o*) Ib. s. 16.
(*p*) 42 & 43 Vict. c. 76, s. 6.

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registered under the Companies Act, 1862, unless they procure an Act of Parliament or a charter. Being so registered, they become corporations, and the remedies on their bills or notes must be against the body and its funds, and if these fail, the only resource is an application to wind them up (*p*). The mode in which these latter bodies may be bound by their negotiable instruments is provided by that statute, which enacts (*q*), that

"A promissory note or bill of exchange shall be deemed to have been made, accepted or indorsed on behalf of any company under this Act, if made, accepted or indorsed in the name of the company by any person acting under the authority of the company, or if made, accepted or indorsed by, or on behalf, or on account of the company, by any person acting under the authority of the company."

Nothing in the Bills of Exchange Act affects the Joint Stock Companies Act (*r*).

When several persons who are not in partnership accept a bill, or make a promissory note, the question whether they are bound jointly, or jointly and severally, depends upon the wording of the instrument (*s*). A note beginning with "*I promise* to pay," and signed by several persons, is deemed joint and several (*t*). In no case will the signature of one of such makers or drawees, it has been said, bind any person except himself (*u*). Nor, if such persons be payees, can any one of them transfer the bill or note by his individual indorsement; all must indorse unless one is authorized to indorse for the others (*x*). A note, however, beginning, "I promise to pay," and signed by one partner for himself and his co-partners, is a joint note, and the partner signing is not severally liable upon it (*y*); but

(*p*) *Re Globe Iron Co.*, L. R. 20 Eq. 337.

(*q*) 25 & 26 Vict. c. 89, s. 47.

(*r*) 45 & 46 Vict. c. 61, s. 97 (3) (b).

(*s*) Sect. 85 (1).

(*t*) Sect. 85 (2).

(*u*) *Ex parte Buckley, In re Clarke*, 14 M. & W. 469; and see *Jenkins* v. *Morris*, 16 M. & W. 877.

(*x*) Sect. 32 (3). *Carvick* v. *Vickery*, Doug. 653, n. 134; *Heilbutt* v. *Nevill*, L. R. 4 C. P. at pp. 356, 358.

(*y*) B. N. P. 279; Marius, 2nd edit. 16; Beawes, 1st edit. 444; *Ex parte Buckley, In re Clarke*, 14 M. & W. 469; *Hall* v. *Smith*, 1 B. & C. 407. See *Innes* v. *Stephenson*, 1 M. & Rob. 146.

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if it promise jointly and severally to pay, all the members of the partnership will be jointly, and the person signing it individually, bound (*z*). An executor or administrator becoming a party to a bill or note, given for the debt of the deceased, binds himself personally (*a*).

Section III.—*Negotiation of Bills and Notes.*

Negotiation of bills and notes.

Although, by the ordinary rule of law, the benefit of contracts could not be transferred, so as to give the transferee a right to sue at *law* upon them in his own name (*b*), yet those arising out of bills and notes, generally speaking, might be so in the manner hereinafter specified. Though it once was doubted whether an English note were transferable *abroad*, it has long been decided that it is so (*c*). How a foreign note is transferred will be subsequently explained with reference to sect. 72 of the Bills of Exchange Act, 1882.

A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill (*d*); and a bill payable to bearer or indorsed in blank is negotiated by delivery (*e*), that is to say, transfer of possession, actual or constructive, from one person to another (sect. 2). A bill payable to order is negotiated by indorsement completed by delivery (*f*). The signature of the indorser written or printed on the bill itself without additional words is sufficient indorsement (*g*). It may be in pencil (*h*); and the mark of a person who cannot write will suffice (*h*). Though usually it is on the back, it may be on the face of the bill (*i*). When

(*z*) *Penkivil* v. *Connell*, 5 Exch. 381; *Maclae* v. *Sutherland*, 3 E. & B. 1.

(*a*) Sect. 26 (1). *Ridout* v. *Bristow*, 1 C. & J. 231; *Nelson* v. *Serle*, 4 M. & W. 795.

(*b*) See now 36 & 37 Vict. c. 66, s. 25, sub-s. 6.

(*c*) *De la Chaumette* v. *Bank of England*, 2 B. & Ad. 385.

(*d*) Bills of Exchange Act, 1882, s. 31 (1).

(*e*) Sect. 31 (2). The delivery of halves of bank notes does not operate as a transfer of bank notes: *Smith* v. *Mundy*, 3 E. & E. 22; *Redmayne* v. *Burton*, 2 L. T. N. S. 324; Grant on Banking, 4th ed. 357.

(*f*) Sect. 31 (3).

(*g*) Sect. 32 (1).

(*h*) *Geary* v. *Physic*, 5 B. & C. 234; *George* v. *Surrey*, M. & M. 516.

(*i*) *Ex parte Yates*, 27 L. J. Bankr. 9; sect. 32 (1) (2).

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indorsements are too many to be written on a bill, a slip of paper called an "allonge" is attached to it; and to prevent fraud, it is usual in placing the first signature on the "allonge" to commence it on the bill itself and finish on the "allonge." An indorsement written on an "allonge" or on a "copy" of a bill issued or negotiated in a country where "copies" are recognized is deemed to be written on the bill itself (*j*).

There may be a written agreement which qualifies the liability of the drawer or acceptor; and as between the original parties it will be valid, if supported by good consideration (*k*). It may be shown that no consideration was given for the bill or note, or that the actual consideration was different from that stated (*l*). Just as it may be shown that a deed was given as an escrow, that is, subject to a condition that it should not operate until a certain event, so it may be shown that a bill was delivered on such a condition. But such an agreement, we have seen, will not, as against a holder in due course, restrain the negotiability of the bill (*m*).

The indorsement must be an indorsement of the entire bill (*n*). A partial indorsement will not operate as a negotiation of the bill, though perhaps under such an indorsement the indorsee might have a lien. But if a bill or note be indorsed for part of the sum due on it, and the limitation do not appear on the face of the bill, the indorsee will be able to recover the whole sum from the acceptor or maker, and will be a trustee of the excess for the indorser (*o*).

A mistake in spelling the name of a person to whom a bill is specially indorsed will not prevent that person from transferring it by the indorsement of his name properly spelt upon it (*p*).

An indorsement may be either blank, special or restrictive (*q*). Where a bill purports to be indorsed conditionally, the condi-

(*j*) Sect. 32 (1).

(*k*) *McManus* v. *Bark*, L. R. 5 Ex. 65; *Webb* v. *Spicer*, 19 L. J. Q. B. 34.

(*l*) *Abbott* v. *Handricks*, 1 M. & G. at p. 795; *Abrey* v. *Crux*, L. R. 5 C. P. 37.

(*m*) Sect. 21 (2). *Davis* v. *Jones*, 17 C. B. 625.

(*n*) Sect. 32 (2). *Heilbut* v. *Nevill*, L. R. 4 C. P. at p. 358.

(*o*) *Reid* v. *Furnival*, 1 Cr. & M. 538; 5 C. & P. 499.

(*p*) Sect. 32 (4); *Leonard* v. *Wilson*, 2 Cr. & M. 589.

(*q*) Sect. 32 (6).

Negotiation of bills and notes.

tion as between indorser and indorsee, would, it is presumed, be operative; and if the money were paid to the indorsee without the fulfilment of the condition, he would hold it in trust for the indorser. But the condition may, as has been already stated, be disregarded by the payer (*r*). The following are instances of conditional indorsements:—"Pay A. B., or order on the arrival of the ship Tanjore at Bombay," or "pay C. D. or order if he marries X."

An indorsement in blank specifies no indorsee. A bill so indorsed is payable to bearer (*s*). An indorsement may be made either by simply writing the signature of the indorser on the bill, or by writing above the signature the words "pay to, or order," or "pay to, or bearer."

A special indorsement specifies the person to whom, or to whose order, the bill is to be payable (*t*). It runs "pay to A. B. or order," or "pay to A. B.'s order." Such a bill is payable only to the particular person mentioned or his order. The indorsee must be named or indicated with reasonable certainty; but the bill may be specially indorsed to two or more indorsees jointly, or in the alternative to one or two, or one or some of several indorsees (*u*). Any indorsement in blank may be converted into a special indorsement (*v*). A blank indorsement may be converted into a special indorsement by writing above the indorser's signature a direction to pay the bill to, or to the order of, himself or some other person.

A restrictive indorsement prohibits the further negotiation of the bill, or expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof; for example, a bill may be indorsed "pay D. only," or "pay D. for the account of B.," or "pay D., or order for collection" (*x*). "Pay J. Spittal, or order, value in amount with H. C. Drinkwater," was held not to be a restrictive indorsement (*y*).

(*r*) Sect. 33. See *Soares* v. *Glyn*, 8 Q. B. 24.

(*s*) Sect. 34 (1). *Peacock* v. *Rhodes*, Doug. 633; *Matthews* v. *Bloxome*, 33 L. J. Q. B. 209.

(*t*) Sect. 34 (2).

(*u*) Sects. 7 (1) (2), 34 (3).

(*v*) Sect. 34 (4).

(*x*) Sect. 35 (1).

(*y*) *Buckley* v. *Jackson*, L. R. 3 Ex. 135.

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An indorsement in full to A. without the word "only" will not deprive A. of the power of indorsing. A restrictive indorsement gives the indorsee the right to receive payment of the bill, and to sue any party thereto whom his indorser could have sued; it confers no power to transfer his rights as indorsee, unless it expressly authorise him to do so (*z*).

Indorsements are deemed, until the contrary is proved, to have been made in the order in which they appear on the bill (*a*).

A person who transfers a bill without indorsing it is called a "transferor by delivery," and is not liable on the bill. But he warrants, to the immediate transferee if a holder for value, that it is what it purports to be, that he has a right to transfer it, and that he is not aware of any fact which makes it valueless (*b*). If the bill be a forgery, or if the transferor by delivery has stolen, or found the bill, he will be liable on it to his immediate transferee; in such cases the bill is not what it purports to be.

If such a transfer were by way of payment of a former debt, that debt will not be looked upon as satisfied, unless the bill or note be discharged, or the holder be guilty of laches, when it comes to maturity (*c*).

Such is the mode of negotiating or transferring a bill or note, which transfer may, in general, be made by any holder (*d*) or his legal representative; as, if the holder die, by his executors or administrators (*e*); if he become bankrupt, by his trustee, unless

(*z*) Sect. 35 (2). See *Williams, Deacon & Co.* v. *Shadbolt*, 1 Cab. & El. 529.

(*a*) Sect. 32 (5). *Macdonald* v. *Whitfield*, 8 App. Cas. 733.

(*b*) Sect. 58 (3). *Gurney* v. *Womersley*, 4 E. & B. 133; *Smith* v. *Mercer*, L. R. 3 Ex. 51; see *Timmins* v. *Gibbins*, 18 Q. B. 722.

(*c*) Infra, p. 671; *Richardson* v. *Harris*, 22 Q. B. D. at p. 275. Such a transfer implies no warranty that the bill is properly stamped: *Pooley* v. *Brown*, 11 C. B. N. S. 566. The transfer by delivery of a note payable to bearer does not imply a warranty that the maker of the note is solvent at the time of such delivery; it is only a warranty to the transferor that he is not aware of the insolvency of the parties to it. See *Rogers* v. *Langford*, 1 C. & M. 637; also *Gurney* v. *Womersley*, ubi sup.; *Timmins* v. *Gibbins*, 18 Q. B. 722.

(*d*) The real holder of a bill may ratify an indorsement made in his name without his authority: *Ancona* v. *Marks*, 7 H. & N. 686.

(*e*) Sect. 97 (2). *Rawlinson* v. *Stone*, 3 Wils. 1; *Bishop* v. *Curtis*, 21 L. J. Q. B. 391.

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under particular circumstances, as where the bankrupt held the bill in the character of trustee or agent for another person (*c*). Persons holding bills in *autre droit* should exercise this power of transfer with much caution, for unless they add words indicating that they sign in a representative character, they will be personally bound by their indorsement (*d*).

When a bill or note is lost or stolen, a thief or finder can, of course, convey no title in it to any other person, if at the time of the loss it be transferable only by indorsement. But if a bill be transferable by mere delivery, the thief or finder may convey a title in it to any person who took the bill in good faith and for value, and who "at the time the bill was negotiated to him had no notice of any defect in the title of the person who negotiated it" (*e*). If such person take it without good faith, or under circumstances which must have led him to suspect the true state of the case, and subject him to the imputation of such gross negligence as satisfies the jury of fraud, he will not be allowed to retain it, even though he have given its full value (*f*). Gross negligence will, however, not be regarded as equivalent to fraud (*g*).

As to the *time* at which a bill or note may be negotiated, it may be so until it has been restrictively indorsed or discharged, by payment or otherwise (*h*). But a person who takes (*i*) a bill

(*c*) Bankruptcy Act, 1883, ss. 44, 168.

(*d*) Bills of Exchange Act, 1882, s. 26 (1).

(*e*) Sect. 29 (1) (b). *Whistler* v. *Forster*, 14 C. B. N. S. 248; *Anon.*, Ld. Raym. 738; 1 Salk. 126; 3 Salk. 71; *Miller* v. *Race*, Burr. 452; 1 Sm. L. C. 9th edit. p. 491; *Lawson* v. *Weston*, 4 Esp. 56; *Grant* v. *Vaughan*, Burr. 1516; *Peacock* v. *Rhodes*, Dougl. 633; *Snow* v. *Saddler*, 3 Bing. 610. But in case of cheques crossed "not negotiable," see sect. 81.

(*f*) Sect. 29 (2). *Goodman* v. *Harvey*, 4 Ad. & E. 870; *Uther* v. *Rich*, 10 Ad. & E. 784; *Bank of Bengal* v. *Macleod*, 7 Moore, P. C. Ca. 35; *Strange* v. *Wigney*, 6 Bing. 683; *Solomons* v. *Bank of England*, 13 East, 135; *Snow* v. *Peacock*, 3 Bing. 406; *Beckwith* v. *Corrall*, 3 Bing. 444; *Easley* v. *Crockford*, 10 Bing. 243; *Crook* v. *Jadis*, 5 B. & Ad. 909; *Cunliffe* v. *Booth*, 3 Bing. N. C. 821; *Raphael* v. *Bank of England*, 17 C. B. 161; *Re Gomersall*, 1 Ch. D. at p. 146; *Misa* v. *Currie*, 1 App. Cas. 553; *Jones* v. *Gordon*, 2 App. Cas. at p. 629; *Tatam* v. *Haslar*, 23 Q. B. D. 345.

(*g*) Sect. 90. *Goodman* v. *Harvey*, ubi sup.; *Jones* v. *Gordon*, ubi sup.

(*h*) Sect. 36 (1). *Schultz* v. *Astley*, 2 Bing. N. C. 544; *Dehers* v. *Harriott*, 1 Shower, 163; *Mutford* v. *Walcott*, Ld. Raym. 575; *Charles* v. *Marsden*, 1 Taunt. 224; *Graves* v. *Key*, 3 B. & Ad. 313; *Stein* v. *Yglesias*, 1 C. M. & R. 565.

(*i*) See *Whistler* v. *Foster*, 14 C. B. N. S. 248.

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after it is due, or with notice of its having been dishonoured by non-acceptance, takes it subject to any defects of title affecting it at its maturity (*j*). The expression "defect of title" is used in the Act instead of the phrase once common, "equity attaching to the bill" (*k*). "After a bill or note is due, it comes disgraced to the indorsee, and it is his duty to make inquiries concerning it." He takes it subject to all the equities with which it may be incumbered. Thus, if the holder took it from a thief or finder, he cannot recover on it, inasmuch as the thief or finder could not (*l*).

A bill payable on demand is deemed to be overdue when it appears on the face of it to have been in circulation for an unreasonable length of time, which for this purpose is a question of fact (*m*). A bill accepted or indorsed when it is overdue, will, as regards the acceptor or any indorser, be deemed a bill payable on demand (*n*). A person taking a cheque—that is, a bill of exchange, drawn on a bank and payable on demand—does so at his peril, if it appears to have been in circulation for an unreasonable time (*o*). A different rule applies to promissory notes payable on demand when negotiated. They are not deemed to be overdue for the purposes of affecting a holder with defects of title of which he had no notice, by reason of a reasonable time for presenting it for payment having elapsed since its issue (*p*). But a note payable on demand which has been *indorsed* must be presented for payment within a reasonable time of the indorsement (*q*).

A title is defective when the person who negotiates the bill obtained it or the acceptance by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circum-

(*j*) Sect. 36 (2).

(*k*) Lord *Ellenborough* in *Tinson* v. *Francis*, 1 Camp. 19.

(*l*) *Taylor* v. *Mather*, 3 T. R. 83, n.; *Brown* v. *Davies*, 3 T. R. 80; *Boehm* v. *Stirling*, 7 T. R. 423; *Crossley* v. *Ham*, 13 East, 498; *Lee* v. *Zagury*, 8 Taunt. 114; *Beauchamp* v. *Parry*, 1 B. & Ad. 89, per Lord *Tenterden*.

(*m*) Sect. 36 (3).

(*n*) Sect. 10 (2).

(*o*) See *London and County Bank. Co.* v. *Groome*, 8 Q. B. D. 288 (cheque indorsed eight days after date not overdue); sects. 36 (b) and 173.

(*p*) Sect. 86 (3).

(*q*) Sect. 86 (1). See *Chartered Mercantile Bank of India* v. *Dickson*, L. R. 3 P. C. 574.

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stances as amount to a fraud (*q*). The circumstance that the bill was an accommodation bill, or that there was a set-off, would not be such a defect. These equities, or defects in title, as they are called in the Bills of Exchange Act, must be such as naturally arise out of the bill or note transaction, not out of some collateral matter, as, for instance, a right of set-off, which the maker or acceptor would have had against the party who transferred it to the holder (*r*).

Though a bill or note is, generally speaking, negotiable after it has become due, yet it is not so after it has once been *paid* at maturity, if such negotiation would have the effect of charging persons who otherwise would be discharged (*s*). An indorser who pays a bill may, by s. 59, further negotiate the bill (*t*). He is not, however, entitled to enforce payment of the bill against any intervening party to whom he was previously liable (*u*). An acceptor cannot re-issue a bill of which, at or after its maturity, he is the "holder in his own right"; for it is then discharged (*x*). The common law seems to be partly altered. It was held before the Act that, if the acceptor of a bill became the executor of the holder, the bill was discharged (*y*). If a bill be *paid* at maturity, that payment will discharge the parties to it, even though their names should be left on the bill by accident and it should subsequently be negotiated (*z*). But if it be paid before it arrives at maturity, the person so paying or

(*q*) Sect. 29 (2).

(*r*) Ibid. *Burrough* v. *Moss*, 10 B. & C. 558; *Whitehead* v. *Walker*, 10 M. & W. 696; *Stein* v. *Yglesias*, 1 C. M. & R. 565; *Oulds* v. *Harrison*, 10 Exch. 572; *In re Overend, Gurney & Co.*, L. R. 6 Eq. 344. As to the limit of the above rule in other respects, see *Chalmers* v. *Lanion*, 1 Camp. 383; *Bosanquet* v. *Dudman*, 1 Stark. 1; *Atwood* v. *Crowdie*, 1 Stark. 483; *Buzzard* v. *Flecknoe*, 1 Stark. 333; *Collenridge* v. *Farquharson*, 1 Stark. 259; *Dunn* v. *O'Keefe*, 6 Taunt. 305, affirmed 5 M. & S. 282, in error.

(*s*) *Beck* v. *Robley*, 1 H. Bl. 89, n.; *Bartrum* v. *Caddy*, 9 Ad. & E. 275; *Glaseock* v. *Balls*, W. N. 1889, p. 200. See, however, the judgment in *Lazarus* v. *Cowie*, 3 Q. B. 464; and also *Jewell* v. *Parr*, 13 C. B. 909.

(*t*) Sect. 59 (2) (b). *Callow* v. *Lawrenee*, 3 M. & S. 95; *Hubbard* v. *Jackson*, 4 Bing. 390; *Graves* v. *Key*, 3 B. & Ad. 313; *Williams* v. *James*, 15 Q. B. 498. See, where an action has been brought, *Deuters* v. *Townsend*, 5 B. & S. 613; *Woodward* v. *Pell*, L. R. 4 Q. B. 58.

(*u*) Sect. 37.

(*x*) Sect. 61. *Harmer* v. *Steele*, 14 M. & W. 831; 4 Ex. 1.

(*y*) *Freakley* v. *Fox*, 9 B. & C. 130.

(*z*) Sect. 59 (1).

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receiving payment must run the risk, if he allow his name to remain on it, of being subsequently called on by a *bonâ fide* holder, should it get into the hands of such a person. "Nothing," to use the words of *Parke*, B., "will discharge the acceptor or the drawer except payment *according to the law merchant*, that is, payment of the bill *at maturity*. If a party pays it before, he *purchases it*, and is in the same situation as if he had discounted it" (*a*).

Lastly. It is to be observed, on the subject of transfer, that the indorser of a bill by indorsing it—

"(a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken;

"(b) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements;

"(c) Is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of its indorsement a valid and subsisting bill, and that he had then a good title thereto (*b*)."

The drawer of a bill and an indorser may, by express stipulations, negative or limit his own liability to the holder, or waive, as regards himself, some or all of the holder's duties (*c*). This is sometimes done by the drawer or indorser adding to his signature the words "without recourse, or *sans recours*." This prevents the suing of the drawer or indorser, as the case may be. It does not affect a holder's right to sue any other party to the bill.

(*a*) *Morley* v. *Culverwell*, 7 M. & W. 174, at p. 182. But see *Thornton* v. *Maynard*, L. R. 10 C. P. 695; *Solomon* v. *Davis*, 1 Cababe & Ellis, N. P. 83; *Deacon* v. *Stodhart*, 2 M. & G. 317, post, s. 8, and *Attenborough* v. *Mackenzie*, 25 L. J. Exch. 244.

(*b*) Sect. 55 (2). *Rouquette* v. *Overmann*, L. R. 10 Q. B. 525. So of a cheque: *Keene* v. *Beard*, 8 C. B. N. S. 372. In fact, the contract of an indorser is in so many respects similar to that of a drawer, that it is often said that every indorser is the drawer of a new bill.

(*c*) Sect. 16 (1) and (2). As to converting a blank indorsement into a special, sect. 34 (4).

Section IV.—*Acceptance.*

Acceptance.

Acceptance is "the signification by the drawee of his assent to the order of the drawer" (*g*). An acceptance must be expressed by writing on the bill, and must, according to the present law, be signed by the drawee (*h*). It must be for the payment of money; if it were for the delivery of negotiable paper, or anything except money, it would be invalid (*i*).

A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete (*j*). The acceptor of a bill overdue will be liable to pay on demand (*k*). No particular form of words is necessary to make an acceptance by the drawee; the mere signature of the drawee without additional words being sufficient (*l*).

An acceptance may be either general or qualified, or, as the distinction is sometimes expressed, absolute or conditional (*m*). A general acceptance assents, without qualification, to the order of the drawer (*n*); a qualified acceptance in express terms varies the effect of the bill as drawn. Thus it may be (*o*) conditional, that is to say, payment by the acceptor may be made dependent on the fulfilment of a stated condition, *e.g.*, "accepted when in cash for the cargo of the ship Thetis." It has been held that an acceptance may be rendered conditional by another contemporaneous writing (*p*), though not as against a *bonâ fide* holder ignorant of the existence of such writing. Its terms cannot be varied by any contemporaneous parol agreement, since that would be against the first principles of the laws of evidence (*q*). There may be an accept-

(*g*) Sect. 17 (1).
(*h*) Sect. 17 (2) (a).
(*i*) Sect. 17 (2) (b).
(*j*) Sect. 18. *Baxendale* v. *Bennett*, 3 Q. B. D. 525; *In re Hayward*, L. R. 6 Ch. 546; *Hogarth* v. *Latham*, 3 Q. B. D. 643; *L. & S. W. Bank* v. *Wentworth*, 5 Ex. D. 96.
(*k*) Sect. 10 (2).
(*l*) Sect. 17 (2) (a).
(*m*) Sect. 19 (1), (2).
(*n*) Sect. 19 (2). *Heiron* v. *Morgan*, 44 L. T. N. S. 182.
(*o*) *Julian* v. *Shobrooke*, 2 Wils. 9; *Sproat* v. *Matthews*, 1 T. R. 182; *Smith* v. *Vertue*, 30 L. J. C. P. 56.
(*p*) *Young* v. *Austen*, L. R. 4 C. P. 553.
(*q*) *Adams* v. *Wordley*, 1 M. & W. 374 *Young* v. *Austen*, ubi supra.

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ance to pay part only of the amount for which the bill is drawn, or an acceptance to pay only at a particular specified place, or an acceptance of some one or more, but not all, of the drawees (*r*). It may be qualified as to time (*s*), *e.g.*, accepted on condition of being renewed till November 28, 1844 (*t*). An acceptance to pay at a particular place is a general acceptance (*u*), unless it expressly states that the bill is to be paid there only, and not elsewhere. Thus an acceptance "payable at Coutt's Bank" would be general, and would not require presentment to that bank for payment. On the other hand, an acceptance "payable at Coutt's Bank only" would be qualified.

A holder of a bill has a right to require an unqualified acceptance (*x*), conformable to the tender of the order specifying, if none be mentioned, a place of payment, and mentioning the time of presentment, if payable after sight. But if the holder thinks fit to accept any such acceptance, he will be bound by it.

Acceptance of a bill is incomplete and revocable until delivery of the instrument (*y*). The acceptor engages that he will pay the bill according to the tenor of his acceptance (*z*). Against a holder in due course he may not deny the existence of the drawer, or the genuineness of his signature (*a*); an acceptor, it was said, was bound to know the handwriting of the drawer. Thus he may not prove that the signature is a forgery. He also admits the drawer's capacity and authority to draw (*b*), *e. g.*, in the case of an agent, he is estopped from proving that the agent was not authorised to draw (*c*). In the case of a bill payable to the drawer's order, the acceptor may not deny the capacity of the drawer to indorse, but may deny the genuine-

(*r*) Sect. 19 (2) (b) (c) (e).

(*s*) Sect. 19 (2) (d).

(*t*) *Russell* v. *Phillips*, 14 Q. B. 891; *Fanshawe* v. *Peet*, 26 L. J. Ex. 314.

(*u*) Sect. 19 (2) (c), altering the law as laid down by the House of Lords in *Rowe* v. *Young*, 2 Bligh, 391.

(*x*) Sect. 44 (1). Byles, 14th ed. 210.

(*y*) Sect. 21 (1). See *Baxendale* v. *Bennett*, 3 Q. B. D. at p. 531. After issue the acceptance may be waived or cancelled by consent: *Ralli* v. *Dennistoun*, 6 Exch. 483.

(*z*) Sect. 54 (1).

(*a*) Sect. 54 (2) (a). But see sect. 7, sub-s. 3; and *Vagliano* v. *Bank of England*, 23 Q. B. D. 243, as to bills payable to a fictitious payee.

(*b*) Sect. 54 (2) (a).

(*c*) *Garland* v. *Jacomb*, L. R. 8 Ex. 216; *Halifax* v. *Lyle*, 18 L. J. Ex. 197.

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ness or validity of the indorsement (*d*), and the same rule holds good in the case of a bill payable to the order of a third person (*e*).

The drawer of a bill, and any indorser of it, may insert therein the name of the person to whom the holder may resort in case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment (*f*). Such person is called in the Act "the referee in case of need." If acceptance is refused by this "referee," notice of dishonour is not necessary in order to preserve the holder's right of recourse against the person giving the address of the referee in case of need. A dishonoured bill containing the name of a referee in case of need must be protested for non-payment before it is presented for payment to the referee (*g*).

There is a peculiar kind of acceptance called *acceptance for honour supra protest* (*h*). It is adopted when, in order to promote the negotiation of the bill, or save the credit of the drawer or some other party thereto, in a case where the drawee is not to be found, or cannot, or will not, accept, or, after he has accepted, absconds, or becomes bankrupt, a stranger thinks fit to accept the bill for the honour of some one of the parties thereto. This acceptance will enure to the benefit of all the parties subsequent to him for whose honour it was made (*i*), and whose name it generally specifies; if it do not, it is considered to be for the honour of the drawer (*k*). A bill accepted for the honour of some one of the parties to it, may be again accepted for the honour of another (*l*). But in no case is the holder *obliged* to take an acceptance for honour (*m*).

(*d*) Sect. 54 (2) (b). See *Garland* v. *Jacomb*, L. R. 8 Ex. 216; *Smith* v. *Chester*, 1 T. R. 654; *Carvick* v. *Vickery*, 2 Dougl. 652. Capacity means capacity to contract: sect. 22 (1). Apparently "validity" means authority.

(*e*) See *London and South Western Bank* v. *Wentworth*, 5 Ex. D. 96. Sect. 54 (2) (c).

(*f*) Sect 15. *Ex parte Prange*, L. R. 1 Eq. 1.

(*g*) Sect. 67 (1).

(*h*) Sect. 65 (1).

(*i*) Sect. 66 (2).

(*k*) Sect. 65 (4).

(*l*) Beawes, 42; 2 Camp. 448, n.

(*m*) *Mitford* v. *Walcot*, 12 Mod. 410; Ld. Raym. 575; Beawes, 37; *Gregory* v. *Walcup*, Comb. 76; *Pillans* v. *Van Mierop*, Burr. 1663.

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An acceptance for honour *supra protest* must be written on the bill and indicate that it is an acceptance for honour (*n*). It must be signed by the acceptor for honour; *e. g.*, "accepted for the honour of A. B., *supra protest*," or "accepts, s. p." Such an acceptor engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment and protested for non-payment, and that he receives notice of these facts (*o*). He is liable to the holder, and to all parties to the bill subsequent to the party for whose honour he has accepted (*p*). The engagement of an acceptor for honour differs from that of an ordinary acceptor; it is conditional on due presentment, and notice of dishonour, and protest of the bill. It is equivalent to saying to the holder, "Keep the bill, do not return it; and when the time arrives at which it ought to be paid, if it be not paid by the party on whom it is drawn, come to me, and you shall have the money." In order, therefore, to complete the liability of the acceptor for honour, the bill must be presented for payment when it falls due, notwithstanding the former refusal of the drawee, who may possibly in the meantime have received assets (*q*). This presentment (*r*) must be followed by protest of the bill for non-payment before it is presented for payment to the acceptor for honour or referee in case of need (*s*).

Formerly, it was necessary that an acceptance for honour should be made in the presence of a notary, and that an act of honour should be executed. The Act expressly states that payment for honour *supra protest*, in order to operate as such, and not as a mere voluntary payment, must be attested by "a notarial act of honour" (*t*). When dishonoured by an acceptor for honour, a bill of exchange must, notwithstanding the option given by s. 51, be protested for nonpayment (*u*). The payee

(*n*) Sect. 65 (3).

(*o*) Sect. 66 (1). *Phillip* v. *Im Thurm*, 1 C. P. 220.

(*p*) Sect. 66 (2).

(*q*) *Hoare* v. *Cazenove*, 16 East, 391; *Mitchell* v. *Baring*, 10 B. & C. 4; M. & M. 381.

(*r*) See sect. 65 (5), as to the maturity of such a bill, overruling *Williams* v. *Germaine*, 7 B. & C. 468.

(*s*) Sect. 67 (1).

(*t*) Sect. 68 (3).

(*u*) Sect. 67 (4).

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for honour succeeds to the rights and duties of the holder as regards the party for whose honour he pays, and all parties liable to him (*v*).

There is another kind of acceptance. A person who accepts a bill without receiving value for so doing, and for the purpose of lending his name, is called an *accommodation* acceptor (*x*). He is liable on the bill to a holder for value, whether or not the latter in taking the bill knew the acceptor to be an accommodation acceptor (*y*). The person accommodating may be the acceptor, drawer, or indorser. The rights *inter se* of the parties to such a bill will be regulated by the real nature of the transaction between them, and not by the order of their names on the bill. *Primâ facie*, however, they will be entitled to relief as if the bill had been drawn and indorsed for value. In the case of an accommodation bill the drawer, in the absence of any express agreement to the contrary, engages that he will provide funds for the payment of the bill at maturity, and that, if owing to his failing to do so the acceptor is compelled to pay the bill, he will indemnify him (*z*).

There cannot be a second acceptance of a bill of exchange. If such be written on a bill it may be evidence of a collateral undertaking (*a*). All the numbered parts of a set, when a bill is so drawn, are regarded as one bill (*b*). But if the drawee accepts more than one part of a bill drawn in sets, he is liable on every part to holders in due course as if it were a separate bill (*c*).

Section V.—*Presentment.*

Presentment.

There are two kinds of presentment—presentment for *acceptance*, and presentment for *payment*. Every holder of a bill

(*v*) Sect. 68 (5). Beawes, 47; *Smith* v. *Nissen*, 1 T. R. 269. See *Ex parte Lambert*, 13 Ves. 179; *Ex parte Wackerbath*, 5 Ves. 574; *In re Overend, Gurney & Co.*, L. R. 6 Eq. 344.

(*x*) Sect. 28 (1).

(*y*) Sect. 28 (2). *Burdon* v. *Benton*, 9 Q. B. 843.

(*z*) *Reynolds* v. *Doyle*, 1 M. & G. 753; *Ex parte European Bank*, L. R. 7 Ch. 99.

(*a*) *Jackson* v. *Hudson*, 2 Camp. 447; *Steele* v. *M'Kinlay*, 5 App. Cas. p. 770.

(*b*) Sect. 71 (1).

(*c*) Sect. 71 (4).

ought to present it in due time for *acceptance*, if necessary, and in all cases for *payment*, and to give notice, if it be dishonoured, to every person who would be entitled to bring an action on it after paying it. If he fails in any of these particulars, such parties will be discharged. In some cases the debt for which the bill or cheque was given, though that of a third person, may be discharged; *e. g.*, if C., the creditor, takes from D., his debtor, the cheque of an agent of D., and does not present it within a reasonable time, so as to prejudice the position of D., he is discharged (*d*). Presentment.

First, as to presentment for *acceptance*. It is prudent in all cases, since the holder, if he succeeds in obtaining it, gains the additional security of the drawee, while if he fails, his remedy against the drawer is accelerated. But it is necessary only in three cases to make parties to a bill liable: where a bill is payable after sight (*e*), or it expressly stipulates for presentment, or it is drawn payable elsewhere than at the residence or place of business of the drawee (*f*). In no other case is presentment necessary.

When a bill has been presented for acceptance and dishonoured, notice of dishonour must be at once given to the parties whom it is intended to charge, and the Statute of Limitations runs from that date (*g*).

The Bills of Exchange Act contains certain rules, for the most part declaratory of the common law, as to presentment (*h*). First, as to presentment for *acceptance*:—

"(a) The presentment must be made by or on behalf of the holder to the drawee or to some person authorised to accept or refuse acceptance on his behalf (*i*), at a reasonable hour on a business day (*k*), and before the bill is overdue."

The holder of a bill payable after sight must either present

(*d*) *Hopkins* v. *Ware*, L. R. 4 Ex. 268.
(*e*) *Way* v. *Bassett*, 5 Hare, 55.
(*f*) Sect. 39.
(*g*) *Whitehead* v. *Walker*, 9 M. & W. 506.
(*h*) Sect. 41.
(*i*) *Cheek* v. *Roper*, 5 Esp. 175.
(*k*) *I. e.*, any other day than those specified in s. 92.

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it for acceptance or negotiate it within a reasonable time, otherwise the drawer and all indorsers prior to the holder will be discharged (*l*). What is such reasonable time is to be determined by the nature of the bill, the usage of trade as to similar bills, and the facts of the particular case (*m*). No delay warranted by the ordinary course of business is unreasonable; and therefore bills drawn by a country banker upon London may, by the course of dealing, be retainable, as part of the circulating medium of the country, for a longer period than they would be if drawn under other circumstances (*n*). So with respect to bills payable abroad after sight, in the absence of any positive regulation, general usage, or particular course of trade, the rule is, that they must be forwarded to their destination for acceptance within a reasonable time; what is that reasonable time is a mixed question of law and fact, to be decided by a judge or a jury, acting under the direction of a judge, on the particular circumstances of each case, and they, in order to arrive at its determination, should not take into their consideration the situation and interests of the drawer only, or of the holder only, but of both. Where a jury were directed to act thus, and held a delay of four months and twenty-one days not unreasonable, their decision has been approved of (*o*), though the bill was not circulated during that time. If the bill be circulated during the interval, greater indulgence is allowed; and in one case *Buller*, J., said, that if a bill at three days' sight were kept out in that way for a year, he could not say there would be laches (*p*). But if there be a wanton or careless detainer by the holder, even of such a bill, the other parties are discharged (*q*). On a presentment for acceptance, the bill must,

(*l*) Sect. 40 (1).

(*m*) Sect. 40; *Fry* v. *Hill*, 7 Taunt. 397.

(*n*) *Shute* v. *Robins*, M. & M. 133.

(*o*) *Mellish* v. *Rawdon*, 9 Bing. 416; *Muilman* v. *D'Eguino*, 2 H. Bl. 565; *Straker* v. *Graham*, 4 M. & W. 721; *Ramchurn Mullick* v. *Luchmeecund Radakissen*, 9 Moore, P. C. Ca. 46; *Godfray* v. *Coulman*, 10 Moore, P. C. Ca. 11.

(*p*) *Muilman* v. *D'Eguino*, 2 H. Bl. 565; and *Goupy* v. *Hardon*, 7 Taunt. 159.

(*q*) *Muilman* v. *D'Eguino*, *Mellish* v. *Rawdon*, *Straker* v. *Graham*, *Ramchurn Mullick* v. *Luchmeecund Radakissen*, ubi supra.

it seems, be left with the drawee twenty-four hours, unless he, in the interim, either accept or refuse to do so (*r*). Presentment.

"(b) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all then presentment may be made to him only (*s*):

"(c) Where the drawee is dead presentment may be made to his personal representative (*t*):

"(d) Where the drawee is bankrupt presentment may be made to him or to his trustee (*u*):

"(e) Where authorized by agreement or usage, a presentment through the post office is sufficient (*v*)."

Presentment is excused where the drawee is dead or bankrupt, or is a fictitious person or one not having capacity to contract, or where after the exercise of reasonable diligence presentment cannot be made (*x*). But the circumstance that the holder has reason to believe that the bill will not be honoured does not excuse non-presentment (*y*).

A bill must be presented for *payment*, otherwise the drawer and indorsers will be discharged (*z*). It is not necessary to charge the maker or acceptor. The Act contains certain rules for presentment for *payment*.

"(1.) Where the bill is not payable on demand, presentment must be made on the day it falls due" (*a*).

A bill or note not payable on demand is not really payable until three days, known as days of grace, after the day fixed by the bill. If the third day be a Sunday, Christmas Day, Good Friday, or a day appointed by royal proclamation as a public fast or thanksgiving day, the bill is payable on the preceding business day. If the third day is a Bank Holiday, it is payable

(*r*) Byles, 14th ed. p. 209.
(*s*) Sect. 41 (1).
(*t*) Sect. 41 (1). *Smith* v. *New South Wales Bank*, 8 Moo. P. C. N. S. at p. 461.
(*u*) Sect. 41 (1).
(*v*) Ibid.
(*x*) Sect. 41 (2).
(*y*) Sect. 41 (3).
(*z*) Sect. 45, and as to drawer of a cheque, sect. 74.
(*a*) Sect. 45 (1).

Presentment.

on the succeeding business day (*y*). The time of payment of a bill payable at a fixed period after date, after sight, or after the happening of a specified event, is ascertained by excluding the day from which the time is to begin to run, and including the day of payment (*z*). The due date of a bill drawn in one country and payable in another is determined by the law of the latter country (*a*).

A foreign bill is frequently drawn payable at so many usances. An usance signifies the time in which, during the infancy of bills, all bills between this country and the place on or at which the instrument is drawn, were payable (*b*): these usances are calculated exclusively of the day of the date and of the days of grace. Thus, an usance between this country and Venice being three calendar months, a bill drawn on Venice at two usances, and dated on the 1st of January, purports to fall due upon the 1st of July following. But at Venice six days of grace are allowed, excluding Sundays, holidays, and days on which the bank is shut; the bill, therefore, must not be presented till the 7th, and if such a day intervene, not till the 8th.

In computing the time which such bills have to run, it sometimes becomes necessary to divide a month; thus, a bill drawn on Venice at half usance, is payable at one month and a half from date; in such cases the half month means fifteen days (*c*).

"(2.) Where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its *issue* (*d*) in order to render the *drawer* liable, and within a reasonable time after its *indorsement* in order to render the *indorser* liable. In determining what is a reasonable time regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case" (*e*).

(*y*) Sect. 14 (1) (a) and (b).
(*z*) Sect. 14 (2).
(*a*) Sect. 72 (5).
(*b*) See a Table of Usances, Chitty on Bills, 11th ed., p. 260, n.
(*c*) Marius, 23.
(*d*) *Ware* v. *Evans*, Ld. Raym. 928; as to cheques, see *Alexander* v. *Burchfield*, 7 M. & G. 1061.
(*e*) Sect. 45 (2).

Presentment.

What is a reasonable time is, in the absence of any settled rule, a mixed question of law and fact, to be decided in the same way as the like question concerning the presentment for acceptance of bills at or after sight (*f*); and a longer time for presentment will be allowed when the instrument was intended to be a continuing security, or has been circulated, and was apparently meant for circulation (*g*). But any delay beyond what the common course of business warrants is in ordinary cases unreasonable. If the instrument be payable at a banker's, and in the place where the party receives it, the established rule now is, that it suffices to present it *at any time during banking hours* on the business day (*h*) after it is received (*i*). If it be payable elsewhere, it suffices to forward it by the regular post on the day after it is received (*j*); and the party receiving it by post has till the next day to present it (*k*). These limits, however, must not be transgressed (*l*), save under very special circumstances; as where a servant received the notes on Friday for his master, who was then absent, and did not return till after banking hours on Saturday, and consequently could not present the notes till Monday (*m*).

In the case of a cheque, any unreasonable delay to present it for payment exonerates the drawer to the extent to which he may have been injured, if the banker or person on whom it was drawn has failed in the interim (*n*).

"(3.) Presentment must be made by the holder or by some

(*f*) See ante, pp. 261, 262; *Merc. Bk. of Lond. and C.* v. *Dickson*, L. R. 3 P. C. 574.

(*g*) *Barough* v. *White*, 4 B. & C. 325; *Heywood* v. *Watson*, 4 Bing. 496; *Banks* v. *Colwell*, 3 T. R. at p. 81; *Camidge* v. *Allenby*, 6 B. & C. 373.

(*h*) Sect. 92.

(*i*) *Robson* v. *Bennett*, 2 Taunt. 388; *Boddington* v. *Schlencker*, 4 B. & Ad. 752.

(*j*) *Rickford* v. *Ridge*, 2 Camp. 537; *Darbishire* v. *Parker*, 6 East, 3; and as to cheques, see *Hare* v. *Henty*, 10 C. B. N. S. 65.

(*k*) *Williams* v. *Smith*, 2 B. & Ald. 496.

(*l*) *Beeching* v. *Gower*, Holt, N. P. C. 315; *Heywood* v. *Pickering*, L. R. 9 Q. B. 428; *Camidge* v. *Allenby*, 6 B. & C. 373; *Moule* v. *Brown*, 4 Bing. N. Cas. 266 (a cheque); *Alexander* v. *Burchfield*, 7 M. & G. 1061; *Hopkins* v. *Ware*, L. R. 4 Ex. 268.

(*m*) *James* v. *Holditch*, 8 D. & R. 40. See *Williams* v. *Smith*, 2 B. & Ald. 496.

(*n*) Sect. 74 (1); *Robinson* v. *Hawksford*, 9 Q. B. 52; *Serle* v. *Norton*, 2 M. & Rob. 401; *Hopkins* v. *Ware*, L. R. 4 Ex. 268.

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person authorized to receive payment on his behalf at a reasonable hour on a business day (*n*), at the proper place as hereinafter defined (*o*), either to the person designated by the bill as payer, or to some person authorized to pay, or refuse payment on his behalf, if with the exercise of reasonable diligence such person can there be found" (*p*).

If the maker or drawee be absent, or the house at which the bill or note was payable be found shut up, it may be treated as dishonoured (*q*); but care must be taken that he has absented himself, and not merely removed; nor is his bankruptcy or stopping payment any excuse for the want of presentment (*r*). The person who presents a bill must be ready and willing to deliver it up on payment (*s*).

The following are the rules defining a proper place for presentment:—

"(a) Where a place of payment is specified in the bill, and the bill is there presented (*t*).

"(b) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented (*u*).

"(c) Where no place of payment is specified, and no address given (*x*), and the bill is presented at the drawee's or acceptor's place of business, if known, and if not, at his ordinary residence, if known.

"(d) In any other case, if presented to the drawee or acceptor wherever he can be found (*x*), or if presented at his last known place of business or residence."

Where a bill is payable at a bankers, a presentment at the bankers is sufficient (*y*); if at a particular place, where the acceptor has no residence, a presentment, it is said, at all the banking houses in the place (*z*). Where a particular house is pointed

(*n*) See sect. 92.
(*o*) See infra.
(*p*) Sect. 45 (3).
(*q*) *Hine* v. *Allely*, 4 B. & Ad. 624.
(*r*) *Sands* v. *Clarke*, 8 C. B. 751.
(*s*) Sect. 52 (4).
(*t*) Sect. 45 (4).
(*u*) Sect. 45 (4); *Hine* v. *Allely*, supra.
(*x*) Sect. 45 (4).
(*y*) *Saunderson* v. *Judge*, 2 H. Bl. 509; *Harris* v. *Packer*, 3 Tyr. 370, n. See *Bailey* v. *Porter*, 14 M. & W. 44, in which the fact of the bankers at whose bank the bill was made payable being themselves the holders was considered equivalent to presentment.
(*z*) *Hardy* v. *Woodroofe*, 2 Stark. 319.

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out by the bill as the acceptor's residence, he is bound, if he remove from that house, to leave sufficient funds to meet the bill, and a presentment to any inmate (*a*), or, if the house be shut up, at the door, will be sufficient (*b*). By the usage of bankers in London, a bill or cheque held by a bank and payable by another, may be presented at the clearing house (*c*). If the bill be payable at two alternate places, the holder may present at either (*d*).

A bill drawn on two or more persons, not partners, must, if no place of payment is specified, be presented to all (*e*). Presentment for *acceptance* is dispensed with where the drawee is dead (*f*). But in the event of the death of the drawee, and if no place of payment be specified, presentment for *payment* must be made to the personal representatives, if such there be, and they can with reasonable diligence be found (*g*). As in the case of presentment for acceptance, usage may permit presentment for acceptance by post.

Presentment for payment is unnecessary (*h*) :—

"(a) Where, after the exercise of reasonable diligence, presentment as required by this Act cannot be effected (*i*). The fact that the holder has reason to believe that the bill will on presentment be dishonoured, does not dispense with the necessity for presentment (*k*).

"(b) Where the drawee is a fictitious person (*l*).

"(c) As regards the *drawer*, where a drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented."

For instance, where the drawer has no assets, or reasonable grounds for believing that he will have assets, in the hands of the acceptor (*m*).

(*a*) *Buxton* v. *Jones*, 1 M. & G. 83.
(*b*) *Hine* v. *Allely*, 4 B. & Ad. 624.
(*c*) *Reynolds* v. *Chettle*, 2 Camp. 596.
(*d*) *Beeching* v. *Gower*, Holt, 315.
(*e*) Sect. 45 (6).
(*f*) Sect. 41 (2) (a).
(*g*) Sect. 45 (7).
(*h*) Sect. 46 (2).
(*i*) *Hardy* v. *Woodroofe*, 2 Stark. 319 ; *Sands* v. *Clarke*, 8 C. B. 751.
(*k*) *Hill* v. *Heap*, D. & R. N. P. C. 57.
(*l*) *Smith* v. *Bellamy*, 2 Stark. 223.
(*m*) *Wirth* v. *Austin*, L. R. 10 C. P. 689.

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"(d) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented.

"(e) By waiver of presentment, express or implied" (*n*).

Section VI.—*Notice.*

Notice.

When a bill or note is dishonoured by non-acceptance or non-payment, notice of such dishonour must be given to the drawer and each indorser to whom the holder wishes to have recourse (*o*). If the drawer have died, notice must be given to his representatives; if he have become a bankrupt, to his trustee (*p*). Notice to a person not a party to the bill, but only collaterally liable, as upon a guarantee for its payment, is unnecessary (*q*). It is no excuse for the omission to give notice that the indorser or drawer has not suffered loss thereby; the law presumes that he is injured, and, except in certain cases, the party to whom it should have been given is discharged from all liability.

Notice of dishonour does not mean mere *knowledge*, and a party may be entitled to a formal communication of the dishonour of a bill, though it be clearly shown that he knew it would be dishonoured (*r*).

The notice must conform to certain rules, of which the following are the chief (*s*):—

"(1.) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill (*t*):

(*n*) Sect. 46 (2).

(*o*) Sects. 48, 49; *Lafitte* v. *Slatter*, 6 Bing. 623.

(*p*) Sect. 49 (9), (10); *Rohde* v. *Proctor*, 4 B. & C. 517. See *Ex parte Moline*, 19 Ves. 216.

(*q*) *Walton* v. *Mascall*, 13 M. & W. 72; *Hitchcock* v. *Humfrey*, 5 M. & G. 559; *Smith* v. *Mercer*, L. R. 3 Ex. 51, seems irreconcilable with those cases and with *Carter* v. *White*, 25 Ch. D. 666.

(*r*) *Burgh* v. *Legge*, 5 M. & W. 418. But if he be the person to whom in truth the bill is presented, formal notice is unnecessary: *Caunt* v. *Thompson*, 7 C. B. 400.

(*s*) Sect. 49.

(*t*) *Chapman* v. *Keane*, 3 Ad. & E. 193; *Ex parte Barclay*, 7 Ves. 597; *Jameson* v. *Swinton*, 2 Taunt. 224; *Wilson* v. *Swabey*, infra. See *Stewart* v. *Kennett*, 2 Camp. 177. Notice from the acceptor has been held sufficient;

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"(2.) Notice of dishonour may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not:

"(3.) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given (*u*).

"(4.) Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of the holder, and all indorsers subsequent to the party to whom notice is given."

It does not appear necessary that the person giving notice should have been specifically authorised to do so on behalf of the holder or indorser. Unless, however, he on whose behalf the notice is given be liable on the bill it will not avail. Thus, it will not suffice if he be discharged by his signature being cancelled by having indorsed *sans recours*, or through the bill not having been duly presented for acceptance. The notice need not state on whose behalf it is given (*x*). If it purport to do so, and by mistake the name of another party to the bill be mentioned, the notice will not be void. The only effect, it seems, will be to entitle the person to whom it is addressed to avail himself, as against the party on whose behalf it is actually given, of any defence he would have against the party whose named is used (*y*).

The notice must be given in sufficient time to maintain the action if such party were suing on the bill (*a*).

"(5.) The notice may be given in writing or by personal communication (*g*), and may be given in any terms which sufficiently

however, a learned author remarks (Bayley on Bills, 6th ed. 250) he probably acted as agent for the holder.

(*u*) *Wilson* v. *Swabey*, 1 Stark. 34; *Chapman* v. *Keane*, 3 Ad. & E. 193; overruling, as to this point, *Tindal* v. *Brown*, 1 T. R. 167; 2 T. R. 186; and *Ex parte Barclay*, 7 Ves. 597; *Harrison* v. *Ruscoe*, 15 M. & W. 231; *Lysaght* v. *Bryant*, 9 C. B. 46.

(*x*) *Woodthorpe* v. *Lawes*, 2 M. & W. 109.

(*y*) *Harrison* v. *Ruscoe*, 15 M. & W. 231.

(*a*) *Harrison* v. *Ruscoe*, supra.

(*g*) *Houlditch* v. *Cauty*, 4 Bing. N. C. 411.

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identify the bill and intimate that the bill has been dishonoured by non-acceptance or non-payment (*h*).

"(6.) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour" (*hh*).

Rules 5 and 6 remove some difficulties as to the sufficiency of notices of dishonour. All that is now necessary is a notice identifying the bill, and intimating that it has been dishonoured by non-acceptance or non-payment. Before the Act the true rule of construction was that where the terms of the notice are such that it appears by reasonable intendment, and would be inferred by any man of business, that the bill has been presented to the acceptor and not paid by him, although it does not appear by express terms or necessary implication, that is sufficient (*i*). Therefore a notice informing a party that the acceptance due that day was unpaid, accompanied by expressions requesting his attention to it, or requiring payment, was deemed by the Court of Exchequer Chamber to be sufficient. A notice which described a bill as "a note," but in which the date was accurately stated, was sufficient (*j*).

Whether a person has been misled by a misdescription of a bill in a notice of its dishonour is a question of fact in each particular case. Notice was held good where the defendant, the drawer, was called the "acceptor," and the acceptor was described as the "drawer" (*k*), and where the notice misstated the bank at

(*h*) Sect. 49. *Curlewis* v. *Corfield*, 1 Q. B. 814.

(*hh*) Sect. 49.

(*i*) *Paul* v. *Joel*, 3 H. & N. 455; S. C. (Ex. Ch.) 4 H. & N. 355. The notice was in these words—"B.'s acceptance to J., 500*l*., due January 12, is unpaid; payment to R. & Co. is requested before 4 o'clock." In *Bailey* v. *Porter*, 14 M. & W. 44, which was adopted by the Court as the ruling authority, the following notice was held sufficient:—"James Court's acceptance, due this day, is unpaid, and I request your immediate attention to it." *Armstrong* v. *Christiani*, 5 C. B. 687.

(*j*) *Stockman* v. *Parr*, 11 M. & W. 809.

(*k*) *Stockman* v. *Parr*, 11 M. & W. 809; *Bromage* v. *Vaughan*, 9 Q. B. 608; *Mellersh* v. *Rippen*, 7 Exch. 578; *Rowlands* v. *Springett*, 14 M. & W. 7.

which the bill was payable, all other particulars being rightly described, and the defendant not being in fact misled. Notice.

"(7.) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

"(8.) Where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf" (*m*).

A referee in case of need is not for the purpose of receiving notice of dishonour an agent of the party inserting his name (*n*). Where a drawer was one of the partners of a firm by which the bill was accepted, the notice which any one of the partners received of its dishonour was deemed sufficient to bind the drawer (*o*). Notice to a member of a public company or *quasi*-corporation is not notice to the company (*p*). An agent for the purpose of indorsing a bill is deemed to be an agent for the purpose of receiving notice of dishonour, and a notice given him will be good.

"(9.) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative if such there be, and with the exercise of reasonable diligence he can be found.

"(10.) Where the drawer or indorser is *bankrupt*, notice *may be* given either to the party himself or to his trustee.

"(11.) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, *unless* one of them has authority to receive such notice for the others" (*l*).

In one case the drawer, who was a bankrupt, had absconded.

(*m*) Sect. 49. *Bromage* v. *Vaughan*, 9 Q. B. 608.

(*n*) *In re Leeds Banking Co., Ex parte Prange*, L. R. 1 Eq. 1; *Crosse* v. *Smith*, 1 M. & S. 545, at p. 554. (A clerk to a merchant is his agent to receive notice of dishonour if the notice be given at the counting-house. See post, p. 274.)

(*o*) *Hills* v. *Thorowgood*, 2 H. & W. 102.

(*p*) *Steward* v. *Dunn*, 12 M. & W. at p. 664.

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His house remained open, and in the possession of a messenger. No notice was given to the drawer or left at his house, or given to the assignees, of whose appointment the holder had notice. In these circumstances the drawer's estate was held to be discharged from the bill (*r*). In another case the holder of a bill which was dishonoured after the appointment of a trustee in the bankruptcy of the drawer, sent by post notice of the dishonour to the drawer, directed to an address which he had left for some months, the address being the only one with which the holder was acquainted. The notice was held sufficient (*s*).

"(12.) The notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter (*t*).

"In the absence of special circumstances, notice is not deemed to have been given within a reasonable time, unless—(a) where the person giving, and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill; (b) where the person giving, and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day, then by the next post thereafter" (*u*).

The holder has his day to give notice to any party he may seek to charge, and each of the prior indorsers in turn has *his* day; but the holder may avail himself of a notice duly given by any other party to the bill (*x*). Non-business days, that is, Sunday, Good Friday, Christmas Day, bank holidays, and days appointed by royal proclamation as a public fast or thanksgiving day, are not counted if the period within which the notice should be given is less than three days (*y*). If a bill is dishonoured on Saturday, it will be sufficient if the

(*r*) *Rohde* v. *Proctor*, 4 B. & C. 517.

(*s*) *Ex parte Baker, In re Bellman*, L. R. 4 Ch. D. 795; *Ex parte Johnston*, 1 Mont. & Ayr. 622.

(*t*) Sect. 49.

(*u*) *Williams* v. *Smith*, 2 B. & Ald. 496; *Hawkes* v. *Salter*, 4 Bing. 715; *Prideaux* v. *Priddle* (as to notice of dishonour of a cheque), L. R. 4 Q. B. 455.

(*x*) *Rowe* v. *Tipper*, 13 C. B. 249. See sect. 49 (3).

(*y*) Sect. 92.

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notice be sent off so as to be delivered on the Monday, if the persons giving and receiving notice reside in the same place. Where they reside in different places, the notice may be sent off on the Monday if there be a convenient post on that day; if not, the notice must be sent by the next post thereafter.

"(13.) Where a bill, when dishonoured, is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder" (*a*).

A banker presenting a bill or note for his customer has the same time to give notice to his customer as if the banker were the holder for his own benefit; and the customer has the same time to transmit the notice to former parties as if such had been the case (*b*). And a person who pays a bill for the honour of an indorser, holds as upon a transfer from him, and has a right to take advantage of any notice of which the person for whom he made the payment could have availed himself (*c*).

"(14.) Where a party to a bill receives due notice of dishonour, he has, after the receipt of such notice, the same period of time for giving notice to antecedent parties that the holder has after the dishonour (*d*).

"(15.) Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office" (*e*).

In certain cases giving notice will be excused or dispensed with. It is *excused* when the delay is caused by "circumstances

(*a*) Sect. 49 (13).

(*b*) *Haynes* v. *Birks*, 3 B. & P. 599; *Scott* v. *Lifford*, 9 East, 347; *Langdale* v. *Trimmer*, 15 East, 291; *Poole* v. *Dicas*, 1 Bing. N. C. 649. See *Boyd* v. *Emmerson*, 2 Ad. & E. 184. In the case of a bill having passed through several branch banks, each branch is to be considered as an independent holder, and entitled to notice, and the time to transmit it: *Clode* v. *Bayley*, 12 M. & W. 51; *Prince* v. *Oriental Bank*, 3 App. Cas. p. 332.

(*c*) *Goodall* v. *Polhill*, 1 C. B. 233.

(*d*) Sect. 49 (14). See *Horne* v. *Rouquette*, 3 Q. B. D. 514.

(*e*) Sect. 49 (15). *Newen* v. *Gill*, 8 C. & P. 367; *Chapman* v. *Keane*, 3 Ad. & E. 193.

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beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence," as in case of the death or illness of the holder (*e*), or where the indorser gives a wrong address or misleads the holder as to it, and the notice is consequently long in reaching him (*f*).

Notice of dishonour is *dispensed* with—

"(a) When, after the exercise of reasonable diligence, notice as required by this Act cannot be given to, or does not reach the drawer or indorser sought to be charged" (*g*).

Thus, going to the party's counting-house during business hours and finding no one there to receive the notice, is equivalent to a dispensation with notice; since, according to the usage of trade, a merchant who puts his name to a bill ought to be ready at his place of business to receive notice of its dishonour (*h*).

"(b) By waiver, express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice" (*i*).

In an action by an indorsee against the drawer, a letter in which he said, "You know I meant to call upon you immediately after the 24th with the money; Mr. G. (the acceptor) is an old and intimate friend of mine," was deemed sufficient evidence of waiver of presentment and notice of dishonour (*j*). In fact, any acknowledgment by a drawer of his liability to pay, or any promise to pay the amount, though conditional as to the mode of payment, is evidence for a jury of due notice of dishonour, and, in the case of a foreign bill, of its having

(*e*) Sect. 50 (1). *Hilton* v. *Shepherd*, 6 East, 14, n.

(*f*) *Bateman* v. *Joseph*, 12 East, 433; *Beveridge* v. *Burgis*, 3 Camp. 262; *Browning* v. *Kinnear*, Gow, 81; *Firth* v. *Thrush*, 8 B. & C. 387; *Berridge* v. *Fitzgerald*, L. R. 4 Q. B. 639; *Hewitt* v. *Thomson*, 1 M. & Rob. 543; see *Siggers* v. *Brown*, Ib. 520. See per *Parke*, B., *Allen* v. *Edmundson*, 2 Exch. at p. 724; *Turner* v. *Leech*, 4 B. & Ald. 451; *Rowe* v. *Tipper*, 13 C. B. 249.

(*g*) Sect. 50 (2).

(*h*) *Crosse* v. *Smith*, 1 M. & S. 545; *Allen* v. *Edmundson*, 2 Exch. 719. Notice will be dispensed with under this sub-section only where the inability to give notice continues up to the time of bringing action: *Studdy* v. *Beesty*, 60 L. T. N. S. 647.

(*i*) Sect. 50 (2).

(*j*) *Mills* v. *Gibson*, 16 L. J. C. P. 249; *Rabey* v. *Gilbert*, 30 L. J. Ex. 170; *Woods* v. *Dean*, 3 B. & S. 101; 32 L. J. Q. B. 1.

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been duly protested (*k*). According to *Woods* v. *Dean* (*l*), if a person who has not had due notice of dishonour acknowledges, with full knowledge of the facts, his liability, though not to the party then suing, is evidence from which waiver of the notice may be inferred.

Notice of dishonour is dispensed with as regards the *drawer* in the following cases :—

"(1) Where drawer and drawee are the same person; (2) where the drawee is a fictitious person, or a person not having capacity to contract; (3) where the drawer is the person to whom the bill is presented for payment; (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill; (5) where the drawer has countermanded payment" (*m*).

Of these cases the most important is that of accommodation bills. Before the passing of the Bills of Exchange Act it was held that if a bill was accepted for the accommodation of a drawer, who had not the least reason to expect that it would be paid, he would not be entitled to notice of its dishonour (*n*), since the reason for notice is that the drawer may, without delay, withdraw his effects from the drawee's hands, which reason, of course, cannot apply when he has none there. But the drawer was entitled to notice, if on taking up the bill he could sue the acceptor or any other party (*o*), or had reason to expect that the bill would be paid, as if he had effects on their way to the drawee (*p*), or had effects in the drawee's hands at the time when the bill was drawn (*q*), or when it was presented for acceptance (*r*), or afterwards but before it became due (*s*); in a word, if he had any reasonable ground to expect

(*k*) *Campbell* v. *Webster*, 15 L. J. C. P. 4; 2 C. B. 258.

(*l*) 3 B. & S. 101; 32 L. J. Q. B. 1.

(*m*) Sect. 50 (2) (c).

(*n*) *Sharp* v. *Bailey*, 9 B. & C. 44; *Bickerdike* v. *Ballman*, 2 Sim. L. C., 9th ed. 55; 1 T. R. 405; *Fitzgerald* v. *Williams*, 6 Bing. N. C. 68; *Carew* v. *Duckworth* (as to note of dishonour of cheque), L. R. 4 Ex. 313.

(*o*) *Ex parte Heath*, 2 V. & B. 240; 2 Rose, 141; *Cory* v. *Scott*, 3 B. & Ald. 619; *Norton* v. *Pickering*, 8 B. & C. 610. So in the case of an indorser, *Carter* v. *Flower*, 16 M. & W. 743.

(*p*) *Rucker* v. *Hiller*, 3 Camp. 217; 16 East, 43.

(*q*) *Orr* v. *Maginnis*, 7 East, 359. See *Thackray* v. *Blackett*, 3 Camp. 164; and *Blackhan* v. *Doren*, 2 Camp. 503.

(*r*) *Blackhan* v. *Doren*, supra.

(*s*) *Hammond* v. *Dufrene*, 3 Camp. 145. See *Thackray* v. *Blackett*, and *Blackhan* v. *Doren*, supra.

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that the bill will be paid, he was entitled to notice (*u*). "No case," said Lord *Ellenborough*, C. J., in *Orr* v. *Maginnis* (*x*), "has gone the length of extending the exemption (from the necessity of giving notice) to cases where the drawee had effects of the drawer in his hands at the time of the bill drawn, though the balance might vary afterwards, and be turned into the opposite scale; it would be very dangerous and inconvenient, merely on account of the shifting of a balance, to hold notice not to be necessary." For as regards the indorser notice is dispensed with—

"(1) Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the bill (*y*); (2) where the indorser is the person to whom the bill is presented for payment; (3) where the bill was accepted or made for his accommodation" (*z*).

Immediately upon receiving (*a*) the notice, the party to whom it is given becomes liable to an action at the suit of the holder, unless the money due upon the bill or note be then paid. It would seem that non-tender is the breach, and that a subsequent tender would not avail.

A foreign bill dishonoured by non-acceptance or non-payment must be protested (*b*), it is said, and information of the *protest* sent with the notice (*c*). It was once thought that a *copy* of the protest must be sent, unless, indeed, in the case of a person who, having drawn or indorsed a bill abroad, came to this country and received the notice here (*d*). But it is now settled that it is sufficient to send information that the bill has been protested, without any copy of the protest (*e*). Inland bills require no protest, but are usually *noted* for non-payment, a ceremony

(*u*) *Lafitte* v. *Slatter*, 6 Bing. 623; *Turner* v. *Samson*, 2 Q. B. D. 23.

(*x*) 7 East, 359, at pp. 361, 362.

(*y*) See *Leach* v. *Hewitt*, 4 Taunt. 731.

(*z*) Sect. 50 (2) (d). See *Turner* v. *Samson*, 2 Q. B. D. 23.

(*a*) *Castrique* v. *Bernabo*, 6 Q. B. 498.

(*b*) Sect. 51 (2). The section only applies to "a foreign bill appearing on the face of it to be such."

(*c*) In *Ex parte Lowenthal*, L. R. 9 Ch. 591, the Lords Justices expressed an opinion that a notice simply stating the bill had been "duly presented and dishonoured," was sufficient.

(*d*) *Cromwell* v. *Hynson*, 2 Esp. 511; *Robins* v. *Gibson*, 3 Camp. 334; 1 M. & S. 288; B. N. P. 271.

(*e*) *Goodman* v. *Harvey*, 4 Ad. & E. 870.

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which is, however, quite unnecessary (*f*). When a bill is noted or protested, it must be noted on the day of its dishonour—a point which had not hitherto been settled (*g*).

A protest is a minute of the non-acceptance or non-payment, accompanied by a solemn declaration on the part of the holder against any loss to be sustained thereby (*h*). It is made out by a notary public, who, at a seasonable hour in the course of the same day in which the bill has been dishonoured, again presents or causes it to be presented, and, if payment be again refused, makes a minute, consisting of his initials, the day, month and year, and reason, if assigned, of non-payment. This minute, the making of which is termed *noting* the bill, is a mere memorandum, from which the notary may afterwards draw up a *protest* at his leisure (*i*), but, *per se*, it is of no legal effect (*k*). The protest must contain a copy of the bill; it must be signed by the notary; and it must specify the person at whose request the bill is protested, the place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, or the fact that the drawee or acceptor could not be found (*l*). The protest must, in this country, be stamped (*m*). If the services of a notary cannot be obtained at the place where the bill is dishonoured, any householder, or "substantial resident of the place," may, in the presence of two witnesses, give a certificate attesting the dishonour of the bill, and the

(*f*) Sect. 51 (1). See the subject discussed, Chitty on Bills, 8th edit., pp. 500, 501.

(*g*) Sect. 51 (4); and for the exceptions, see sect. 51 (6) (a), and (9).

(*h*) The form given in the First Schedule of the Act is as follows:—

"Know all men that I, A. B. [householder] of , in the county of , in the United Kingdom, at the request of C. D., there being no notary public available, did on the day of , 188 , at , demand payment [*or* acceptance] of the bill of exchange hereunder written from E. F., to which demand he made answer [state answer, if any]: wherefore I now, in the presence of G. H. and I. K., do protest the said bill of exchange.

(Signed) A. B.

G. H. } *Witnesses.*"
I. K. }

As to stamp, see 33 & 34 Vict. c. 97, s. 116, and sched.

(*i*) Sect. 93. See *Chaters* v. *Bell*, 4 Esp. 48. Even in the case of a payment supra protest this may be after action: *Geralopulo* v. *Wieler*, 10 C. B. 690.

(*k*) *Leftley* v. *Mills*, 4 T. R. 170; *Rogers* v. *Stephens*, 2 T. R. 713; *Gale* v. *Walsh*, 5 T. R. 239; B. N. P. 271; *Orr* v. *Maginnis*, 7 East, 359.

(*l*) Sect. 51 (7).

(*m*) 33 & 34 Vict. c. 97, s. 116, and sched.

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certificate will operate as if it were a formal protest of the bill (*m*). In ordinary cases the bill is protested for non-acceptance or non-payment at the place where it is dishonoured (*n*). But a bill which is presented through the post and returned by post dishonoured, may be protested at the place where it is returned; and a bill payable at the place of business or residence of some person other than the drawee which has been dishonoured, by non-acceptance, must be protested for non-payment at the place where it is payable (*o*).

The protest of a foreign bill is excused by any circumstance which would excuse the giving of notice, *e. g.*, when, after the exercise of reasonable diligence, notice cannot be given (*p*).

"Where the acceptor of a bill becomes bankrupt or insolvent, or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers" (*q*).

The only consequence of such a "protest for better security" in the United Kingdom is that the bill may be accepted by any person for honour (*r*). It is not necessary to preserve the right of taking recourse against the drawer or indorser before maturity of the bill.

Section VII.—*Payment.*

Payment.

The payment must of course, subject to the provisions of the Act with respect to crossed cheques (*s*), be to the holder or his representative (*t*). Where money is paid into a bank on the joint account of persons not partners in trade, the bankers are not discharged by payment of the cheque of one of those persons without the authority of the other (*u*).

There are some rules respecting payment of a forged note or

(*m*) Sect. 94.
(*n*) Sect. 51 (6).
(*o*) Sect. 51 (6); and compare 2 & 3 Will. 4, c. 98 (repealed).
(*p*) Sect. 51 (9).
(*q*) Sect. 51 (5).
(*r*) Sect. 65. *Ex parte Wackerbath*, 5 Ves. 574.
(*s*) Sect. 82.
(*t*) Sect. 59.
(*u*) *Innes* v. *Stephenson*, 1 M. & Rob. 145.

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bill of which it is necessary to take notice. In general, a forged or an unauthorized signature is wholly inoperative (*x*). But, as we have seen, the *acceptor* is precluded from denying against a holder in due course the genuineness of the drawer's signature (*y*). If the drawee have not accepted, but pay a forged bill or note, he cannot recover his money back from such a holder; at all events, not unless he discovers the forgery and gives notice that very day before the position of the holder is changed (*z*). And the same diligence is incumbent on one who pays for the honour of a person whose signature has been forged (*a*). Nor will he who pays a forged bill or note have any remedy against the person whose signature has been forged, unless that person, by his gross negligence, facilitated the commission of the forgery (*b*); in which case, if the *negligence was the proximate cause of the loss*, he will have to bear it. Thus, where Hall drew upon his banker for 3*l.*, writing the sum in words and in figures, and the bearer of the cheque erased the words and figures and altered it into a cheque for 200*l.*, the banker who had paid a cheque thus altered was forced to bear the loss (*c*). But where a cheque for 50*l.* 2*s.* 2*d.* was drawn so carelessly that the agent who presented it, and who had previously filled it up, was enabled to introduce a figure of 3 before the figures 50, and the words "three hundred" before the word "fifty," it was held that the drawer, not the banker who paid it in its altered state, should be the sufferer (*d*). A signature by procuration being a notice that the agent has a limited authority to sign, the party paying must ascertain the authority of the

(*x*) Sect. 24. *Robarts* v. *Tucker*, 16 Q. B. 560; *Vagliano* v. *Bank of England*, 23 Q. B. D. 243.

(*y*) Sect. 54 (2). *Smith* v. *Chester*, 1 T. R. 654; *Ashpitel* v. *Bryan*, 3 B. & S. 474.

(*z*) *Price* v. *Neal*, 3 Burr. 1354; *Smith* v. *Mercer*, 6 Taunt. 76; *Cocks* v. *Masterman*, 9 B. & C. 902; *Wilkinson* v. *Johnson*, 3 B. & C. 428; *Matter* v. *Maidstone*, 1 C. B. N. S. 273.

(*a*) *Wilkinson* v. *Johnson*, ubi supra; compare *Phillips* v. *Im Thurm*, L. R. 1 C. P. 463.

(*b*) *Johnson* v. *Windle*, 3 Bing. N. C. 225; *Vagliano* v. *Bank of England*, 23 Q. B. D. p. 262.

(*c*) *Hall* v. *Fuller*, 5 B. & C. 750.

(*d*) *Young* v. *Grote*, 4 Bing. 253. See further as to negligence being the proximate cause of forgery, *Arnold* v. *Cheque Bank*, 1 C. P. D. 258; *Halifax Union* v. *Wainwright*, L. R. 10 Ex. 183; *Vagliano* v. *The Bank of England*, 23 Q. B. D. 243.

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person so signing (*e*). So, likewise, a banker must ascertain the genuineness of all necessary indorsements of a bill (*f*).

Sect. 60 (re-enacting 16 & 17 Vict. c. 59, s. 19) enacts that a banker who pays in good faith and in the ordinary course of business (*g*) a bill payable to order on demand, that is, a cheque (sect. 73), is not bound to show that the indorsement of the payee or of any subsequent indorsee was genuine or authorised (*h*). Section 60 protects only a *banker;* the drawer may, in the absence of negligence conducing directly to the fraud, recover the money from the person who received it from the banker under a forged indorsement (*i*). This section does not apply to a bill the signature of the drawer of which is forged (*k*).

The person paying must also take care that there is no restrictive indorsement (*l*); and it is dangerous to pay before the instrument is due, as the bill may, in certain circumstances, be re-issued (*m*). When a bill is paid it is the duty of the holder to deliver it up to the person paying (*n*).

Payment supra protest.—After a bill has been protested for non-payment, any person may pay it *supra protest* for the honour of any one liable thereon; and he who does so is subrogated to the rights and duties of the holders as regards the party for whose honour he pays (*o*). Before he so pays he must take care that the bill is protested (*p*). Such a payment is usually made upon dishonour (*q*).

How enforced.—Payment of a bill or note may be enforced by action against the drawee, if he has accepted, and against the

(*e*) Sect. 25. *Stagg* v. *Elliott*, 12 C. B. N. S. 373.

(*f*) *Robarts* v. *Tucker*, 16 Q. B. 560; *Vagliano* v. *Bank of England*, 23 Q. B. D. p. 255.

(*g*) *Smith* v. *Union Bank*, 1 Q. B. D. 31.

(*h*) *Charles* v. *Blackwell*, 2 C. P. D. 151.

(*i*) *Ogden* v. *Benas*, L. R. 9 C. P. 193; *Bobbett* v. *Pinkett*, 1 Ex. D. 368, p. 373.

(*k*) *Orr* v. *Union Bank*, 1 Macq. 513.

(*l*) Sect. 35 (1). *Lloyd* v. *Sigourney*, 5 Bing. 525.

(*m*) Sect. 37.

(*n*) Sect. 52 (4).

(*o*) Sect. 68 (5).

(*p*) Sect. 68 (3).

(*q*) Sect. 68 (1). *Vandewall* v. *Tyrrell*, M. & M. 87; *Geralopulo* v. *Wieler*, 10 C. B. 690.

drawers or indorsers, if the bill has been dishonoured either by non-acceptance or non-payment. All these parties may be sued either in the same or different actions, and either at the same time or successively (*s*).

In general, the drawer or indorser of a bill to whom it has been re-indorsed has no remedy upon it against any intermediate parties, because he would be liable over to them; yet if it were indorsed by them under circumstances excluding their right to have recourse to him, for example, "without recourse" (*t*), or as sureties to him for the acceptor, he may sue upon them (*u*). A drawer who pays a bill to the order of a third person may enforce payment against the acceptor (*x*).

A payer for honour is subrogated to the rights and duties of the holder (*y*). It would seem that an indorser who paid would be entitled to all the benefit of the securities deposited with the holder by the acceptor (*z*).

What recoverable.—The holder is generally entitled to recover, from any party liable on the bill, the money expressed to be payable on the instrument, with interest from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case, together with the expenses of noting and protest if necessary (*a*). Such amount will be deemed liquidated damages, and may be recovered under R. S. C. 1883, Ord. XIV. r. 1 (*b*). On a bill dishonoured abroad the holder may, in lieu of the above damages, recover from the drawer or indorser the amount of the re-exchange, that is, the loss resulting from the dishonour,

(*s*) R. S. C. 1883, O. 16, rr. 4, 5; *Smith* v. *Woodcock*, 4 T. R. 691; *Goodman* v. *Cremer*, 18 Q. B. 757. As to consolidation of actions, see O. 49, r. 8. See, as to proceedings for costs after payment, *London and Sub. Bank* v. *Walkinshaw*, 25 L. T. N. S. 704. It is usual to proceed summarily under O. 14, r. 1.

(*t*) Sect. 37.

(*u*) *Bishop* v. *Hayward*, 4 T. R. 470; *Morris* v. *Walker*, 15 Q. B. p. 594; *Wilkinson* v. *Unwin*, 7 Q. B. D. 636; *Wilders* v. *Stevens*, 15 M. & W. 208.

(*x*) Sect. 59 (a). *Woodward* v. *Pell*, L. R. 4 Q. B. 55.

(*y*) Sect. 68 (5). *Goodall* v. *Polhill*, 14 L. J. C. P. 146; *Ex parte Swan*, L. R. 6 Eq. 344.

(*z*) *Duncan, Fox & Co.* v. *North Wales Bank*, 6 App. Cas. 1.

(*a*) Sect. 57 (1).

(*b*) As to interest reserved by the bill, see sect. 9.

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with interest until the time of payment (*c*). A bill of exchange, drawn by an Australian bank on its London agent, was indorsed to another Australian bank and presented for acceptance at the London branch. Acceptance was refused. It was admitted that, if the holder sent out the bill to Australia, he would be allowed, under the South Australian Bills of Exchange Act, 1884, 10 per cent. interest. North, J., held that the holder could recover only the amount of the re-exchange with interest.

"Those cases" (referring to *Allen* v. *Kemble* (*d*), and *Gibbs* v. *Fremont* (*e*)" show clearly that the liability to damages is to be measured according to the law of the country where the contract which was broken was entered into" (*f*).

Sect. 57 (1), he held, was limited to bills dishonoured at home, and sect. 57 (2) to bills dishonoured abroad, that is, at a place foreign to that where the bill was drawn or indorsed, and the only damages were those specified in sect. 57 (2).

Though the bill be returned through ever so many hands, the drawer will be liable for the re-exchange on each return (*g*). Before the passing of the Bills of Exchange Act, it had been decided that, in the event of the drawer paying the holder of the bill damages for re-exchange, the drawer could recover the amount from the acceptor (*h*); and the Act has made no change in this respect (*i*).

(*c*) Sect. 57 (2). *Ex parte Robarts*, 18 Q. B. D. 286; *In re Commercial Bank of South Australia*, 36 Ch. D. 522.

(*d*) 6 Moo. P. C. 314.

(*e*) 9 Ex. 25.

(*f*) *In re Commercial Bk. of S. Australia*, 36 Ch. D. at p. 526, per North, J. See, also, *Ex parte Robarts*, 18 Q. B. D. 286.

(*g*) *Mellish* v. *Simeon*, 2 H. Bl. 378; *De Tastet* v. *Baring*, 11 East, 265; *Suse* v. *Pompe*, 8 C. B. N. S. 538. Evidence is not admissible of a custom that the holder shall instead of re-exchange pay him what the plaintiff gave him for the purchase of the bill: Ibid. But see *Willans* v. *Ayers*, 3 App. Cas. p. 145.

(*h*) *In re General South American Co.*, 7 Ch. D. 637.

(*i*) *Ex parte Robarts*, 18 Q. B. D. 286.

Section VIII.—*Resistance against Payment.*

Resistance against payment.

If the person sued upon a bill or note thinks proper to defend himself, he either denies that he was ever liable, or, admitting his liability to have existed, contends that it has been determined.

First, if he deny that he was ever liable, he may rely upon the absence of any of those circumstances which are above shown to be essential to the holder's right to recover, the presence of which he has not by his own act admitted (*k*); or on the *insufficiency* or *illegality* of the consideration for his liability.

Insufficiency of Consideration.—Contrary to the general rule which prevails respecting other simple contracts, a bill or note is always *primâ facie* presumed to have been given for a sufficient consideration (*l*). "Valuable consideration" is declared to be "any consideration sufficient to support a simple contract" (*m*), and to include "an antecedent debt or liability" (*n*). The presumption as to value is open to rebuttal, and the acceptor as against the drawer, the indorser as against the indorsee, may show that he has received no consideration, or *no sufficient consideration*, for his liability (*o*). The former circumstance may be a defence *in toto* (*p*); the latter is a defence *pro tanto* (*q*), provided the deficiency of consideration is ascertained

(*k*) Vide ante, pp. 260, 261, 268, 278, 280, 281.

(*l*) Sect. 30 (1), and sect. 27 (2).

(*m*) Sect. 27 (1) (a).

(*n*) Sect. 27 (1) (b). *Currie* v. *Misa*, L. R. 10 Ex. 153; *Stott* v. *Fairlamb*, 53 L. J. Q. B. 47.

(*o*) Sect. 28. *Bell* v. *Gardiner*, 4 M. & G. 11, where a note had been given in renewal of a bill satisfied by alteration. The payee of a promissory note given without consideration is not entitled to claim as for a debt in the administration of the donor's estate. *In re Whitaker*, 37 W. R. 673.

(*p*) *Wells* v. *Hopkins*, 5 M. & W. 7; *Spincer* v. *Spincer*, 2 M. & G. 295; *Astley* v. *Johnson*, 5 H. & N. 137. In *Wells* v. *Hopkins*, the bill was given for hops to be supplied *according to sample*. Inferior hops having been supplied, but not accepted, the bill falls to the ground: accord. *Hooper* v. *Treffry*, 1 Exch. 17. In *Jones* v. *Jones*, 6 M. & W. 84, a plea that the bill was the price of an estate bought without writing, was held bad, unless it also state a refusal to convey.

(*q*) *Agra Bank* v. *Leighton*, L. R. 2 Ex. at p. 64; *Warwick* v. *Nairn*, 10 Ex. 762; *Cook* v. *Lister*, 13 C. B. N. S. 543.

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and liquidated, for otherwise the remedy is by counterclaim or cross action (*r*). He may also protect himself on the ground that his signature was obtained by duress, or fraud (*s*); or that the bill or note has been lost, improperly converted, or stolen (*t*).

These defences are available against a holder who has not given value for the bill or note (*u*). But they may be rebutted by the fact that the holder is a "holder in due course," that is, that he took the bill or note in good faith and for value, and that he had no notice of any defects in title (*x*); where that is the case, it will be no defence that the bill was originally accommodation paper, and known by the holder so to be (*y*). Every holder is *primâ facie* presumed to be a holder in due course, that is, he will be presumed to have acquired his interest *bonâ fide* and for value, until, in an action, it is admitted or proved that the acceptance, issue, or indorsement is affected with fraud or illegality, in which case the burthen of proof is shifted, unless and until the holder proves that subsequent to such fraud or illegality he has given value in good faith (*z*). If a person holding a bill for a specific purpose—for example, for the benefit

(*r*) *Morgan* v. *Richardson*, 1 Camp. 40, in notis; *Fleming* v. *Simpson*, ibid.; *Forman* v. *Wright*, 11 C. B. 481; *Solomon* v. *Turner*, 1 Stark. 51; *Tye* v. *Gwynne*, 2 Camp. 346; *Moggeridge* v. *Jones*, 14 East, 486; *Spiller* v. *Westlake*, 2 B. & Ad. 155; *Richards* v. *Thomas*, 1 C. M. & R. 772; *Day* v. *Nix*, 9 Moore, 159; *Warwick* v. *Nairn*, 10 Exch. 762. Undervalue may be material in showing absence of bona fides in the holder: *Jones* v. *Gordon*, 2 App. Cas. 616.

(*s*) Sect. 29 (2). *Whistler* v. *Forster*, 14 C. B. N. S. 248. He may also apply to set the bill aside (*Smith* v. *Kay*, 7 H. L. Ca. 750), or to restrain the circulation of the bill; and see that case as to what fraud will suffice.

(*t*) Sect. 21 (1). *Grant* v. *Vaughan*, Burr. 1516; *Peacock* v. *Rhodes*, Dougl. 633, at 636; *Gill* v. *Cubitt*, 3 B. & C. 466. See cases collected ante, sect. 3. As to lost bills, see post, p. 298.

(*u*) That is, acquired the *legal* right: see *Whistler* v. *Forster*, 14 C. B. N. S. 248.

(*x*) Sect. 29 (1). If on recovering the amount, he would hold part only of the money beneficially, and the rest as a trustee, he nevertheless may recover all: *Reid* v. *Furnival*, 1 C. & M. 538; *Cole* v. *Cresswell*, 11 Ad. & E. 661; *Brown* v. *Rivers*, Dougl. 472.

(*y*) Sect. 28 (2). *Charles* v. *Marsden*, 1 Taunt. 224.

(*z*) Sect. 30 (2); sect. 90. *Tatam* v. *Haslar*, 23 Q. B. D. 345; *Mills* v. *Barber*, 1 M. & W. 425; *Jacob* v. *Hungate*, 1 M. & Rob. 445; *Edmunds* v. *Groves*, 2 M. & W. 642; *Harvey* v. *Towers*, 6 Exch. 656; *French* v. *Archer*, 3 Dowl. 130; *Low* v. *Chifney*, 1 Bing. N. C. 267. See *Heath* v. *Sansom*, 2 B. & Ad. 291; *Paterson* v. *Hardacre*, 4 Taunt. 114; *Wyat* v. *Campbell*, M. & M. 80; *Mann* v. *Lent*, 10 B. & C. 877; *Whitaker* v. *Edmunds*, 1 Ad. & E. 638; *Percival* v. *Frampton*, 2 C. M. & R. 180.

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of the drawer or acceptor—indorses it over in breach of the trust reposed in him, an indorsee who has notice of the trust at the time of the indorsement cannot acquire any better right or title to the bill than the indorser had (*a*). It is not sufficient for the purpose of casting such a suspicion on the holder's title as would call on him to prove that he had given value, to show that the bill was an accommodation bill; for that purpose it should be shown that the bill was obtained from the acceptor, or some person between him and the holder, fraudulently (*b*).

When a bill or note is taken by the holder *overdue*, he takes it subject to any defects of title affecting it at its maturity, or, as they used to be called, the equities attaching to the bill, that is, such equities as naturally arise out of the bill transaction, and are not merely collateral (*c*). A right of set-off would not be such an equity (*d*); on the other hand, the fact that a bill was purchased with another person's money would constitute such a defect (*e*). This rule does not apply to overdue cheques (*f*).

Illegality of Consideration.—Another ground of defence against an immediate party to a bill or note is the illegality of the consideration (*g*); as that the bill or note was secretly given for joining in the acceptance of a composition (*h*); for prostitution (*i*);

(*a*) *Solomons* v. *Bank of England*, 13 East, 135, n.; *Whistler* v. *Forster*, 32 L. J. C. P. 161; 14 C. B. N. S. 248.

(*b*) Sects. 28 (2), 29 (2), 30 (2). *Hall* v. *Featherstone*, 3 H. & N. 284; *Petty* v. *Cooke*, L. R. 6 Q. B. 790.

(*c*) Sect. 36 (2). *Brown* v. *Davies*, 3 T. R. 80; *Barough* v. *White*, 4 B. & C. 325. See ante, p. 253.

(*d*) *Oulds* v. *Harrison*, 10 Exch. 572; *In re Overend, Gurney & Co.*, L. R. 6 Eq. 344.

(*e*) *In re European Bank*, L. R. 5 Ch. 358.

(*f*) *London and County Bank* v. *Groome*, 8 Q. B. D. 288.

(*g*) Sect. 29 (2). *Knight* v. *Hunt*, 5 Bing. 432; *Britten* v. *Hughes*, 5 Bing. 460; *Blogg* v. *Pinkers*, Ry. & Moo. 125; *Haywood* v. *Chambers*, 5 B. & Ald. 753; *Bryant* v. *Christie*, 1 Stark. 329; *Leicester* v. *Rose*, 4 East, 372. See *Young* v. *Timmins*, 1 Tyr. 237.

(*h*) Vide cases as above, note (*g*).

(*i*) *Walker* v. *Parkins*, 3 Burr. 1568. Past seduction is not an *illegal* consideration: *Annandale* v. *Harris*, 2 P. Wms. 432; *Cray* v. *Rooke*, Forr. 153; and past cohabitation has been said to be a good consideration: *Turner* v. *Vaughan*, 2 Wils. 339, per *Bathurst*, J.; and *Ayerst* v. *Jenkins*, 16 Eq. 275. But neither past seduction nor cohabitation is a sufficient consideration to support an agreement with a woman: *Beaumont* v. *Reeve*, 8 Q. B. 483; or, as it would seem, a bill or note.

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for dropping a criminal prosecution (*i*); for recommendation to a public office (*k*); in pursuance of a smuggling contract (*l*); for money lost by gaming or betting on the sides of persons so gaming; money knowingly lent for such gaming or betting, or lent at the time and place of such play, to any person then gaming or betting, or who shall, during the play, play or bet (*m*); for the amount of a wager upon any branch of the public revenue (*n*); or for spirituous liquors sold in small quantities contrary to the stat. 24 Geo. 2, c. 40, s. 12 (*o*); or for agreements of maintenance and champerty (*p*). Bills given in respect of a wager are, by 8 & 9 Vict. c. 109, made void, but the onus of proving that a holder gave no value lies on the defendant (*q*). Payment by the drawer of the acceptor's bets on horse races is good consideration (*r*).

Where the consideration of a bill or note is partly illegal, the security, being entire, becomes void *in toto* (*s*), though the plaintiff may still, without using the bill or note, recover that part of the consideration which is good (*t*). If a bill or note given for an illegal consideration be renewed, the new instrument is also void (*u*), though not, if it be so reformed as to exclude that part of the consideration which was objectionable (*x*).

(*i*) *Collins* v. *Blantern*, 2 Wils. 341, 1 Sm. L. C., 9th ed. p. 398; *Keir* v. *Leeman*, 6 Q. B. 308; 9 Q. B. 371. But see *Flower* v. *Sadler*, 9 Q. B. D. 83; 10 Q. B. D. 572 (C. A.); and see *Brown* v. *Brine*, 1 Ex. D. 5; *Fivaz* v. *Nicholls*, 2 C. B. 501; *Masters* v. *Ibberson*, 8 C. B. 100; *Clubb* v. *Hutson*, 18 C. B. N. S. 414.

(*k*) *Hanington* v. *Duchatel*, 1 Bro. C. C. 124.

(*l*) *Guichard* v. *Roberts*, W. Bl. 445; *Banks* v. *Colwell*, cited 3 T. R. at p. 81.

(*m*) 9 Anne, c. 14 (c. 19, revised ed. Statutes), which is not repealed, as to such securities, by 8 & 9 Vict. c. 109; *Batty* v. *Marriott*, 5 C. B. 818; *Hay* v. *Ayling*, 16 Q. B. 423. See *Lloyd* v. *Gurdon*, 2 Swanst. 180; *Jeffreys* v. *Walter*, 1 Wils. 220; *Lynall* v. *Longbotham*, 2 Wils. 36; *Shillito* v. *Theed*, 7 Bing. 405.

(*n*) *Shirley* v. *Sankey*, 2 B. & P. 130; *Atherfold* v. *Beard*, 2 T. R. 610.

(*o*) *Scott* v. *Gillmore*, 3 Taunt. 226.

(*p*) *Bradlaugh* v. *Newdegate*, 11 Q. B. D. 1.

(*q*) *Fitch* v. *Jones*, 5 E. & B. 238; *Belfast Banking Co.* v. *Doherty*, 4 Ir. L. R. Q. B. D. 124.

(*r*) *Oulds* v. *Harrison*, 10 Ex. 572.

(*s*) *Scott* v. *Gillmore*, supra. See *Cruickshanks* v. *Rose*, 1 M. & Rob. 100.

(*t*) *Robinson* v. *Bland*, Burr. 1077; *Wood* v. *Benson*, 2 C. & J. 94.

(*u*) *Chapman* v. *Black*, 2 B. & Ald. 588; *Wynne* v. *Callander*, 1 Russ. 293; *Preston* v. *Jackson*, 2 Stark. 237; *Hay* v. *Ayling*, 16 Q. B. 423.

(*x*) See *Preston* v. *Jackson*, ubi sup.; *Flight* v. *Reed*, 1 H. & C. 703; *Hub-*

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Formerly, in some cases of illegality, the bill was void even in the hands of a holder *bonâ fide*, and for value. These were, where the consideration was, either wholly or in part, for money lost or applied in any of the modes of gaming above enumerated (*y*). But by the stat. 5 & 6 Will. 4, c. 41, it is enacted, s. 1, that no bill or note shall be *absolutely void* on any of the above grounds, but that any bill or note that would have been void on any of the above grounds shall be deemed to have been drawn, accepted, made or taken for an illegal consideration (*z*); and (s. 2) that if any person shall make, draw, give or execute any such note or bill, and shall pay to any indorsee or holder thereof the money thereby secured, or any part thereof, such money shall be deemed to have been paid for and on account of the person to whom such bill or note was originally given upon such illegal consideration as aforesaid, and shall be a debt due from such last-mentioned person to the person who shall have so paid the money. When the illegality was such as to make the instrument void in the hands even of a *bonâ fide* indorsee, yet if it were not originally *made* on that consideration, such illegality in the consideration on which it was afterwards transferred, was no defence against such indorsee, if he was not, in making out his title, bound to state or prove the signature of the person who made the illegal transfer (*a*); the authorities were contradictory upon the question whether such illegality was a defence, when he was bound to state the signature and prove it (*b*). As to gaming securities, it was never any objection to an action against the indorsee that the bill or note was made on a gaming consideration; for, though the statute directed that they should be void to all intents and purposes, that meant only so far as was necessary to further the purposes of the Act; and, to exempt an indorser from suit, might have assisted a winner, whom the statute meant to

ner v. *Richardson*, Bayl. 6th ed. p. 527.

(*y*) *Bowyer* v. *Bampton*, 2 Str. 1155.

(*z*) See *Hitchcock* v. *Way*, 6 Ad. & E. 943.

(*a*) *Daniel* v. *Cartony*, 1 Esp. 274.

(*b*) *Parr* v. *Eliason*, 1 East, 92; *Daniel* v. *Cartony*, ubi supra; *Lowes* v. *Mazzaredo*, 1 Stark. 385.

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punish, not to protect (*c*). The Bills of Exchange Act enacts that a "holder in due course," that is, one who has taken a bill complete and regular on the face of it in good faith and for value, is not affected by illegality in the inception of the bill, if he had no notice of any defect in the title of the person who negotiated it. And any holder who derives his title from a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of the holder in due course against the acceptor and all parties to the bill prior to the holder in due course (*d*). Consequently a bill originally given for an illegal consideration may be sued upon by an indorsee for value without notice. Bills or notes, however, may be absolutely void against both immediate parties and holders in due course, either because the alleged parties did not make them, or had not the capacity. Such are (subject to exceptions (*e*)) forged instruments; or notes issued by companies not capable of making them; *e.g.*, a railway company (*f*).

Again, the defendant may admit his former liability, but contend that it has been determined by the *suspension*, *extinguishment*, *satisfaction*, or *discharge* of the holder's right of action. We will say a few words concerning each of these grounds of defence.

1st, *Of Suspension.*—If the holder *renew* the bill or note, that is, if he take another bill or note from the defendant in continuation of it, his right of action on the first bill or note is *suspended* (*g*) till he has satisfied the defendant that he has no claim against him on the second, *e. g.*, by delivering it up. There may,

(*c*) *Edwards* v. *Dick*, 4 B. & Ald. 212.

(*d*) Sect. 29 (2), (3); *Ex parte Pyke*, 8 Ch. D. 754.

(*e*) See ante, pp. 251, 255, 257.

(*f*) *Bateman* v. *Mid Wales Ry. Co.*, L. R. 1 C. P. 499.

(*g*) *National Savings Bank* v. *Tranah*, L. R. 2 C. P. 556; *Price* v. *Price*, 16 M. & W. 232; *Currie* v. *Misa*, L. R. 10 Ex. at p. 163. But the receipt of bills accepted by a third person, which are not negotiable by the party giving them, will not suspend the remedy: *James* v. *Williams*, 13 M. & W. 828; *Williams* v. *James*, 2 Exch. 798. Whether taking a bill really operates as a suspension, or only as a conditional payment, see *Belshaw* v. *Bush*, 11 C. B. 191; *Bottomley* v. *Nuttall*, 5 C. B. N. S. 122.

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after a bill or note has been drawn or made, be a binding *verbal* promise for valuable consideration to *renew* it when due (*h*). But the defendant who relies on such a promise must show that he took proper steps to obtain the renewal (*i*). And such a *verbal* promise must not be *contemporaneous* with the drawing of the bill or note, or, if it be made to an indorser, with his indorsement; if it be, the law will not enforce it; for to do so would be to incorporate with a written contract an incongruous parol condition, which is contrary to first principles (*k*). But a contemporaneous *written* agreement for renewal will afford an answer as between the parties to it (*l*).

2ndly, *Extinguishment* or *Merger*.—The defendant's liability on the bill or note will be *extinguished* or *merged*, if the plaintiff obtain from him a security of a higher description, *e. g.*, a judgment upon it against him (*m*). Such a judgment is not *per se* a satisfaction of the debt, nor will it, until satisfaction, prevent the holder from proceeding on the bill or note against any other distinct party to it (*n*). A judgment, though unsatisfied, against one of several *joint* acceptors or makers, is a good defence to an action against the others (*o*). But it is not so if the acceptors or makers are *joint* and *several* (*p*).

3rdly, *Satisfaction or Payment*.—Satisfaction is by actual payment of the bill or note, or what is equivalent to payment (*q*); and this releases all parties subsequent to the person making it,

(*h*) *Hoare* v. *Graham*, 3 Camp. 57, at p. 58, per Lord *Ellenborough*. See *Gibbon* v. *Scott*, 2 Stark. 286. But such an agreement would not operate as a *suspension*. If it afford any answer it would be by way of *waiver* or *satisfaction*: *Ford* v. *Beech*, 11 Q. B. 852; or defence upon equitable grounds.

(*i*) *Maillard* v. *Page*, L. R. 5 Ex. 312; *Gibbon* v. *Scott*, ubi supra.

(*k*) See *Hoare* v. *Graham*, ubi supra. *Abrey* v. *Crux*, L. R. 5 C. P. 37. On the same principle, proof cannot be given of a parol agreement contemporaneous with the making of the note, to the effect that it shall not be paid if a certain event happen: *Foster* v. *Jolly*, 1 C. M. & R. 703. See, however, s. 21 (2) (b).

(*l*) Sect. 21 (2). *Young* v. *Austen*, L. R. 4 C. P. 553.

(*m*) *Siddall* v. *Rawcliffe*, 1 C. & M. 487.

(*n*) Bac. Abr. Extinguishment, D.; *Claxton* v. *Swift*, 2 Shower, 441, 494; Lutw. 878; *Hayling* v. *Mulhall*, 2 W. Bl. 1235.

(*o*) *King* v. *Hoare*, 13 M. & W. 494; *Kendall* v. *Hamilton*, 4 App. Cas. 504; *Cambefort* v. *Chapman*, 19 Q. B. D. 229.

(*p*) Ibid.

(*q*) Sect. 59 (1).

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as well as all prior parties for his accommodation. It differs from extinguishment, inasmuch as, though the holder's claim may be extinguished as to some and not as to others, yet if satisfied as to any, it is satisfied as to all of these parties (*r*). But payment of a bill, even at maturity, by a drawer for value, who is also the payee (*s*), or by an indorser (*t*), or by a stranger (*u*) upon his own account, will not discharge the acceptor (*v*). The payment must be by or on behalf of the drawee or acceptor (*x*). There may be a satisfaction *pro tanto*, as by part payment, or the receipt of dividends under a bankruptcy (*y*).

Any *material* alteration of a bill or note after it has been issued, without the assent of all parties liable on the bill, avoids the bill, except as against a person who has made or assented to the alteration and subsequent indorsers (*z*). But if the material alteration be not apparent, a holder in due course may

(*r*) *Sard* v. *Rhodes*, 1 M. & W. 153; *Pierson* v. *Dunlop*, 2 Cowp. 571; *Ex parte Wyldman*, 2 Ves. sen. 113; *Ewin* v. *Lancaster*, 6 B. & S. 571; *Windham* v. *Wither*, Str. 515; *Gillard* v. *Wise*, 5 B. & C. 134; *Cook* v. *Lister*, 13 C. B. N. S. 543. As to what may operate as a *satisfaction*, see *Sard* v. *Rhodes*, supra; *Sibree* v. *Tripp*, 15 M. & W. 23; *Bell* v. *Buckley*, 11 Exch. 631; *Goddard* v. *O'Brien*, 9 Q. B. D. 37; by realising a security: *Hills* v. *Mesnard*, 10 Q. B. 226.

(*s*) Sect. 59 (2); *Johnson* v. *Kennion*, 2 Wils. 262; *Williams* v. *James*, 15 Q. B. 498; *Jones* v. *Broadhurst*, 9 C. B. 173; see *Cook* v. *Lister*, 13 C. B. N. S. 543. But in bankruptcy the holder of a bill who has been thus paid will not be allowed to prove against the acceptor for the whole amount: *Ex parte Taylor*, 26 L. J. Bktcy. 58; yet he may recover in an action the balance, as trustee for the drawer: *Thornton* v. *Maynard*, L. R. 10 C. P. 695.

(*t*) *Goodwin* v. *Cremer*, 18 Q. B. 757.

(*u*) *Deacon* v. *Stodhart*, 2 M. & G. 317. If made on the acceptor's account, he might adopt it: *Jones* v. *Broadhurst*, ubi supra; *Belshaw* v. *Bush*, 11 C. B. 191; *Simpson* v. *Eggington*, 10 Ex. 845; see *Walter* v. *James*, L. R. 6 Ex. 124.

(*v*) Unless he were an accommodation acceptor. See as to this, *Strong* v. *Foster*, 17 C. B. 201; *Pooley* v. *Harradine*, 7 E. & B. 431; *Solomon* v. *Davis*, 1 Cab. & El. 83.

(*x*) Sect. 59 (1).

(*y*) *Johnson* v. *Kennion*, 2 Wils. 262; *Bacon* v. *Searles*, 1 H. Bl. 88; *Pierson* v. *Dunlop*, Cowp. 571; *Walwyn* v. *St. Quintin*, 1 B. & P. 652. See *Cook* v. *Lister*, 13 C. B. N. S. 543.

(*z*) Sect. 64 (1). *Master* v. *Miller*, 4 T. R. 320; 1 Sm. L. C. 9th ed. 825; *Alderson* v. *Langdale*, 3 B. & Ad. 660; *Atkinson* v. *Hawdon*, 2 Ad. & E. 628; *Sloman* v. *Cox*, 1 C. M. & R. 471. An alteration even by a stranger in a material point will vitiate the instrument, as it was the laches of the holder in not keeping it safely. See the principle laid down and explained in *Davidson* v. *Cooper*, 13 M. & W. 343 (Exch. Ch.)

enforce payment of it according to its original tenour (*a*). This is an alteration of the common law. Even though the parties consent to such an alteration after issue, the instrument, though unimpeachable by them, is a new contract, and the old stamp will not suffice (*b*), unless such alteration were made to correct a mistake, and render the bill what it was originally meant to have been (*c*). Alterations in the date (*d*), sum payable, or time or place for payment, or addition of a place of payment without the acceptor's assent, or words expressing the value received to be on a particular account (*e*), or adding a new maker or drawer (*f*), are material (*g*). But the insertion of a mere memorandum, giving the right place for payment, or the correction of the drawee's name to make it correspond with his acceptance, or an alteration of the marginal figures, are, it has been held, not so (*h*); and an alteration perfectly immaterial to the rights of the parties will have no effect (*i*). Nor will the alteration affect its validity, if made with the consent of parties *before* it has *issued* (*k*). A bill or note is *issued* when it is first delivered complete in form to a person who takes it as holder (*l*): and this is, *primâ facie*, so soon as it is passed away by the drawer or maker, or (when the alteration is in the acceptance) accepted by the drawee (*m*). If a bill or note exhibit the appearance of

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(*a*) Sect. 64 (1).

(*b*) *Bowman* v. *Nichol*, 5 T. R. 537.

(*c*) *Byrom* v. *Thompson*, 11 A. & E. 31; *Kershaw* v. *Cox*, 3 Esp. 246; *Jacob* v. *Hart*, 6 M. & S. 142; *Clerk* v. *Blackstock*, Holt, 474.

(*d*) *Hirschman* v. *Budd*, L. R. 8 Ex. 171. With regard to cheques, a crossing becomes a material part of the instrument, and any obliteration of it, or, except as authorized by the Act, any alteration or addition to it, is unlawful. Sect. 78.

(*e*) *Knill* v. *Williams*, 10 East, 431.

(*f*) *Gardner* v. *Walsh*, 5 E. & B. 83, overruling *Catton* v. *Simpson*, 8 Ad. & E. 136. See this question discussed *Gould* v. *Coombs*, 1 C. B. 543. The removal of the name of a joint maker from a note to which it was originally stipulated he should be a party, would be a material alteration: *Parry* v. *Nicholson*, 13 M. & W. 778.

(*g*) Sect. 64 (2). See *Suffel* v. *Bank of England*, 9 Q. B. D. 555; *Leeds Bank* v. *Walker*, 11 Q. B. D. 84.

(*h*) *Trapp* v. *Spearman*, 3 Esp. 57; *Marson* v. *Petit*, 1 Camp. 82, n.; *Farquhar* v. *Southey*, M. & M. 14; *Garrard* v. *Lewis*, 10 Q. B. D. 30.

(*i*) *Aldous* v. *Cornwell*, L. R. 3 Q. B. 573.

(*k*) *Downes* v. *Richardson*, 5 B. & Ald. 674; *Johnson* v. *Duke of Marlborough*, 2 Stark. 313; *Tarleton* v. *Shingler*, 7 C. B. 812.

(*l*) Sect. 2. *Downes* v. *Richardson*, ubi sup.; *Cardwell* v. *Martin*, 9 East, 190; *Kennerley* v. *Nash*, 1 Stark. 452.

(*m*) *Walton* v. *Hastings*, 4 Camp. 223; *Outhwaite* v. *Luntley*, 4 Camp. 179; *Knill* v. *Williams*, 10 East, 431;

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alteration, it is for the holder to account for it (*q*). But the mere cancellation, unintentionally, or under a mistake, or without the authority of the holder, is inoperative (*r*).

4thly. *Different kinds of Discharge.*—An acceptance or note may be *waived*, either *expressly* or *impliedly*, so as to discharge the acceptor or maker (*s*). But neither length of time, silence, nor a declaration by the holder that he should look to the drawer for payment, are sufficient to discharge the acceptor (*t*). The "renunciation," as the waiver is termed in the Act, must be absolute and unconditional, and, unless the bill is delivered up to the acceptor, must be in writing (*u*).

It is a maxim of law, that if one principal in a contract, by *any act of his own*, discharge, or even give time, though but for a moment, to the other principal, he discharges all his sureties. In the contract by bill, the acceptor, or by note the maker, is considered, *primâ facie*, the principal, and the drawer or indorsers as his sureties; and, consequently, if the holder either discharge or suspend his remedy against the former, the latter, unless he expressly reserves his remedies against them (*x*), or they have previously consented to it (*y*), or afterwards promised to pay with knowledge of it, are all immediately

Tidmarsh v. *Grover*, 1 M. & S. 735; *Cowie* v. *Halsall*, 4 B. & Ald. 197; *Johnson* v. *Duke of Marlborough*, 2 Stark. 313; *Langton* v. *Lazarus*, 5 M. & W. 629.

(*q*) *Knight* v. *Clements*, 8 Ad. & E. 215. See *Clifford* v. *Parker*, 2 M. & G. 909; *Tatum* v. *Catomore*, 16 Q. B. 745; *Cariss* v. *Tattersall*, 2 M. & G. 890; *Henman* v. *Dickinson*, 5 Bing. 183; *Bishop* v. *Chambre*, M. & M. 116; *Johnson* v. *Duke of Marlborough*, 2 Stark. 313, and *Downes* v. *Richardson*, 5 B. & Ald. 674.

(*r*) Sect. 63 (3). *Raper* v. *Birkbeck*, 15 East, 17; *Wilkinson* v. *Johnson*, 3 B. & C. 428; *Novelli* v. *Rossi*, 2 B. & Ad. 757; *Warwick* v. *Rogers*, 5 M. & G. 340.

(*s*) Sect. 62 (1).

(*t*) *Parker* v. *Leigh*, 2 Stark. 228; *Farquhar* v. *Southey*, M. & M. 14; *Dingwall* v. *Dunster*, Dougl. 235, 247; *Adams* v. *Gregg*, 2 Stark. 531; *Anderson* v. *Cleveland*, 13 East, 430; Bayley, ubi supra.

(*u*) Sect. 62 (1) and (2). As to the former law, see *Foster* v. *Dowler*, 6 Ex. p. 852.

(*x*) *Owen* v. *Homan*, 4 H. L. Ca. 997; *Muir* v. *Crawford*, L. R. 2 H. L. Sc. 456; *Overend* v. *Oriental Corporation*, L. R. 7 H. L. 348; and s. 62 (1).

(*y*) *Clark* v. *Devlin*, 3 B. & P. 363. See *Withall* v. *Masterman*, 2 Camp. 179; *Stevens* v. *Lynch*, 12 East, 38; *Isaac* v. *Daniel*, 8 Q. B. 500. Consenting to a judge's order for a stay of proceedings against the acceptor or prior party, on payment of debt and costs, is not giving him time so as to discharge the drawer or subsequent party: *Kennard* v. *Knott*, 4 M. & G. 474; *Michael* v. *Myers*, 6 M. & G. 702.

discharged (*z*). But a mere delay or forbearance to sue the acceptor or maker, without any valid agreement not to do so, will not discharge them (*a*); nor will the taking a collateral security from the acceptor as a new bill, not in renewal of the old one (*b*). *Primâ facie* a *subsequent* indorser stands in the light of a surety for the prior ones (*c*), and, therefore, if the holder discharge or give time to a *prior* indorser, he will discharge those *subsequent* to him (*d*). But the discharge of a *subsequent* indorser does not discharge a *prior* one (*e*). In *Hall* v. *Cole* (*f*), the drawer of a bill payable to his own order indorsed it to A., who indorsed it back to the drawer, and the drawer then indorsed it to B. In an action by B. against A., it was held that the acceptance by B. of a cognovit from the drawer discharged A., though it did not appear whether the cognovit was given in the character of drawer or in that of indorser.

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It was once thought that the acceptor of an accommodation bill, or maker of an accommodation note, stood in the light of a surety, and that the holder would discharge him by discharging or giving time to the person for whose accommodation he accepted or made it (*g*). But this has often been questioned; and certainly would not now be so decided, where the holder,

(*z*) Cited by Lord *Selborne* in *Duncan, Fox & Co.* v. *N. & S. Wales Bank*, 6 App. Cas. 1, as a correct statement of the law. See *Ex parte Smith*, Co. B. L. 189; *English* v. *Darley*, 2 B. & P. 61; *Gould* v. *Robson*, 8 East, 576; *Withall* v. *Masterman*, 2 Camp. 179; *De la Torre* v. *Barclay*, 1 Stark. 7; *Rees* v. *Berrington*, 2 Ves. jun. 540; *Re Jacobs*, L. R. 10 Ch. 211 (acceptance of a composition); *Yglesias* v. *River Plate Bank*, 3 C. P. D. 60.

(*a*) *Walwyn* v. *St. Quintin*, 1 B. & P. 652; *Philpot* v. *Briant*, 4 Bing. 717; *Orme* v. *Young*, Holt, N. P. C. 84; *Combe* v. *Woolf*, 8 Bing. 156; *Clarke* v. *Wilson*, 3 M. & W. 208.

(*b*) *Pring* v. *Clarkson*, 1 B. & C. 14. See *Price* v. *Edmunds*, 10 B. & C. 578; *Bedford* v. *Deakin*, 2 Stark. 178.

(*c*) Sed vide the observations of *Tindal*, C. J., in *Bassett* v. *Dodgin*, 9 Bing. 653.

(*d*) *Hall* v. *Cole*, 4 Ad. & E. 577; *Ellison* v. *Dezell*, Selw. N. P. 13th edit., p. 314; per Lord *Eldon* in *English* v. *Darley*, 2 B. & P. at p. 62; *Cook* v. *Lister*, 13 C. B. N. S. at p. 597, per *Willes*, J. See *Bank of Ireland* v. *Beresford*, 6 Dow, 233; *Smith* v. *Knox*, 3 Esp. 46.

(*e*) *Hayling* v. *Mulhall*, 2 W. Bl. 1235 (see *English* v. *Darley*, 2 B. & P. at p. 62); *Claridge* v. *Dalton*, 4 M. & S. 226. See *Haigh* v. *Jackson*, 3 M. & W. 598.

(*f*) 4 Ad. & E. 577.

(*g*) *Laxton* v. *Peat*, 2 Camp. 185. See *Bank of Ireland* v. *Beresford*, 6 Dow, 233; *Ex parte Glendinning*, 1 Buck, 517.

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when he gave the discharge or indulgence, did not know of the accommodation (*h*). If he did know it when he received the instrument (*i*), or gave the discharge or indulgence (*k*), the accommodation acceptor or maker will be discharged. The surety, however, would not be discharged by the holder's taking from the principal a cognovit, defeasible upon the payment of instalments, the first of which would fall due before the person giving it could have been sued to execution (*l*). One joint maker of a note is discharged by the holder's *discharging* the other, and that without any reference to the law of principal and surety, but on the ground that the creditor's discharge of one joint debtor is a discharge of all (*m*).

When the drawer or indorser of a bill accepted for value is compelled to pay it, he is entitled, as surety, to the benefit of securities deposited with the holder by the acceptor to secure its payment, and in the possession of the holder at the time of dishonour (*n*).

"There is neither principle nor authority for saying that the indorsers are, during the currency of the bill, sureties, or in the nature of sureties, to the indorsee, or that they have any equity to prevent the indorsee from dealing as it may seem to him most desirable with any other parties, unless thereby he prevents himself from giving notice of dishonour, so as to give them their remedy against prior parties to the bill; and I agree that any contrary decision would be very mischievous. But though the indorsers had no such right by contract, yet, after the bills were dishonoured, and

(*h*) *Overend, Gurney & Co.* v. *Oriental Corporation*, L. R. 7 H. L. 348; *Raggett* v. *Axmore*, 4 Taunt. 730; *Fentum* v. *Pocock*, 5 Taunt. 192; *Kerrison* v. *Cooke*, 3 Camp. 362; *Mallet* v. *Thompson*, 5 Esp. 178; *Carstairs* v. *Rolleston*, 5 Taunt. 551; *Nichols* v. *Norris*, 3 B. & Ad. 41; *Harrison* v. *Cortauld*, 3 B. & Ad. 36.

(*i*) *Pooley* v. *Harradine*, 7 E. & B. 431; *Taylor* v. *Burgess*, 5 H. & N. 1; *Greenough* v. *M'Clelland*, 2 E. & E. 424; *Lawrence* v. *Walmsley*, 12 C. B. N. S. 799; *The Mutual Loan Fund Association* v. *Sudlow*, 5 C. B. N. S. 449.

(*k*) *Davies* v. *Stainbank*, 6 De G. M. & G. 679; *Bailey* v. *Edwards*, 4 B. & S. 761; *Ewin* v. *Lancaster*, 6 B. & S. 571.

(*l*) *Price* v. *Edmunds*, 10 B. & C. 578.

(*m*) *Nicholson* v. *Revill*, 4 Ad. & E. 675. And so will obtaining a judgment against one joint maker discharge the other: *King* v. *Hoare*, 13 M. & W. 494; *Kendall* v. *Hamilton*, 4 App. Cas. 504. See ante, Ch. II. p. 48.

(*n*) *Duncan, Fox & Co.* v. *N. & S. Wales Bank*, 6 App. Cas. 1; *Becherraise* v. *Lewis*, L. R. 7 C. P. at p. 377.

notice of dishonour had been given to the indorsers, the position of the parties is altered. Though the indorser is primarily liable as principal on the bill, and is not strictly a surety for the acceptor, he has this in common with a surety for the acceptor, that he is entitled to the benefit of all payments made by the acceptor, and is entitled, on paying the holder, to be put in a situation to have a right to sue the acceptor" (*o*). Resistance against payment.

Section IX.—*Foreign Bills.*

Sect. 4 of the Bills of Exchange Act defines a foreign bill as any other than an inland bill, which is defined as "a bill which is, or on the face of it purports to be, both drawn and payable within the 'British Islands' (*i. e.*, any part of the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent thereto being part of the dominions of her Majesty), or drawn within the British Islands upon some person resident therein" (*p*). As to the capacity of the parties to such a bill the Act says nothing; but sect. 22 provides that capacity to incur liability is co-extensive with capacity to contract, which would seem to imply that the domicile of the contracting parties will determine it (*q*). In most foreign laws greater strictness as to the form of negotiable instruments is required than is here necessary. Thus, in Germany a bill must be described in the body of it as a bill of exchange, the payee must be named, the drawer must sign his name, and the bill must bear the date and name of the place of issue (*r*). In France the signature of the acceptor must be accompanied by the word "*accepté*" (*s*). Foreign bills.

Sect. 72 of the Act provides that—

"Where a bill drawn in one country is negotiated, accepted, or

(*o*) Lord *Blackburn* in *Duncan, Fox & Co.* v. *N. & S. Wales Bank*, 6 App. Cas. at p. 18.

(*p*) *Smallpage's and Brandon's Cases*, 30 Ch. D. 598.

(*q*) *Sottomayer* v. *De Barros*, 3 P. D. 1.

(*r*) Endemann, Handbuch des deutschen Handelsrecht, 4, 129.

(*s*) Code de Commerce, Article 122.

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payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:—

"(1.) The validity of a bill as regards requisites in form is determined by the law of the place of issue (*i. e.*, the place where the first delivery took place, complete in form, to a person who takes as holder (*t*)), and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *supra protest*, is determined by the law of the place where such contract was made."

In other words, the *lex loci contractus* governs the validity of the form of a bill. The Act specifies the following exceptions:—

"(a) Where a bill is issued out of the United Kingdom, it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue (*u*).

"(b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom (*v*).

"(2.) Subject to the provisions of this Act (*x*), the interpretation of the drawing, indorsement, acceptance, or acceptance supra protest of a bill, is determined by the law of the place where such contract is made; provided that where an inland bill is indorsed in a foreign country, the indorsement shall, as regards the payer, be interpreted according to the law of the United Kingdom" (*y*).

On a bill of exchange payable to order, drawn in France, accepted and payable in England, the contract of the acceptor is to pay to an order valid by the law of England. An indorsee can, therefore, maintain an action in England against the acceptor, on an indorsement valid by English law, although the indorsement was made in France, and apparently by French

(*t*) Sect. 2.

(*u*) Sect. 72 (1). *Bristow* v. *Sequeville*, 5 Ex. 127.

(*v*) Sect. 72 (1). See *Allen* v. *Kemble*, 6 Moo. P. C. 314; *Rothschild* v. *Currie*, 1 Q. B. 43; *Hirschfield* v. *Smith*, L. R. 1 C. P. 340; *Rouquette* v. *Overmann*, L. R. 10 Q. B. 525; *Smallpage's and Brandon's Cases*, 30 Ch. D. 598.

(*x*) The provisions referred to are the remaining sub-sections and probably sections 15 and 53 of the Act; Chalmers on Bills of Exchange, 223.

(*y*) Sect. 72; *Lebel* v. *Tucker*, L. R. 3 Q. B. 77; *Bradlaugh* v. *De Rin*, L. R. 5 C. P. 473. What is the meaning of interpretation? Apparently it means the legal consequences.

law gave no right to the indorsee to sue in his own name, and although the indorser (who was also drawer and payee) and the indorsee were, at the time the bill was made and indorsed, subjects of France and domiciled and resident in that country (*z*). The last part of the section appears to recognise the case of *De la Chaumette* v. *Bank of England* (*a*), where it was held that the title to an English note to bearer passed by delivery, though such mode of transfer was not recognised by the law of France. Foreign bills.

"(3.) The duties of the holder with respect to presentment for acceptance or payment, and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done, or the bill is dishonoured" (*b*).

A bill of exchange, drawn in England, and payable in Spain, was indorsed in England by the defendant to the plaintiff, who indorsed it to M., a resident in Spain. By the law of Spain no notice of dishonour by non-acceptance is required. Acceptance was refused, and twelve days passed before M. wrote to inform the plaintiff of the dishonour; the plaintiff on receipt from M. of notice of dishonour gave immediate notice to the defendant. It was held that the plaintiff could recover the amount of the bill from the defendant, the drawer (*c*). In delivering judgment, Brett, L. J., said:—

"Every party to a bill knows that by the law merchant it may be indorsed abroad. He, by the law merchant, undertakes some liability in respect of such indorsement abroad. The question is, how will he be affected by such indorsement abroad? Such an indorsement raises a contract between the immediate indorser and indorsee. Such an indorsement, then, raises a foreign contract, and that must be construed according to the law of the country in which it was made. The liability of each of those contracting parties to the other is to be determined by the law of the country in which the contract was made" (*d*).

(*z*) *Lebel* v. *Tucker*, L. R. 3 Q. B. 77; *Smallpage's and Brandon's Cases*, L. R. 30 Ch. D. 598; *Bradlaugh* v. *De Rin*, L. R. 5 C. P. 473.

(*a*) 2 B. & Ad. 385.

(*b*) Sect. 72. *Hirschfield* v. *Smith*, L. R. 1 C. P. 340.

(*c*) *Horne* v. *Rouquette*, L. R. 3 Q. B. D. 514.

(*d*) *Horne* v. *Rouquette*, 3 Q. B. D. at p. 520.

Foreign bills.

The Act further provides that—

"(4.) Where a bill is drawn out of, but payable in, the United Kingdom, and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable" (*b*).

If, for instance, a bill is drawn in New York on London, and the amount is expressed in dollars, the sum in English money which the holder is entitled to receive will be calculated according to the above rule. For stamp purposes, the duty would be "calculated on the value of such money in British currency according to the current rate of exchange on the day of the date of the instrument" (*c*).

"(5.) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable" (*d*).

In France or Germany, no days of grace are allowed, and bills are there payable on the day of maturity (*e*).

Section X.—*Remedy upon lost Bills or Notes.*

Remedy upon lost bills or notes.

At common law, if a negotiable bill or note, that is, payable in its original state to bearer or order, were lost, the loser, so long as it remained lost, could not maintain an action upon it (*f*); nor could any action be maintained for the consideration on which it was given, since it operated as payment (*g*). The circumstance that it was payable to *order*, and *was not indorsed*, did not entitle the party to sustain this action, since "the law merchant requires the production of the instrument before a party to it can be called on to pay it" (*h*).

(*b*) Sect. 72.
(*c*) 33 & 34 Vict. c. 97, s. 11.
(*d*) 45 & 46 Vict. c. 61, s. 72.
(*e*) *Rouquette* v. *Overmann*, L. R. 10 Q. B. 535—538.
(*f*) *Hansard* v. *Robinson*, 7 B. & C. 90.
(*g*) *Champion* v. *Terry*, 3 B. & B. 295; *Alderson* v. *Langdale*, 3 B. & Ad. 660; *Clay* v. *Crowe*, 8 Ex. 295; 9 Ex. 604.
(*h*) Per *Parke*, B., *Clay* v. *Crowe*, 8 Ex. at p. 298; *Ramuz* v. *Crowe*, 1 Ex. 167.

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So if a bill or note transferable by delivery be cut in halves, and half be lost, it was held that the holder cannot sue at law upon the other half (*i*). But if the bill or note were not in its original state *negotiable*, as where it was payable to the *payee* only (*j*), he might maintain an action either on it, or on the original consideration, if any, since no one else could acquire a title to it (unless, indeed, the defendant would have had a remedy over on the bill or note upon paying it) (*k*). Lord *Campbell*, in his note to *Pierson* v. *Hutchinson* (*l*), suggests that "another distinction may perhaps be taken with respect to a bill indorsed in blank, and lost *after it has become due:* as the finder could not in that case give an effectual right of action even to an indorsee for value and without notice, it may be thought that the acceptor cannot insist on an indemnity." However, he afterwards observes, that "as the plaintiff might make out a *primâ facie* case by proving the acceptance and indorsement, it might be hard to expose the acceptor, after payment of the bill without any indemnity, to the hazard of showing by legal evidence that the bill had been lost after it became due." And accordingly this distinction had been virtually denied to exist (*m*).

In order to avail himself of this defence, it must be pleaded; and if it be not, the plaintiff, upon a denial of the making, &c., may prove the loss or destruction of the bill, and give secondary evidence of it, as of any other document (*n*). If there be no pleading, which renders it necessary for the plaintiff to produce the bill on the trial, and the plaintiff do not produce it, the only result will be, that he may not be able to obtain interest for the period before action, if the form of the claim does not show when it became due (*o*).

(*i*) *Mayor* v. *Johnson*, 3 Camp. 324; *Redmayne* v. *Burton*, 2 L. T. N. S. 324. The person to whom half was sent, or into whose possession it got, would not acquire a title to sue: *Smith* v. *Mundy*, 3 E. & E. 22; see s. 21 (1). In former editions it is observed, "the case of *Mayor* v. *Johnson* may be considered open to review."

(*j*) *Wain* v. *Bailey*, 10 A. & E. 616; per cur., *Clay* v. *Crowe*, ubi sup.; *Rolt* v. *Watson*, 4 Bing. 273; *Mayor* v. *Johnson* supra.

(*k*) *Champion* v. *Terry*, 3 B. & B. 295.

(*l*) 2 Camp. 211.

(*m*) *Poole* v. *Smith*, Holt, 144; and see *Pooley* v. *Millard*, 1 C. & J. at p. 414, per cur.

(*n*) *Blackie* v. *Pidding*, 6 C. B. 196; *Charnley* v. *Grundy*, 14 C. B. 608.

(*o*) *Hutton* v. *Ward*, 15 Q. B. 26.

Remedy upon lost bills or notes.

In cases where the loser of a bill was precluded by the above rules from enforcing payment in a Court of law, he could formerly only obtain relief in *equity* on giving a proper indemnity (*o*). The Common Law Procedure Act, 17 & 18 Vict. c. 125, s. 87, provides that, "in case of any action founded on a bill of exchange or other negotiable instrument (*p*), it shall be lawful for the Court or a Judge to order that the loss of such instrument shall not be set up (*q*); provided an indemnity is given to the satisfaction of the Court or Judge, or a Master, against the claims of any other person upon such negotiable instrument." This section is not repealed. But the Bills of Exchange Act enacts as follows:—

Sect. 69. "Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever, in case the bill alleged to have been lost shall be found again. If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled to do so" (*r*).

Sect. 70. "In any action or proceeding upon a bill the Court or a Judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the Court or Judge against the claims of any other person upon the instrument in question" (*s*).

These sections apparently do not extend to indorsements.

(*o*) *Pooley* v. *Millard*, 1 C. & J. at p. 414. See *Mossop* v. *Eadon*, 16 Ves. 812; and per *Richards*, C. B., in *Davies* v. *Dodd*, Wils. Exch. Rep. 110; 4 Price, 176.

(*p*) This includes cheques: *Eyre* v. *Waller*, 5 H. & N. 460.

(*q*) *Aranguren* v. *Scholfield*, 1 H. & N. 494; *King* v. *Zimmerman*, L. R. 6 C. P. 466.

(*r*) See 47 & 48 Vict. c. 61, s. 14.

(*s*) See s. 51 (8).

CHAPTER II.

CONTRACTS WITH CARRIERS.

Contracts with carriers.

A COMMON carrier is one who undertakes for hire to transport from place to place the goods of such as choose to employ him (*a*). Of this description are the proprietors of stage-waggons and coaches which carry goods for hire, lightermen (*b*), hoymen, barge-owners, ferrymen (*c*), canal-boatmen, owners and masters of ships engaged generally in the transportation of goods for hire, and other persons owning similar instruments of public conveyance (*d*). Railway companies are common carriers with regard to the goods they profess to carry, unless the Acts constituting them limit their liability (*e*). They are bound to afford all reasonable facilities for the forwarding and delivering of all traffic within the meaning of sect. 1 of the Railway and Canal Traffic Act, 1854, even though the company is not a common carrier of such articles (*f*). A town carman not plying

(*a*) *Gisbourn* v. *Hurst*, 1 Salk. 249, at p. 250; *Liver Alkali Co.* v. *Johnson*, L. R. 9 Ex. 338; *Scaife* v. *Farrant*, L. R. 10 Ex. 358. The last two cases seem to show that if the carriers, in all cases of carrying a particular class of goods, entered into special agreements, they would not be common carriers.

(*b*) *Liver Alkali Co.* v. *Johnson*, supra.

(*c*) A ferryman, however, seems not to be in the situation of a common carrier; at all events where he takes the passenger along with the goods: *Payne* v. *Partridge*, 1 Show. 257; 1 Salk. 12; *Walker* v. *Jackson*, 10 M. & W. 161.

(*d*) *Coggs* v. *Bernard*, 2 Ld. Raym. 909, at p. 918; *Hyde* v. *Trent and Mersey Navigation Co.*, 5 T. R. 389; *Forward* v. *Pittard*, 1 T. R. 27; *Nugent* v. *Smith*, 1 C. P. D. 19, 423; *Liver Alkali Co.* v. *Johnson*, L. R. 7 Ex. 267; 9 Ex. 338.

(*e*) *Palmer* v. *Grand Junction Rail. Co.*, 4 M. & W. 749; *Johnson* v. *The Midland Rail. Co.*, 4 Exch. 367; *Tattan* v. *Great Western Rail. Co.*, 2 E. & E. 844. As to what is professing to convey, see *Oxlade* v. *The North Eastern Rail. Co.*, 3 L. T. N. S. 671; *Richardson* v. *North Eastern Rail. Co.*, L. R. 7 C. P. 75. A mere stipulation or announcement that they were not common carriers, if in fact they acted as such, would be unavailing: see *Bank of Kentucky* v. *Adams' Ex. Co.*, 3 Otto, p. 180.

(*f*) *Dickson* v. *G. N. Rail. Co.*, 18 Q. B. D. 176. See pp. 315, 316, below.

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between certain termini, but undertaking casual jobs, is not, properly speaking, a common carrier (*g*); nor is a stage-coach owner, who carries passengers *only*. A stage-coach owner or railway company carrying passengers does not warrant their safety, or that the carriage is free from defects, at all events (*h*); but only that, so far as human care, skill, and foresight will go, their safe conveyance will be provided for (*i*).

Carriers may make such conditions as they deem proper with respect to the carriage of passengers (*j*).

It is now settled law that stage-coach owners or railway companies carrying passengers are liable as insurers of their personal luggage (*k*). Apparently, it matters not that the luggage has been placed at the passenger's request in the carriage with him. "A railway company, in accepting a passenger's luggage for carriage in a passenger train, and in the carriage with the passenger himself, do enter into a contract as common carriers, modified only to the extent that if loss happens by reason of want of care of the passenger himself, who has taken within his own immediate control the goods which are lost, their contract as insurers does not apply to loss occasioned by the passenger's own default" (*l*). But if a passenger takes, without notice to the company, merchandise or articles other than the personal luggage which a traveller usually carries, the company will not be responsible for loss or damage (*m*). The

(*g*) *Brind* v. *Dale*, 2 M. & Rob. 80.

(*h*) *Redhead* v. *Midland Rail. Co.*, L. R. 4 Q. B. 379. The conveyance by stage-coaches is regulated by 2 & 3 Will. 4, c. 120, and 5 & 6 Vict. c. 79.

(*i*) *Simson* v. *London General O. Co.*, L. R. 8 C. P. 390; *Richardson* v. *Great Eastern Rail. Co.*, 1 C. P. D. 342; *Hymon* v. *Nye*, L. R. 6 Q. B. D. 685; *Butler* v. *Manchester & Sheffield Rail. Co.*, 21 Q. B. D. 207, at p. 211, per Lord *Esher*, M. R.

(*j*) *Butler* v. *Manchester & Sheffield Rail. Co.*, 21 Q. B. D. 207, at p. 211, per Lord *Esher*, M. R.

(*k*) *Cohen* v. *North Eastern Rail. Co.*, 1 Ex. D. 217; 2 Ex. D. 253. They are within 17 & 18 Vict. c. 31, s. 7: *Cohen* v. *The North Eastern Rail. Co.*, ubi supra. Consequently the conditions attempted to be imposed on the passenger must be reasonable and signed by him. Query, whether *Cutler* v. *North London Rail. Co.*, 19 Q. B. D. 64, was rightly decided. If the defendants were liable as gratuitous bailees, was there any evidence of gross negligence? See *Talley* v. *Great Western Rail. Co.*, L. R. 6 C. P. 44.

(*l*) Lord *Halsbury*, L. C., in *Great Western Rail. Co.* v. *Bunch*, 13 App. Cas. 31, at p. 42, disapproving of *Bergheim* v. *Great Eastern Rail. Co.*, 3 C. P. D. 221.

(*m*) *Cahill* v. *London & N. W. Rail.*

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chief difficulty in recent cases has been in determining whether such luggage has been received by the company's servants for the purpose of carriage. On the one hand, luggage may be entrusted to a porter so long before the departure of a train that the porter cannot be considered to have received it as the agent of the company. "Railway companies have provided cloak rooms or left-luggage offices, which are the proper receptacles for luggage brought to the station under such circumstances" (*n*). On the other hand, it is equally clear that the company may, as carriers, be in the possession of the luggage, if their porter receives it for the purpose of conveying it to the train, although the passenger does not intend to travel forthwith by their train (*o*).

The duty (*p*) of a common carrier is to carry the goods of all persons offering (for there need not be an actual *tender* (*q*)) to pay his hire (*r*) (unless, indeed, his carriage be full, or the goods are of such a kind as to be liable to extraordinary danger, or such as he is unaccustomed or unable to convey (*s*)), to take proper care of them in their passage, and to make a safe and right delivery of them at the time agreed upon, or, in the absence of any stipulation in that respect, within a reasonable time (*t*). A carrier is not bound to carry by the shortest, if it

Co., 10 C. B. N. S. 154; 13 C. B. N. S. 818; *Belfast & Ballymena Rail. Co.* v. *Keys*, 9 H. L. Ca. 556; *Phelps* v. *London & N. W. Rail. Co.*, 19 C. B. N. S. 321; *Hudston* v. *The Midland Rail. Co.*, L. R. 4 Q. B. 366; *Maerow* v. *Great W. Rail. Co.*, L. R. 6 Q. B. 612.

(*n*) Lord *Herschell* in *Great Western Rail. Co.* v. *Buneh*, 13 App. Cas. at p. 53.

(*o*) *Buneh* v. *Gt. Western Ry.*, 13 App. Cas. p. 59.

(*p*) See *Tattan* v. *Great Western Rail. Co.*, 2 E. & E. 844.

(*q*) *Pickford* v. *Grand Junction Rail. Co.*, 8 M. & W. 372. ("The money is not required to be paid down by the plaintiffs until the carrier receives the goods, which he is bound to carry." —*Parke*, B.)

(*r*) *Jaekson* v. *Rogers*, 2 Show. 327; Bac. Ab. Carriers (B.); *Riley* v. *Horne*, 5 Bing. 217.

(*s*) *Jaekson* v. *Rogers*, 2 Show. 327; *Lane* v. *Cotton*, 1 Ld. Raym. 646; *Batson* v. *Donovan*, 4 B. & A. 21; *Johnson* v. *Midland Rail. Co.*, 4 Exch. 367; *Oxlade* v. *North Eastern Rail. Co.*, 15 C. B. N. S. 680.

(*t*) *Streeter* v. *Horlock*, 1 Bing. 34; *Hyde* v. *Trent and Mersey Nav. Co.*, 5 T. R. 389; *Ellis* v. *Turner*, 8 T. R. 531; *Davis* v. *Garrett*, 6 Bing. 716; *Taylor* v. *Great Northern Rail. Co.*, L. R. 1 C. P. 385; *Lord* v. *Midland Rail. Co.*, L. R. 2 C. P. 339; *Raphael* v. *Pickford*, 5 M. & G. 551; *Hales* v. *The London & North Western Rail. Co.*, 4 B. & S. 66; *D'Arc* v. *London & North Western Rail. Co.*, L. R. 9 C. P. 325. As to the measure of da-

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be not the ordinary route (*u*). Nor is he bound to deliver goods within any particular time. In the absence of a special contract, it is sufficient if he deliver them within a reasonable time. "It is the duty of a common carrier to convey the goods without an unnecessary delay or deviation; but it may be necessary for the safe carriage of the goods that he should either delay or deviate in his course, and he is then justified in doing so" (*x*).

At common law he stands in the situation of an insurer of the property entrusted to him, and is answerable for every loss or damage happening to it while in his custody, no matter by what cause occasioned, unless it were by the act of God, such as a tempest, or of nature, or a defect in the thing carried (*y*), or that of the king's enemies. The carrier will not be liable for deterioration by evaporation or leakage, or the inherent vice of the article (*z*). In other cases, even his entire faultlessness does not excuse him (*a*). Thus he is liable for damage done by accidental fire, or by a robbery (*b*). His liability continues up to the time of the goods being delivered (*c*); unless, as sometimes happens, they continue in his possession after the deter-

mages for a breach of this duty, see *Horne* v. *Midland Rail. Co.*, L. R. 8 C. P. 131; *Grébert-Borgnis* v. *Nugent*, 15 Q. B. D. 85; *Schulze & Co.* v. *Great Eastern Rail. Co.*, 19 Q. B. D. 30; *Baldwin* v. *London, Chatham & Dover Rail. Co.*, 9 Q. B. D. 882.

(*u*) *Hales* v. *London & North Western Rail. Co.*, 4 B. & S. 66.

(*x*) *Montague Smith*, J., in *Taylor* v. *Great Northern Rail Co.*, L. R. 1 C. P. at p. 388.

(*y*) *Blower* v. *Great Western Rail. Co.*, L. R. 7 C. P. 655; *Nugent* v. *Smith*, 1 C. P. D. 423. And he will be liable even then, if he be guilty of negligence. See *Phillips* v. *Clark*, 2 C. B. N. S. 156; *Grill* v. *The G. I. S. C. Co.*, L. R. 1 C. P. 600; 3 C. P. 476.

(*z*) *Hudson* v. *Baxendale*, 2 H. & N. 575; *Nugent* v. *Smith*, ubi sup.

(*a*) *Oakley* v. *The Portsmouth and R. S. P. Co.*, 11 Exch. 618.

(*b*) *Dale* v. *Hall*, 1 Wils. 281; 1 Inst. 89; *Collins* v. *Bristol & Exeter Rail. Co.*, 1 H. & N. 517; 7 H. L. Ca. 194; *Covington* v. *Willan*, Gow, 115. It has been expressly held by the Supreme Court of the United States that it is the duty of the carrier to see that the goods are properly packed. "The common carrier is regarded as an insurer of the property packed, as upon him the duty rests to see that the packing and conveyance are such as to secure its safety": *Hannibal Rail. Co.* v. *Swift*, 17 Otto, p. 273.

(*c*) *Gatliffe* v. *Bourne*, 4 Bing. N. C. 314; *Bourne* v. *Gatliffe*, 3 M. & G. 643; 7 M. & G. 850; 11 Cl. & Fin. 45; *Patscheider* v. *Great Western Rail. Co.*, 3 Ex. D. 153; *Hodkinson* v. *London & North Western Rail. Co.*, 14 Q. B. D. 228.

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mination of their journey, under a contract, express or implied, by which the nature of his employment, and, of course, of his liabilities with regard to them, may be altered (*d*). For instance, if, on their arrival, he agree to hold them as a warehouseman or wharfinger (*e*).

Throughout the whole transit or journey, even if part of it is over the line of another company, unless the company stipulates to the contrary (*f*), this liability extends (*g*); and a person who holds himself out as a common carrier of goods between two places, one of which is outside England, is subject to the common law liability of carriers (*h*).

This being the rule of the common law, regulating all cases in which there was no special contract between carriers and their employers, the former soon found it their interest to make agreements requiring a premium in proportion to the risk incurred, where the goods intrusted to them were beyond a certain value. This was generally done by inserting in the newspapers, distributing in handbills, and sticking up in their offices a notice, that they would not be accountable for any property beyond a certain value, unless insured, and paid for at the time of delivery. If this notice were brought home to the

(*d*) As to his duties and liability in case of refusal by the consignee to remove them, see *Crouch* v. *The Great Western Rail. Co.*, 2 H. & N. 491; 3 H. & N. 183; *Hudson* v. *Baxendale*, 2 H. & N. 575; *Great Northern Rail. Co.* v. *Swaffield*, L. R. 9 Ex. 132; *Heugh* v. *London & N. W. Railway*, L. R. 5 Ex. 51.

(*e*) *Mitchell* v. *Lancashire & Yorkshire Rail. Co.*, L. R. 10 Q. B. 256; *Van Toll* v. *The South Eastern Rail. Co.*, 12 C. B. N. S. 75 (where the goods were deposited in the cloak room): *Shepherd* v. *Bristol & Exeter Rail. Co.*, L. R. 3 Ex. 189.

(*f*) *Fowles* v. *Great Western Railway*, 7 Exch. 699. See *Coxon* v. *Great Western Railway*, 5 H. & N. 274.

(*g*) *Muschamp* v. *Lancaster & Preston Junction Railway*, 8 M. & W. 421; *Scothorn* v. *S. Staffordshire Railway*, 8 Exch. 341. See *Bristol & Exeter Railway* v. *Collins*, 7 H. L. Cas. 194. In the United States the Supreme Court held that, in the absence of a special agreement, the company in such circumstances is "only bound to safely carry over its own route, and safely to deliver to the next connecting carrier."—17 Otto, p. 107. The contrary, though open to exception in point of principle, is well established here. As to passengers, see *Thomas* v. *Rhymney Railway*, L. R. 6 Q. B. 266; *Foulkes* v. *Midland Railway*, 5 C. P. D. 157.

(*h*) *Crouch* v. *London & North Western Rail. Co.*, 14 C. B. 255. See also *Doolan* v. *Midland Rail. Co.*, 2 App. Cas. 792.

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knowledge of the employer (for that was indispensably necessary in order to render it available (*i*)), his consent to his terms was implied (*k*), and the carrier became entitled to the protection for which he stipulated (*l*). He might even be entitled to be relieved from liability for the consequences of his own default; but these notices, as generally worded and interpreted by courts of law, only exonerated the carrier from liability for loss or damage occurring to uninsured goods, *without fault on his part;* for if he were guilty of wilful misconduct or gross negligence, he was chargeable with the damage occasioned thereby, and his notice was not permitted to limit his responsibility (*m*), unless the employer had been guilty of a concealment of the nature and value of the property (*n*), for that would have discharged the carrier, even though he had given no notice.

The construction of these notices, and the necessity of proving that they had arrived at the employer's knowledge, having given rise to much litigation, the Legislature enacted positive regulations on the subject. Those which concern *Carriers by Sea* we will enumerate under the head *Contracts of Affreightment;* those concerning *Carriers by Land and Canal* are the Carriers Act (11 Geo. 4 & 1 Will. 4, c. 68), the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), the Regulation of Railways Acts, 1868 and 1873 (31 & 32 Vict. c. 119, and 36 & 37 Vict. c. 48), and the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25) (*o*).

The Carriers Act enacts (sect. 1), that no common carrier *by*

(*i*) *Kerr* v. *Willan*, 6 M. & S. 150; *Henderson* v. *Stevenson*, L. R. 2 H. L. Sc. 470; *Parker* v. *South Eastern Rail. Co.*, 1 C. P. D. 618. See *Watkins* v. *Rymill*, 10 Q. B. D. 178, where *Stephen*, J., reviews the cases.

(*k*) *Mayhew* v. *Eames*, 3 B. & C. 601; *Rowley* v. *Horne*, 3 Bing. 2.

(*l*) *Nicholson* v. *Willan*, 5 East, 507. See *Van Toll* v. *South Eastern Rail. Co.*, 12 C. B. N. S. 75; *Harris* v. *Great Western Rail. Co.*, 1 Q. B. D. 515.

(*m*) *Garnett* v. *Willan*, 5 B. & Ald. 53; *Sleat* v. *Fagg*, Id. 342; *Martin* v. *Great Indian P. Ry. Co.*, L. R. 3 Ex. 9. See the judgment of *Bayley*, B., in *Owen* v. *Burnett*, 2 C. & M. 353.

(*n*) *Batson* v. *Donovan*, 4 B. & Ald. 21; *Great Northern Rail. Co.* v. *Shepherd*, 8 Exch. 30; *Belfast and B. R. Co.* v. *Keys*, 9 H. L. Ca. 556; *Cahill* v. *The London and North Western Rail. Co.*, 13 C. B. N. S. 818.

(*o*) See these statutes in the Appendix.

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land (*p*), for hire, shall be liable for the loss (*q*) of, or any injury to, any gold or silver coin, gold or silver in a manufactured or unmanufactured state, precious stones, jewellery, watches, clocks, time-pieces, trinkets (*r*), bills, bank-notes, orders, notes or securities for payment of money (*s*), stamps, maps, writings, title-deeds, paintings (*t*), engravings, pictures, gold or silver plate or plated articles, glass (*u*), china, silks manufactured or unmanufactured, wrought up or not wrought up with other materials (*v*), furs (*x*), or lace [not being machine-made: 28 & 29 Vict. c. 94], contained in any parcels (*y*), or package (*z*), when the value (*a*) exceeds the sum of 10*l.*; unless at the time of delivery at the office, warehouse, or receiving-house (*b*) of such carrier, or to his book-keeper, coachman, or other servant, the value and nature of such article or articles shall have been declared, and the increased charge, or an engagement to pay the same, accepted by the person receiving the parcel (*c*). By sect. 2, common carriers, on the delivery of such parcels or packages exceeding

(*p*) This statute applies, though the carriage is to be partly by water, *e.g.*, from London to Jersey, so as to protect the carrier as regards the land journey: *Pianciani* v. *The London and South Western Rail. Co.*, 18 C. B. 226; *Le Conteur* v. *The London and South Western Rail. Co.*, L. R. 1 Q. B. 54; *Baxendale* v. *The Great Eastern Rail. Co.*, L. R. 4 Q. B. 244; *Doolan* v. *Midland Rail. Co.*, 2 App. Cas. 792. But the Act does not apply to carriage by sea only: *Peninsular and Oriental Co.* v. *Sand*, 3 Moo. P. C. N. S. 272.

(*q*) Infra, p. 308.

(*r*) *Bernstein* v. *Baxendale*, 6 C. B. N. S. 251, overruling *Davey* v. *Mason*, Car. & M. 45.

(*s*) *Stoesiger* v. *The South Eastern Rail. Co.*, 3 E. & B. 549.

(*t*) In the sense of works of art: *Woodward* v. *London & North Western Ry.*, 3 Ex. D. 121.

(*u*) See *Owen* v. *Burnett*, 2 C. & M. 353; *Bernstein* v. *Baxendale*, 6 C. B. N. S. 251.

(*v*) Silk dresses made up for wear come within these words: *Flowers* v. *South Eastern Railway*, 16 L. T. 329, overruling *Davey* v. *Mason*, Car. & M. 45.

(*x*) On the question, what falls within this denomination, see *Mayhew* v. *Nelson*, 6 C. & P. 58.

(*y*) The carriers will not be liable for things merely *accessory* to these articles: *Wyld* v. *Pickford*, 8 M. & W. 443; *Henderson* v. *London and North Western Railway*, L. R. 5 Ex. 90 (picture frames); but they will be liable for things not accessory: *Treadwin* v. *The Great Eastern Rail. Co.*, L. R. 3 C. P. 308.

(*z*) *Whaite* v. *The Lancashire and Yorkshire Rail. Co.*, L. R. 9 Ex. 67.

(*a*) *Blankensee* v. *London and North Western Rail. Co.*, 45 L. T. 761.

(*b*) See *Syms* v. *Chaplin*, 5 Ad. & E. 634; *Stephens* v. *London & South Western Railway*, post, p. 308.

(*c*) He may waive this; therefore, if he make no such demand, he will be liable: *Behrens* v. *Great Northern Rail. Co.*, 6 H. & N. 366; 7 H. & N. 950.

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the value of 10*l.* and so declared as aforesaid, may demand an increased rate of charge, to be announced by a notice in legible characters affixed in the office (*d*); and persons sending parcels are to be bound by such notice, without further proof of the same having come to their knowledge. By sect. 3, carriers shall, if required, give a receipt for the parcel, acknowledging the same to have been insured (*e*), which receipt shall not be liable to any stamp duty; and carriers who do not give such receipt when required, or affix the proper notice, are not entitled to the benefit of this Act, but shall be responsible as at common law, and liable to refund the increased charge. Carriers cannot, *by a notice*, limit their liability at common law to answer for the loss of any articles in respect whereof they are not entitled to the benefit of this Act (*f*). Every office of such common carrier shall be deemed a receiving-house (*g*); any one proprietor shall be liable to be sued, and no action shall abate for the want of joining any co-proprietor (*h*). Parties entitled to damages for parcels lost or damaged may recover the extra charges for insurance (*i*).

"Loss," in sect. 1, means a loss by the carrier of the article itself (*k*), and not a loss sustained by the owner by reason of delay, or a temporary loss (*l*). The Act does not protect a common carrier from liability to answer for losses or injury arising from the felonious acts (*m*) of any servant in his employ;

(*d*) The form of notice, almost universally adopted by land carriers since this Act, is given in the notes to *Owen* v. *Burnett*, 4 Tyrwh. at p. 133. See *Draysen* v. *Horne*, 32 L. T. 691, as to defective notice.

(*e*) *Peck* v. *N. S. R. Co.*, E. B. & E. 958.

(*f*) Sect. 4. This means a mere public notice: *Walker* v. *York and North Midland Rail. Co.*, 2 E. & B. 750; and see infra, p. 311, notes (*a*) and (*b*).

(*g*) This would include an inn at which the carrier is in the habit of receiving goods: *Stephens* v. *London and South Western Rail. Co.*, 18 Q. B. D. 121.

(*h*) Sect. 5. See *Syms* v. *Chaplin*, 5 Ad. & E. 634.

(*i*) Sect. 7.

(*k*) *Hearn* v. *The London and South Western Rail. Co.*, 10 Ex. 793.

(*l*) *Millen* v. *Brasch*, 10 Q. B. D. 142.

(*m*) Sect. 8. The felony of a servant, therefore, forms a good answer to a plea of this statute: *Machu* v. *The London and South Western Rail. Co.*, 2 Exch. 415; *The Great Western Rail. Co.* v. *Rimell*, 18 C. B. 575. So apparently a misdemeanour would be a good defence. But, "*without gross negligence*," would form no answer to

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a term which includes not merely his own immediate servants, but those employed by any person with whom he may contract to perform part of his duty (*n*). Nor does it protect any such servant from liability to answer for the consequences of his own neglect or misconduct (*o*). The Act extends to a loss at a point, to which the goods have been negligently taken by the carrier, beyond the intended destination (*p*). Common carriers are not concluded as to the value of any parcel by the value declared (*q*). The carrier is not, in a case within the Act, liable for a loss of the articles named in the statute, though occasioned by the *gross negligence* of his servants, not amounting to a *misfeasance* (*r*).

It was at one time supposed (*s*) that the notice directed by the 2nd section to be affixed in the office, was a substitute for the notice formerly employed, and that, unless this was put up, the person sending the goods was under no obligation to notify their description and value, and the carrier was liable for their loss. This view proved to be erroneous; the Court of Exchequer Chamber held that the protection afforded by the 1st section is absolute, unless the value and nature of the articles be declared, and also that it applies not only in cases where the goods are delivered to the carrier at an office, but on the road, or at any other place. The operation of the Act is

a plea, that the goods were received on the terms of a notice uncomplied with: *Butt* v. *The Great Western Rail. Co.*, 11 C. B. 140.

(*n*) *Machu* v. *The London and South Western Rail. Co.*, 2 Exch. 415; *Stephen* v. *London and South Western Rail. Co.*, 18 Q. B. D. 121, which goes beyond the former case. The servant of the proprietor of a receiving office for parcels intended to be sent by the defendants' railway held to be a "servant" within the meaning of the Act: *Way* v. *Great Eastern Rail. Co.*, 1 Q. B. D. 692. See *Doolan* v. *Midland Rail. Co.*, 2 App. Cas. 792. As to the evidence necessary to support this reply, see *Vaughton* v. *London and North Western Rail. Co.*, L. R. 9 Ex. 93; *M'Queen* v. *Great Western Rail. Co.*, L. R. 10 Q. B. 569; *Turner* v. *Great Western Railway*, 34 L. T. 22.

(*o*) Sect. 8.

(*p*) *Morritt* v. *North Eastern Rail. Co.*, 1 Q. B. D. 302.

(*q*) Sect. 9.

(*r*) *Hinton* v. *Dibbin*, 2 Q. B. 646, overruling *Owen* v. *Burnett*, 2 C. & M. 353. And see *Austin* v. *Manchester Railway*, 10 C. B. at p. 474; *Morritt* v. *North Eastern Rail. Co.*, 1 Q. B. D. 302.

(*s*) *Hart* v. *Baxendale*, 6 Exch. 769.

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thus concisely explained by Mr. Justice *Patteson*, in delivering the opinion of that Court (*t*):—

"The meaning of the legislature is, that all persons sending goods of a particular description and value, whenever they deliver them to the carrier, are bound to give information of the nature and value of the articles. That is the first clause; and the object of the legislature was, that such information shall be given, whether the goods were delivered at the office of the carrier, or at the sender's house, or on the road, or elsewhere, and clauses follow with certain provisions as to what is *then* to be done. Although the value and nature of the articles may be declared, it does not necessarily follow that the carrier would be protected; but a different clause must be acted on before his liability ceases. However, the first step to be taken is, that the sender of the goods notify their value; then it is that the carrier is entitled to have a larger charge. He cannot have that larger charge, or save himself from responsibility, by saying, 'I will have such and such a sum of money;' but he must have a tariff stuck up in his office, to notify to all persons sending articles of that kind what he proposes to demand beyond the usual charge. The notice required by the 2nd section to be affixed in the office is not a notice that the carrier means to avail himself of the benefit of the Act, and that all persons who send articles of a particular description and value shall tell him that they are of that description and value, for the Statute requires that in the first instance; but it is only a notice of what the extra charge is to be."

Special contracts are not to be affected by this Act (*u*); but if they be not inconsistent with the exemption, it will apply (*v*). Independently of the Act, the carrier may make what terms he pleases. Whether the consignor has, in fact, assented to the conditions—whether, for example, he is bound by printed conditions on a receipt or ticket—may be a question of difficulty (*x*). But if a carrier receive goods upon the terms that he is only to be responsible for particular risks, he will only be liable for them (*y*); or that the owner shall take all risks of the convey-

(*t*) *Baxendale* v. *Hart*, 6 Exch. at p. 789.

(*u*) Sect. 6. As to what is a special contract, see *York, Newcastle, and Berwick* v. *Crisp*, 14 C. B. 527.

(*v*) *Baxendale* v. *Great Eastern Rail. Co.*, L. R. 4 Q. B. 244.

(*x*) See the judgment of *Stephen*, J., in *Watkins* v. *Rymill*, 10 Q. B. D. 178.

(*y*) *Scaife* v. *Farrant*, L. R. 10 Ex. 358.

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ance, and that he, the carrier, shall not be responsible for damage howsoever caused, he will not be liable even for the gross negligence of himself or his servants (*z*). The ticket to this effect, delivered by the carrier to the person bringing the goods, may constitute such a special contract, and not a mere notice which would be void under the 4th section (*a*). A notice, too, to the like effect previously served by the carrier on the person sending the goods, and not expressly dissented from by him, is sufficient to warrant a jury in finding that there was such a special contract, and that he did not receive them as a common carrier (*b*).

The railway companies, which had acquired, by means of the facilities and powers conferred on them by Parliament, and their union with the canals, which, for the most part, had become attached to them, a monopoly in effect of the carrying trade throughout the country, proceeded to take advantage of these decisions, and create for themselves, through the medium of such tickets and notices, exemption from risk, even for their own carelessness and misconduct. In order, therefore, to prevent them from subjecting the public to unreasonable and improper conditions (*c*), "The Railway and Canal Traffic Act, 1854 (*d*), provides, by s. 7 :—

"That every such company as aforesaid shall be liable for the loss of, or for any injury done to any horses, cattle or other animals (*e*), or to any articles, goods or things in the receiving (*f*), forwarding or delivering (*g*) thereof, occasioned by the neglect or

(*z*) *Austin* v. *Manchester, &c. Rail. Co.*, 16 Q. B. 600; *Austin* v. *Manchester, &c. Rail. Co.*, 10 C. B. 454; *Carr* v. *The Lancashire, &c. Rail. Co.*, 7 Exch. 707; *White* v. *The Great Western Rail. Co.*, 2 C. B. N. S. 7.

(*a*) *Carr* v. *The Lancashire and Great Northern Rail. Co.*, 7 Exch. 707; *Austin* v. *The Manchester Rail. Co.*, 10 C. B. 454; *Great Northern Rail. Co.* v. *Morville*, 21 L. J. Q. B. 319.

(*b*) *Walker* v. *The York and North Midland Rail. Co.*, 2 E. & B. 750.

(*c*) *Pardington* v. *South Wales Rail. Co.*, 1 H. & N. 392. See *Wise* v. *Great Western Rail. Co.*, 1 H. & N. 63.

(*d*) 17 & 18 Vict. c. 31. By 31 & 32 Vict. c. 119, s. 16, the provisions of this Act are extended to steam vessels worked by railway companies in connection with their traffic, in respect of which they are enabled to take tolls: *Cohen* v. *South Eastern Rail. Co.*, 1 Ex. D. 217.

(*e*) Dogs: *Ashendon* v. *London and Brighton Rail. Co.*, 5 Ex. D. 190.

(*f*) *Hodgman* v. *The W. Midland Rail. Co.*, 5 B. & S. 173; 6 B. & S. 560.

(*g*) *Rooth* v. *North Eastern Rail. Co.*, L. R. 2 Ex. 173; *Gill* v. *Manchester Rail. Co.*, L. R. 8 Q. B. 186. This word seems not to have been noticed in *Shepherd* v. *Bristol and Exeter Rail. Co.*, L. R. 3 Ex. 189. This applies to

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default (*k*) of such company or its servants (*l*), notwithstanding any notice, condition or declaration made and given by such company contrary thereto, or in anywise limiting such liability, every such notice, condition or declaration being hereby declared to be null and void: Provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding and delivering of any of the said animals, articles, goods or things as shall be adjudged by the Court or judge before whom any question relating thereto shall be tried, to be just and reasonable: Provided always, that no greater damages shall be recovered for the loss of, or for any injury done to any of such animals beyond the sums hereinafter mentioned: (that is to say) for any horse, fifty pounds; for any neat cattle per head, fifteen pounds; for any sheep or pigs per head, two pounds; unless the person sending or delivering the same to such company shall, at the time of such delivery, have *declared* (*m*) them to be respectively of higher value than as above mentioned, in which case it shall be lawful for such company to demand and receive, by way of compensation for the increased risk (*n*) and care thereby occasioned, a reasonable per centage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge; and such per centage or increased rate of charge shall be notified in the manner prescribed in the statute 11 Geo. 4 & 1 Will. 4, c. 68, and shall be binding upon such company in the manner therein mentioned: Provided also, that the proof of the value of such animals, articles, goods and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or injury: Provided also, that no special contract between such company and any other parties respecting the receiving, forwarding or delivering of any animals, articles, goods or things as aforesaid, shall be binding upon, or affect any such party, unless the same be signed by him or by the

passengers' luggage, ante, pp. 302, 303.

(*k*) As to cases of inevitable accident, see *Ashendon* v. *London and Brighton Rail. Co.*, 5 Ex. D. at p. 194.

(*l*) "Servants" include agents (not strictly servants) employed to do work which the railway company are under a contract with others to perform: *Doolan* v. *Midland Rail. Co.*, 2 App. Cas. 792.

(*m*) But if he has made a declaration that they are of less value he will be bound by it: *M'Cance* v. *The London & North Western Rail. Co.*, 7 H. & N. 477.

(*n*) "Although a small percentage may be reasonable irrespective of distance, it by no means follows that the same is true of a high percentage." *Dickson* v. *Great Northern Rail. Co.*, 18 Q. B. D. at p. 187.

person delivering (*o*) such animals, articles, goods or things respectively for carriage (*p*): Provided also, that nothing herein contained shall alter or affect the rights, privileges or liabilities of any such company under the said Act of 11 Geo. 4 & 1 Will. 4, c. 68, with respect to articles of the descriptions mentioned in the said Act" (*q*).

The following interpretation of this obscure enactment was given by *Jervis*, C. J. (*r*) :—

"The fair meaning of the section, as it seems to me, is this:—The first branch of it declares that all notices, conditions or declarations made and given by the company, shall be null and void in so far as they go to release the company from liability for loss of or injury to goods, &c., in the receiving, forwarding or delivering thereof, occasioned by the neglect or default of the company or its servants. But then it goes on to provide, in the next branch, that this shall not prevent the company from making such conditions which shall be adjudged by the Court or judge, before whom any question relating thereto shall be tried, to be just and reasonable. And, further, though just and reasonable, such condition or 'special contract' shall not be binding, unless signed by the person sending or delivering the goods. The result seems to be this:—A general notice is void: but the company may make special contracts with their customers, provided they are just and reasonable, and signed; and whereas the monopoly created by railway companies compels the public to employ them in the conveyance of their goods, the legislature have thought fit to impose the further security that the Court shall see that the condition or special contract is just and reasonable" (*s*).

This interpretation of the statute was adopted by the Exchequer Chamber in *McManus* v. *The Lancashire and Yorkshire Ry. Co.* (*t*), and subsequently, in *Peek* v. *North Staffordshire Ry.*

(*o*) See *Peek* v. *North Staffordshire Rail. Co.*, E. B. & E. 958; 32 L. J. Q. B. 241; 10 H. L. 473. This only applies when the company seek to exempt themselves: *Baxendale* v. *Great Eastern Rail. Co.*, L. R. 4 Q. B. 244.

(*p*) This section applies to passengers' luggage: *Cutler* v. *North London Rail. Co.*, 19 Q. B. D. 64.

(*q*) See also 31 & 32 Vict. c. 119, ss. 14, 16, and 34 & 35 Vict. c. 78, s. 12.

(*r*) *The London & North Western Rail. Co.* v. *Dunham*, 18 C. B. 826; and see *Simons* v. *The Great Western Rail. Co.*, 18 C. B. 805.

(*s*) *Pardington* v. *South Wales Rail. Co.*, 1 H. & N. 392; *Wise* v. *The Great Western Rail. Co.*, 1 H. & N. 63.

(*t*) 4 H. & N. 327.

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Co. (*u*), by the House of Lords; Lord *Westbury* and Lord *Wensleydale* in the latter adopting the above language. Every special contract for carriage, that is, every contract subject to other terms than common law liabilities of the carrier, must be in writing, must be just and reasonable, and signed by the person sending or delivering the goods.

Whether the conditions which a railway company has imposed be just and reasonable, must depend, in many instances, upon the circumstances of the particular case (*v*). The burden of showing that the contract is reasonable lies on the company. A condition which provides that the company shall not be responsible for any damage, however caused (*x*), or in any case (*y*), is certainly unreasonable and bad (*z*). The circumstance that alternative rates or terms are offered is a material, though not conclusive, element in determining the reasonableness of a contract (*a*).

"It is not open to doubt," said Lord *Herschell* in *Great Western Rail. Co.* v. *McCarthy* (*b*), "since the case of *Peek* v. *North Staffordshire Rail. Co.*, that a contract exempting the company from liability

(*u*) 10 H. L. 473.

(*v*) *Simons* v. *The Great Western Rail. Co.*, 18 C. B. 805; *Beal* v. *The South Devon Rail. Co.*, 5 H. & N. 875; *Ashendon* v. *L. B. & S. C. Rail. Co.*, 5 Ex. D. 190; *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Brown*, 8 App. Cas. 703. In *Garton* v. *The Bristol and Exeter Rail. Co.*, 1 B. & S. 112, a condition that no claim for damage will be allowed, unless made within three days after the delivery of the goods; nor for loss, unless made within three days of the time when they should be delivered, was thought to be bad (per Cockburn, C. J., at p. 146); and a condition "that the company would not be accountable for the *loss*, detention or damage of any package, insufficiently or improperly packed," was held to be unjust and unreasonable.

(*x*) Or caused by detention or delay, or overcarriage: *Allday* v. *The G. W. Rail. Co.*, 5 B. & S. 903.

(*y*) *Ashendon* v. *L. & B. Rail. Co.*, 5 Ex. D. 190; *Cutler* v. *North London Rail. Co.*, 19 Q. B. D. 64.

(*z*) *M'Manus* v. *The Lancashire and Yorkshire Rail. Co.*, 4 H. & N. 327; *M'Cance* v. *L. & N. W. Rail. Co.*, 7 H. & N. 477; 3 H. & C. 343; *Rooth* v. *The N. E. Rail. Co.*, L. R. 2 Ex. 173; *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Brown*, 8 App. Cas. 703; *D'Arc* v. *London and North West. Rail. Co.*, L. R. 9 C. P. 325; *Dickson* v. *Great Northern Rail. Co.*, 18 Q. B. D. 176. See, as to exemption from liability of railways conveying goods partly by railway and partly by sea, 31 & 32 Vict. c. 119, s. 14, and for goods, &c., carried in a vessel not belonging to the railway company, 34 & 35 Vict. c. 78, s. 12.

(*a*) *Manchester, Sheffield and Lincolnshire Rail. Co.* v. *Brown*, 8 App. Cas. 703.

(*b*) 12 App. Cas. 218, at p. 228.

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in the terms of the consignment note in the present case, is *primâ facie* not just and reasonable, and that, if no other alternative is offered to the consignor, the company are liable for the negligence of their servants, notwithstanding the stipulations of the contract of carriage. It is equally well settled, since the decision of your Lordships' House, in the case of *Manchester, Sheffield, and Lincolnshire Rail. Co.* v. *Brown* (*c*), that, if the consignor has an offer *bonâ fide* made to him of having his goods carried upon terms just and reasonable, and voluntarily chooses, in consideration of a pecuniary benefit, to exonerate the carrier from any part of his ordinary responsibility, a contract thus limiting the carrier's liability may be just and reasonable, though without the alternative option it would not be. It appears to me, that all the questions in the present case resolve themselves into this one: was the alternative offered to the plaintiff, and which it was open to him to accept in lieu of that contained in the contract, which he in fact entered into, a just and reasonable one? I may remark, before I proceed further, that, in my opinion, the question whether a contract is just and reasonable within the meaning of the statute, must be determined by the Court or judge alone, and that it is not a question proper to be left to a jury, even though questions of fact be necessarily involved in its determination."

By sect. 2 of the Act railway and canal companies are required, "according to their respective powers," to "afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles" (*d*). Thus conveniently timed trains may be ordered (*e*); and a company may be required to erect other structures than those which actually exist, if such are within their powers (*f*). The

(*c*) 8 App. Cas. 703.

(*d*) Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2. As to reasonable facilities, see *Baxendale* v. *London and South Western Rail. Co.*, 12 C. B. N. S. 758; *Garton* v. *Bristol and Exeter Rail. Co.*, 6 C. B. N. S. 639; *Baxendale* v. *Great Western Rail. Co.*, 5 C. B. N. S. 309; *Nicholson* v. *Great Western Rail. Co.*, 5 C. B. N. S. 366; 7 C. B. N. S. 755; *Great Western Rail. Co.* v. *Railway Commissioners*, 7 Q. B. D. 182; *Corporation of Hastings* v. *South Eastern Rail. Co.*, 3 N. & M. 179; *Beeston Brewery Co.* v. *Midland Rail. Co.* (connection by a siding with a railway), 5 B. & M. 53.

(*e*) *G. N. of Scotland Rail. Co.* v. *Highland Rail. Co.*, 5 B. & M. 103.

(*f*) See per *Selborne*, L. C., and *Brett*, L. J., in *S. E. R. Co.* v. *Railway Commissioners*, 6 Q. B. D. 586; *Local*

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decision of the Court of Appeal in *Dickson* v. *Great Northern Rail. Co.* (*g*), gives to this provision a very important effect. It imposes on railway companies the duty of receiving, carrying, and forwarding all traffic, that is, all passengers, goods, and animals.

"The important point," says *Lindley*, L. J. (*h*), "is that railway companies are bound to carry goods and animals which they have facilities for carrying. It would, however, be a mistake to suppose that railway companies are bound to carry, as common carriers, everything which they can be required to carry under the provisions of the Railway and Canal Traffic Act, 1854. Railway companies are bound by that Act to provide reasonable facilities for carrying passengers, but they are not common carriers of passengers. So railway companies are bound to provide reasonable facilities for carrying animals or particular classes of goods; but it by no means follows that they are liable as common carriers for what they are bound by statute to carry. This distinction is important and requires to be borne in mind. Whether railway companies are common carriers of particular classes of goods depends upon what they habitually do, or profess to do, with respect to such goods. The Railway and Canal Traffic Act, 1854, does not make railway companies liable as common carriers in respect of goods which they do not profess to carry as such. This was, in fact, decided in *Oxlade* v. *North Eastern Rail. Co.*" (*i*).

At common law a carrier was not bound to charge his customers equally (*j*), provided the charges were reasonable. But by the Railway and Canal Traffic Act, 1854, s. 2, it was enacted that—

"No such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever" (*k*).

Board for Newington v. *N. E. R. Co.*, 3 N. & M. 306.

(*g*) 18 Q. B. D. 176.

(*h*) Ibid. at p. 184.

(*i*) 1 C. B. N. S. 454, at p. 498.

(*j*) *G. W. Rail. Co.* v. *Sutton*, L. R. 4 H. L. 226, 237.

(*k*) Extended to steam vessels used by railway companies: 31 & 32 Vict. c. 119. As to the construction of this provision, see *Denaby Main Colliery Co.* v. *Manchester, &c. Railway*, 11 App. Cas. 97; *Lancashire & Yorkshire Railway* v. *Greenwood*, 21 Q. B. D. 215.

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In general, differences in charges not accounted for by differences in cost of service will be regarded as undue preference (*l*). The section extends to terminal charges (*m*). Thus a lowering of rates, not in consequence of difference of cost of service, but in order to exclude competition, will be deemed undue preference (*n*). But the section does not apply to rates charged by a railway company for the use of docks owned by them, but wholly unconnected with their business as a railway company (*o*). It has been held that it is no defence to an action for charges that they are unreasonable, and that they give an undue preference (*oo*).

By the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), it is enacted—

Sect. 27—"(1.) Whenever it is shown that any railway company charge one trader or class of traders, or the traders in any district, lower tolls, rates, or charges for the same or similar merchandise, or lower tolls, rates, or charges for the same or similar services, than they charge to other traders, or classes of traders, or to the traders in another district, or make any difference in treatment in respect of any such trader or traders, the burden of proving that such lower charge or difference in treatment does not amount to an undue preference shall lie on the railway company.

"(2.) In deciding whether a lower charge or difference in treatment does or does not amount to an undue preference, the Court having jurisdiction in the matter, or the Commissioners, as the case may be, may, so far as they think reasonable, in addition to any other considerations affecting the case, take into consideration whether such lower charge or difference in treatment is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made (*p*), and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant: Provided that no railway company shall make,

As to what is undue preference, *L. & N. W. Rail. Co.* v. *Evershed*, 3 App. Cas. 1029; *In re Ransome & E. Counties Rail. Co.*, 1 C. B. N. S. 437; 4 C. B. N. S. 135; *Ayr Trustees* v. *Glasgow & S. W. Rail.*, 4 B. & M. 90; *Skinningrove Iron Co.* v. *N. E. Railway*, 5 B. & M. 244; *Londonderry Commissioners* v. *G. N. Railway, &c.*, 5 ib. 282; and cases cited supra, p. 315, note (*d*).

(*l*) *Richardson* v. *Midland Rail. Co.*, 4 N. & M. 1.

(*m*) *L. & N. W. Rail. Co.* v. *Evershed*, 3 App. Cas. 1029. Compare *E. & W. I. Dock Co.* v. *Savill*, 39 Ch. D. 532.

(*n*) *Garton* v. *B. & E. Rail. Co.*, 1 B. & S. 112.

(*o*) *East & West India Dock Co.* v. *Savill*, 39 Ch. D. 524.

(*oo*) *Lancashire and Yorkshire Rail. Co.* v. *Greenwood*, 21 Q. B. D. 215.

(*p*) See *Garton* v. *B. & E. Rail. Co.*, supra.

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nor shall the Court, or the Commissioners, sanction any difference in the tolls, rates, or charges made for, or any difference in the treatment of, home and foreign merchandise, in respect of the same or similar services.

"(3.) The Court or the Commissioners shall have power to direct that no higher charge shall be made to any person for services in respect of merchandise carried over a less distance than is made to any other persons for similar services in respect of the like description and quantity of merchandise carried over a greater distance on the same line of railway" (*p*).

Sect. 29.—"(1.) Notwithstanding any provision in any general or special Act, it shall be lawful for any railway company, for the purpose of fixing the rates to be charged for the carriage of merchandise to and from any place on their railway, to group together any number of places in the same district, situated at various distances from any point of destination or departure of merchandise, and to charge a uniform rate or uniform rates of carriage for merchandise to and from all places comprised in the group from and to any point of destination or departure.

"(2.) Provided that the distances shall not be unreasonable, and that the group rates charged and the places grouped together shall not be such as to create an undue preference" (*q*).

The Railway Commission, established by the Regulation of Railways Act, 1873, has been re-organized, and its jurisdiction much enlarged, by the Railway and Canal Traffic Act, 1888 (*r*). To a Commission, styled the Railway and Canal Commission, and consisting of two appointed Commissioners and three *ex officio* Commissioners, are transferred the jurisdiction and powers vested in the Railway Commissioners established by the Act of 1873. Sect. 9 enacts—

"Where any enactment in a special Act—

"(a) contains provisions relating to traffic facilities, undue preference, or other matters mentioned in section two of the Railway and Canal Traffic Act, 1854; or

"(b) requires a company to which this part of this Act applies to provide any station, road, or other similar work for public accommodation; or

"(c) otherwise imposes on a company to which this part of this

(*p*) See *Hozier* v. *Caledonian Rail. Co.*, 1 N. & M. 27.

(*q*) See as to group rates, *Denaby Main Colliery Co.* v. *Manchester, Sheffield and Lincoln Rail. Co.*, 3 N. & M. 426.

(*r*) 51 & 52 Vict. c. 25. See Appendix.

Act applies, any obligation in favour of the public or any individual;"

the Commissioners have the like jurisdiction to hear and determine as in the case of a contravention of sect. 2 of the Railway and Canal Traffic Act.

Under that Act and the Regulation of Railways Act, 1873, no action lay for breach of the provisions as to undue preference (*s*). But sect. 10 of the Act of 1888 enacts that—

"Where any question or dispute arises, involving the legality of any toll, rate, or charge, or portion of a toll, rate, or charge, charged or sought to be charged for merchandise traffic by a company to which this part of this Act applies, the Commissioners shall have jurisdiction to hear and determine the same, and to enforce payment of such toll, rate, or charge, or so much thereof as the Commissioners decide to be legal."

They may also, in addition or substitution for other relief, award damages (*t*).

Generally speaking, when goods are forwarded in pursuance of an order which binds the person giving it to receive the goods, as the property in them passes to that person by the delivery to the carrier, he is the proper plaintiff if they be lost (*u*); for the vendor was his agent to employ the carrier (*v*). But it is otherwise when the property in the goods has not yet passed to the vendee, as where there is no writing or acceptance sufficient to satisfy the Statute of Frauds, and the carrier was not of his selection (*x*); or where the goods are sent merely for approval (*y*), or the consignee is the agent of the consignor (*z*), or the carrier has contracted to be liable to the consignor in

(*s*) *L. & N. W. Rail. Co.* v. *Evershed*, 3 App. Cas. 1029.

(*t*) 51 & 52 Vict. c. 25, s. 12.

(*u*) *Dawes* v. *Peck*, 8 T. R. 330; *Dutton* v. *Solomonson*, 3 B. & P. 582; *Davis* v. *James*, 5 Bur. 2680; *Tronson* v. *Dent*, 8 Moore, P. C. 419; *Martin* v. *Great Indian P. R. Co.*, L. R. 3 Ex. 9; *Crouch* v. *The Great Northern Rail. Co.*, 11 Exch. 742, 757.

(*v*) *Cork Distilleries Co.* v. *Great S. & W. Rail. Co.*, L. R. 7 H. L. 269; consequently the consignee may at any time require the carrier to deliver them to him. *Ibid.*; *London and North Western Rail. Co.* v. *Bartlett*, 7 H. & N. 400.

(*x*) *Coats* v. *Chaplin*, 3 Q. B. 483; *Coombs* v. *Bristol and Exeter Rail. Co.*, 3 H. & N. 510; *Norman* v. *Phillips*, 14 M. & W. 277.

(*y*) *Swain* v. *Shepherd*, 1 M. & Rob. 223.

(*z*) *Sargent* v. *Morris*, 3 B. & Ald. 277.

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consideration of the latter's becoming responsible for the price of the carriage (*a*). The question with whom the contract or carriage was made is to be determined by the whole terms. In *Great Western Rail. Co.* v. *Bagge* (*b*), it appeared that the consignor had contracted with the consignee to pay the carriage, and it was held that the consignor was liable to pay the freight. It frequently happens that goods are sent to a booking-office keeper for the purpose of being delivered by him to a carrier. In such case, the booking-office keeper being the agent of the owner for the purpose only of delivering to the carrier, it must, in order to fix him with negligence, be shown that he omitted so to deliver. It will not be even *primâ facie* evidence against him, as it would against the carrier, that the goods never reached their destination (*c*).

A question frequently arises in practice, whether carriers who have received goods to be taken to a point beyond that to which their own means of conveyance extend, are liable *as carriers* for loss beyond that point, or are to be considered as agents for the purpose of carrying to the end of their track, and employing fresh agents at its termination to complete the journey. In such cases they are generally regarded as the carriers throughout (*d*). A similar *quære* arises when the customer does not call for the goods (*e*).

With regard to the remuneration to which a carrier is entitled, it is clear that he must carry for a reasonable amount; and if he insist on receiving more before conveying the goods, or before parting with them, an action for money had and received will

(*a*) *Moore* v. *Wilson*, 1 T. R. 659; *Davis* v. *James*, 5 Burr. 2680.

(*b*) 15 Q. B. D. 625. In *Dunlop* v. *Lambert* (6 C. & F. 600) the authorities are reviewed.

(*c*) *Gilbart* v. *Dale*, 5 Ad. & E. 543.

(*d*) *Bristol and Exeter Rail. Co.* v. *Collins*, 7 H. L. Ca. 194; 1 H. & N. 517; *Muschamp* v. *Lancaster and Preston Rail. Co.*, 8 M. & W. 421; *Scothorn* v. *S. Stafford Rail. Co.*, 8 Exch. 341; *Webber* v. *G. W. Rail. Co.*, 3 H. & C. 771; *Crouch* v. *G. W. Rail. Co.*, 2 H. & N. 491, 503; *Shepherd* v. *Bristol and Exeter Rail. Co.*, L. R. 3 Ex. 189. If there be an interchange of traffic, and, as in *Gill* v. *The M. S. & L. Rail. Co.*, L. R. 8 Q. B. 186, an arrangement by which the traffic is worked as if the concerns of both were amalgamated, both or either may be sued most probably. But the Railway and Canal Traffic Act does not affect a railway company beyond its own line: *Zunz* v. *S. E. Rail. Co.*, L. R. 4 Q. B. 539.

(*e*) *Mitchell* v. *L. & Y. Rail. Co.*, L. R. 10 Q. B. 256.

lie against him for the excess (*f*). What is such reasonable amount appears to be a question for the jury (*g*). In like manner, if a railway company has, in disregard of s. 90 of 8 & 9 Vict. c. 20, and s. 2 of 17 & 18 Vict. c. 31, made unequal charges under like circumstances, and given undue preference, those who have made such higher payments under protest may recover them (*h*). Where the goods are of extraordinary danger, or carried under peculiar circumstances, it is in the carrier's option to insist upon a special contract (*i*). If such goods are tendered to a carrier, and he gives notice to the owner that he will not be responsible for loss, unless a more than ordinary rate of insurance be paid, which the owner declines to pay, but leaves the goods to be carried, it appears that the carrier receives them on the footing of such notice. If the carrier be not a railway or canal company, his liability becomes limited, and he is only bound to use the ordinary care of a bailee for reward.

Carriers have a particular lien for their charges (*k*). They may also by agreement, or by a custom clearly proved, have a general lien for the balance of their charges (*l*).

(*f*) *Parker* v. *G. W. Rail. Co.*, 7 M. & G. 253. See *Pickford* v. *Grand Junction Rail. Co.*, 8 M. & W. 372; 10 M. & W. 389; *Ashmole* v. *Wainwright*, 2 Q. B. 837; *Parker* v. *Bristol and Exeter Rail. Co.*, 6 Exch. 702; *Crouch* v. *G. N. Rail. Co.*, 11 Exch. 742.

(*g*) *Ashmole* v. *Wainwright*, 2 Q. B. 837.

(*h*) *L. & N. W. Rail. Co.* v. *Evershed*, 3 App. Cas. 1029.

(*i*) See *Wyld* v. *Pickford*, 8 M. & W. 443; and *Crouch* v. *L. & N. W. Rail. Co.*, 14 C. B. 255. And see per *Parke*, B., in *Carr* v. *L. & Y. Railway*, 7 Exch. at p. 709; *Walker* v. *The York and North Midland Rail. Co.*, 2 E. & B. 750; also see *Butt* v. *G. W. Railway*, 11 C. B. 140; *Wise* v. *G. W. Railway*, 1 H. & N. 63; *Hughes* v. *G. W. Railway*, 14 C. B. 637. The charge of a railway company for insurance must not be unreasonable: *Peek* v. *N. Staffordshire Railway*, E. B. & E. 958; *Harrison* v. *L. & B. Railway*, 2 B. & S. 122, 152.

(*k*) *Skinner* v. *Upshaw*, Ld. Raym. 752.

(*l*) *Rushforth* v. *Hadfield*, 7 East, 224; *Wright* v. *Snell*, 5 B. & Ad. 350; *Butler* v. *Woolcott*, 2 Bos. & P. N. R. 64.

CHAPTER III.

CONTRACTS OF AFFREIGHTMENT.

SECT. 1. *Contract of Affreightment by Charterparty.*
2. *Contract for Conveyance in a General Ship.*
3. *Duties of Masters and Owners.*
4. *Duties of Merchant.*
5. *General Average.*
6. *Salvage.*

Contracts of affreightment.

CONTRACTS of affreightment, being contracts for the carriage of goods in vessels, fall under the general denomination of contracts with carriers (*a*). On account, however, of the important place they occupy in the mercantile law, it has been thought proper to devote a separate chapter to their consideration. Contracts of this description are either—

1. Contracts of affreightment by charterparty ; or
2. Contracts for the conveyance of goods in a general ship.

SECTION 1.—*Affreightment by Charterparty.*

Affreightment by charterparty.

The contract by charterparty is defined to be that "by which an entire ship, or some principal part thereof, is let to a merchant for the conveyance of goods, on a determined voyage to one or more places"(*b*). It may be, and more often is, a contract by which the shipowner agrees to carry goods on a specified vessel for a particular voyage or series of voyages (*c*). The in-

(*a*) The carriage of *passengers* in merchant vessels is now regulated by stat. 18 & 19 Vict. c. 119; 26 & 27 Vict. c. 51, and 35 & 36 Vict. c. 73.

(*b*) Abbott, Part 3, c. 1.

(*c*) See per *Cockburn*, C. J., in *Sandeman* v. *Scurr*, L. R. 2 Q. B. at p. 96.

strument by which the contract is recorded, and which, though sometimes a deed, and almost invariably in writing (*d*), is not necessarily so, is generally executed by the owner of the ship, when made at the place of his residence, and sometimes by the managing owner or the master, and often by means of a broker (*e*). If made abroad, it can of course only be executed

Affreightment by charterparty.

(*d*) *Lidgett* v. *Williams*, 4 Hare, 456; *Horsley* v. *Rush*, cited 7 T. R. 209.

(*e*) As to ship-husband's right to execute a charterparty, see *Thomas* v. *Lewis*, 4 Ex. D. 18.

The following is a form of charterparty:—

CHARTERPARTY.

London, 5th Nov. 1886.

A. B. & Co., ——— *E.C.*

OUTWARD.

This charterparty is mutually entered into between C. D. & Co. as agents for owners, and Messrs. A. B. & Co. as charterers, of the good ship or vessel Ajax, captain, Anderson, now in Hull.

The vessel is 1,395 tons net, British register, guaranteed to be made tight, staunch, strong, coppered in 1886, and in every way fitted for the voyage.

Class of vessel is 3/3rds L 11 in French veritas, and is to be so continued throughout the voyage.

The voyage to be Liverpool to Yokohama and Hiogo, or so near thereto as the vessel can safely get, where cargo is to be delivered as per bills of lading in the customary manner, so ending the voyage. The vessel to proceed with all safe speed direct to the port of discharge.

Vessel's hold and cargo capacity are given to charterers for cargo, except only what is customary and necessary for the ship's stores for the above voyage; and owners hereby guarantee the vessel to carry 1,850 tons (of 20 cwt.) weight of cargo (without being overladen), or if this be refused by owners or captain, then charterers have power to deduct the *pro ratâ* equivalent for such short carrying from owners' account. The weight of cargo to be computed from invoices, and from carriers' notes and from bills of lading. Either these original documents, or shippers' certificates of such weights, to be accepted as absolute proof by the owners.

The cargo to be taken on board as customary, and to be of lawful merchandise, including gunpowder (in the river), charterers erecting the necessary magazine, specie, kerosine or similar oils, acids on deck at shipper's risk; also machinery which can be shipped without cutting hatches. The vessel to proceed to any crane as required in loading dock, but any extra expense in loading or discharging packages over three tons weight to be borne by charterers.

Charter money to be paid owners is 2,058*l.*, say two thousand and fifty-eight pounds sterling, in full of all port charges, primages, &c. 1,000*l.* to be payable abroad, at current rate of exchange, by bills of lading, or charterers' order (at their option), to captain on final and true delivery of cargo; balance to be paid here in cash on sailing, less 5 per cent. for interest and insurance. Captain to have an absolute lien and charge for freight on cargo, but to have no recourse on charterers for any freight due abroad, per bill of lading, if not paid; charterers' responsibility to cease as soon as cargo is signed for, except for advance due here, and the order (if any) for balance due abroad.

Loading dock to be ordered by charterers, and to load in the river if required. Vessel to be made ready, and proceed to her loading berth as soon as possible on signing of this

Affreightment by charterparty.

by the master, unless an agent of the owner be there (*d*); and in that case, if by deed, no action can be maintained on the

charter. Provided there is not sufficient water to allow of her leaving the dock fully laden, the loading to be completed in the river.

Loading days allowed charterers are thirty, with two clear days extra for clearing; for any used for loading beyond these 14*l.* per day demurrage to be paid to owners by charterers. Sundays, customs or bank holidays, or detention by frost, are always excluded throughout this charterparty. Any day or days during which ballast is discharged not to count against charterers. Captain to notify, in writing, when vessel is in a proper loading berth as above, with the hold clear and cleaned, vessel painted, rigged, and ready for cargo. When such are complied with, loading days to commence twenty-four hours after such notice has been received by charterers. Lay days not to commence to count before 20th November, unless vessel and cargo both ready sooner; and charterers to have the option of cancelling this charterparty if vessel not arrived and ready to commence loading by 5th December.

Mate's receipts to be signed for the cargo as taken on board. On production of these, the bills of lading are to be signed by the captain at charterers' request, at any rate of freight, such bills of lading to be without prejudice to this charter. Captain shall also sign for weight of coal, pig iron, or other cargo, when weighed alongside or on board, or delivered on official weighing machine notes. Captain to attend at least once daily at charterers' office to sign bills of lading.

Stevedore to be appointed by charterers. His men are to take on board and stow the cargo under the direction of the master. The master and owners alone to be responsible for stowage of cargo and trim of vessel. Charterers to charge owners for stowage of cargo at the rate of 1*s.* 4*d.* per ton in account. Owners to pay the usual advertising, printing, and measurer's charges, not exceeding eight guineas. Underwriters' surveyors to settle all disputes as to stowage or draught, and their recommendation or decision to be carried out by captain and owners.

Dunnage or mats, if required, to be provided by owners.

Consignment of vessel to be placed in the hands of the agents appointed by the charterers, whom the owners also accept as agents of the vessel at her ports of discharge inwards, the owners paying two and a-half per cent. inwards on amount of this charter, and charterers' agents to have the preference outwards. Should the vessel put into any port or ports on the way, while under this charter, she is to be consigned to charterers' agents there.

A brokerage of five per cent. on this charter is due by owners to B., J. & Co., on signing of same.

If any disputes arise, the same to be settled by two London commercial men, each party naming one as an arbitrator, and, if necessary, the arbitrators to appoint a third. The decision of the majority shall be final, and any party attempting to revoke the submission to arbitration without the leave of a court shall be liable to pay to the other or others, as liquidated damages, the estimated amount of chartered freight. It is further agreed that these presents may be made a rule of her Majesty's High Court of Justice.

It is also further agreed that the said vessel shall, by the owners thereof,

(*d*) See *Stumore* v. *Breen*, 12 App. Cas. p. 704.

Affreightment by charterparty.

covenant against the owner, unless the party executing it had an authority by deed to do so (*e*). But an action may be sustained for the breach of such of the general duties of a shipowner as are not inconsistent with its terms (*f*); and a voyage may be made up to a certain period under a charterparty by deed, and afterwards under a parol agreement, or *vice versâ* (*g*). Whether a charterparty is signed by a person as an agent, or as a principal, is to be determined by reference to the rules already stated in regard to agency (*h*). The terms of a charterparty cannot, of course, be varied by parol (*i*), though it may, like other mercantile instruments, be explained, though not contradicted, by evidence as to the usage of trade; *e.g.*, the well-known usages of a port (*k*).

during the whole of the said voyage, be kept tight, staunch and strong, and well found and provided with men and mariners, sufficient and able to navigate the said vessel, and with all manner of rigging, boats, tackle, provisions and appurtenances whatsoever (restraints of princes and rulere, the dangers and accidents of the seas, rivers, and navigation, fire, pirates, and enemies, throughout this charterparty always excepted). In the event of war being declared between the nation to which this vessel belongs and any other, charterers have the option of cancelling the charter before the vessel proceeds to sea, upon indemnifying the owners from all consequences of re-delivering the cargo; and in case the charter be so cancelled, the charterers shall pay to the owners the sum of 13*l.* for each and every day which shall elapse between the time of the vessel being in a loading berth and the cancelling of such charter, or the final discharge of the cargo (if any) which may have been received on board, whichever last shall happen. For the due performance of the agreements and matters herein contained, each of the said parties bindeth himself and themselves, each of the other, in the sum of estimated amount of freight.

Vessel to call at a wharf in the Tees, on her way to dock, to load some iron, provided same can be done with safety to vessel, and no extra expense be incurred; if the latter, then the same to be paid by charterers.

By authority of X. Y., New York;
C. D., ae Agent.
A. B.

Signed by C. D., in the presence of E. F.

Signed by A. B., in the presence of G. H.

(*e*) *Harrison* v. *Jackson*, 7 T. R. 207; and *Horsley* v. *Rush*, there cited.

(*f*) *Leslie* v. *Wilson*, 3 B. & B. 171. And see per *Tindal*, C. J., in *Bushell* v. *Beavan*, 1 Bing. N. C. at p. 121.

(*g*) *White* v. *Parkin*, 12 East, 578.

(*h*) See pp. 172 *et seq.*; and *Parker* v. *Winlo*, 27 L. J. Q. B. 49; *Hough* v. *Monzanos*, 4 Ex. D. 104.

(*i*) *Gibbon* v. *Young*, 2 Moore, 224; *Thompson* v. *Brown*, 7 Taunt. 656; *Humble* v. *Hunter*, 12 Q. B. 310.

(*k*) *Leideman* v. *Schultz*, 14 C. B. 38; *Russian Steam Nav. Co.* v. *Silva*, 13 C. B. N. S. 610; *Hudson* v. *Ede*, L. R. 3 Q. B. 412; *Norden Steamship Co.* v. *Dempsey*, 1 C. P. D. 654; *Hutchinson* v. *Tatham*, L. R. 8 C. P. 482 (evidence of custom that agents, who signed as such, were liable if principal not

Affreightment by charterparty.

In construing charterparties and bills of lading the governing principles are, that the intention of the parties, as apparent in the document, shall prevail (*l*); that, as a rule, the law of the flag of the ship shall regulate the construction of the documents (*m*); that they are to be read with a regard to business habits and usages (*n*); and that words are to be understood in their business meaning (*o*). Thus, to illustrate the last part of this proposition, "port" used in a charterparty will not be necessarily understood to mean the limits of a port as defined for customs or pilotage purposes, but as understood among men of business. If a vessel were required to deliver at a certain port, and it were usual to deliver part of the cargo at one place in a port and part at another, such would be the proper places of delivery (*p*). Or, to take an instance in which the strict grammatical construction of these documents was not followed, in *Nottebohn* v. *Richter* (*q*), the charterparty required the vessel to proceed to a specified port, take on board a cargo of mahogany from the bank of the river at the ship's risk, proceed, after loading, to a safe port in Europe, the act of God and other usual perils excepted, and deliver the cargo in a specified manner. According to grammatical construction the exceptions would apply only after loading; they were, however, held applicable to all the risks.

The provisions of the charterparty consist of either conditions precedent or substantive parts of the agreement, the breach of which by one party entitles the other to rescind the contract, or representations or collateral promises, the breach of which gives rise to a cause of action and a right to damages. Speaking generally, any covenant, the non-fulfilment of which will frustrate the object of the voyage, will be regarded as a condition

disclosed within a certain time; but see *Pike* v. *Ongley*, 18 Q. B. D. 708); *The Skandinav*, 51 L. J. Ad. 93.

(*l*) *Chartered Bank of India* v. *Netherlands S. Nav. Co.*, L. R. 10 Q. B. D. 521; *Dimech* v. *Corlett*, 12 Moo. P. C. Cas. 199; *In re Missouri Steamship Co.*, 37 W. R. 696.

(*m*) *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115; *The Gaetano and Maria*, 7 P. D. 1, 137; *The Wilhelm Schmidt*, 25 L. T. 34.

(*n*) *Stewart* v. *Merchants' Marine Insurance Co.*, 16 Q. B. D. 619; *Nielsen* v. *Wait*, 16 Q. B. D. 67.

(*o*) *S.S. Garston Co.* v. *Hickie*, 15 Q. B. D. 580.

(*p*) *Nielsen* v. *Wait*, *supra*.

(*q*) 18 Q. B. D. 63.

Affreightment by charterparty.

precedent. The breach of other covenants will give rise only to actions for damages (*r*). In *Behn* v. *Burness* (*s*), the leading case on the subject, it was held that the words "now in ——" were a warranty, or a condition precedent to the contract, that the ship was then at the port named. So, in *Fraser* v. *Telegraph Construction Co.* (*t*), a statement "shipped on board the steamship," was held to be a condition precedent or warranty, which was broken by shipment on a vessel whose principal motive power was not steam. So, a statement that the vessel shall sail before a certain day (*u*), or as to the vessel's class, but not as to her being rightly classed (*x*).

The instrument expresses the freight to be paid, and generally the burthen of the ship; by which latter specification the parties are not however concluded, provided the excess is not unreasonable; for a merchant has been held liable on his covenant to furnish a full cargo, though he had furnished 260 tons, the specified burthen of the ship, which in reality contained 400 (*y*). It also comprises covenants from the owner that the ship shall be tight, staunch, furnished with all necessaries; that she shall be ready and fit by a certain day to receive (*z*), and shall wait a certain time to ship her cargo; shall sail at a particular time (*a*) for her destined port (*b*), "or as near

(*r*) *Tarrabochia* v. *Hickie*, 1 H. & N. 183; *McAndrew* v. *Chapple*, L. R. 1 C. P. 643.

(*s*) 3 B. & S. 751. So, in *Davison* v. *Von Lingen*, 6 Davis, U. S. Supreme Court, 40, the words "now sailed or about to sail," in a charterparty, were held a condition precedent, or, as it is sometimes called, a warranty.

(*t*) L. R. 7 Q. B. 566.

(*u*) *Glaholm* v. *Hays*, 2 M. & G. 257; *Seeger* v. *Duthie*, 8 C. B. N. S. 45.

(*x*) *Routh* v. *Macmillan*, 2 H. & C. 750; *French* v. *Newgass*, 3 C. P. D. 163.

(*y*) *Hunter* v. *Fry*, 2 B. & Ald. 421; *Barker* v. *Windle*, 6 E. & B. 675; *Pust* v. *Dowie*, 5 B. & S. 20, 33; *Morris* v. *Levison* (3 per cent. difference), 1 C. P. D. 155; *Watts* v. *Camors*, 8 Davis (U. S. S. C.), 353; and *infra*, 366 (*h*). See *Mackill* v. *Wright*, 14 App. Cas. 106 (as to a guarantee by shipowner to carry so much dead weight).

(*z*) *Stanton* v. *Richardson*, L. R. 7 C. P. 421; 9 C. P. 390, affirmed in House of Lords, 45 L. J. C. P. 78; *Tully* v. *Howling*, 2 Q. B. D. 182 (charterer in the case of a time charter not bound to take a vessel not ready at or about the time specified).

(*a*) *Hudson* v. *Bilton*, 6 E. & B. 565; *Price* v. *Livingstone*, 9 Q. B. D. 679 ("final sailing").

(*b*) If no particular time be mentioned, the law implies that she shall sail within a reasonable time: *M'Andrew* v. *Adams*, 1 Bing. N. C. 29. See also *Clipsham* v. *Vertue*, 5 Q. B. 265.

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thereto as she may get" (*d*), deliver the goods safely there, and be properly found in men and stores during the voyage, to the best of the owner's endeavours. It may, of course, comprise any other engagements which the charterer thinks proper to exact and the owner to concede; *e.g.*, as in *Nottebohm* v. *Richter* (*e*), that the cargo shall be taken on board by the ship's boats and crew "at ship's risk"; that the master is to sign bills of lading without prejudice to the charterparty.

A clause is usually to be found exempting the owner from liability in case of his being prevented from performing his contract *by restraint of princes*. These words are not equivalent to the words "Queen's enemies," found in bills of lading, and implied by law if not there. "Restraints of princes" do not include the judgments or acts of a court of law (*f*). They apply to an *actual* (*g*), not a mere *expected* restraint, and enure to the benefit of the owner, not of the merchant; on account of which the clause is sometimes worded "*restraints, &c., mutually excepted*" (*h*). It likewise generally extends the exemption to "dangers and accidents of the seas, rivers, and navigation." In order to satisfy these words, there must be an enduring, and not a mere temporary impediment to the prosecution of the voyage (*i*). The expression "perils of the sea" or "dangers and accidents of the sea," would include foundering by collision with another vessel. The meaning of the expression when it occurs in a policy of marine insurance was explained by Lord *Herschell* in *The Xantho* (*k*):—

"I think it clear that the term 'perils of the sea' does not cover every accident or casualty which may happen to the subject-matter of the insurance *on* the sea. It must be a peril *of* the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words.

(*d*) *Capper* v. *Wallace Bros.*, 5 Q. B. D. 163; *Metcalfe* v. *Britannia Iron Works Co.*, 1 Q. B. D. 613.

(*e*) Ante, p. 326.

(*f*) *Finlay* v. *Liverpool & G. W. S. Co.*, 23 L. T. 251.

(*g*) Or where there is a reasonable apprehension of capture: *The San Roman*, L. R. 3 A. & E. 583; L. R. 5 P. C. 301; *The Express*, L. R. 3 A. & E. 597.

(*h*) See an instance in *Crow* v. *Falk*, 8 Q. B. 467.

(*i*) *Schilizzi* v. *Derry*, 4 E. & B. 873; *The General Steam Navigation Co.* v. *Slipper*, 11 C. B. N. S. 493.

(*k*) 12 App. Cas. 503, at p. 509.

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They do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and tear. There must be some casualty—something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that those losses only were losses by perils of the sea which were occasioned by extraordinary violence of the winds or waves. I think that this is too narrow a construction of the words, and it is certainly not supported by the authorities or by common understanding. It is beyond question that if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the sea; and a loss by foundering, owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category. Indeed, I am aware of only one case (*l*) which throws a doubt upon the proposition that every loss by incursion of the sea, due to a vessel coming accidentally (using that word in its popular sense) into contact with a foreign body, which penetrates it and causes a leak, is a loss by perils of the sea."

Damage to cargo, caused by rats gnawing a hole in a pipe connecting the bath room with the sea, and the influx of water, was held to come within the exception "dangers and accidents of the seas." The loss "arose directly from the action of the sea. It was not due to tear and wear, nor to the operation of any cause ordinarily incidental to the voyage, and therefore to be anticipated" (*n*). The words do not protect a shipowner from liability for the negligence of the ship's master and crew (*o*). To avail himself of the exemption he must, in the absence of express provision, show that he has performed his duty to carry with reasonable care. Hence, a collision not caused by the fault of the carrying ship comes within the exception; it is otherwise if due to its fault (*p*). There seems to be no distinction in theory between the meaning of the words "dangers and

(*l*) I. e., *Cullen* v. *Butler*, 5 M. & S. 461.

(*n*) *Hamilton, Fraser & Co.* v. *Pandorf & Co.*, 12 App. Cas. 518.

(*o*) *The Xantho*, 12 App. Cas. at p. 510; *Lloyd* v. *General Iron Screw Colliery Co.*, 3 H. & C. 284; 33 L. J. Ex. 269; *Grill* v. *General Iron Screw Colliery Co.*, L. R. 3 C. P. 476. As to the onus of proof, see *Taylor* v. *Liverpool & G. W. Steam Co.*, L. R. 9 Q. B. 546; *Czech* v. *General Steam Navigation Co.*, L. R. 3 C. P. 14; but *quære* as to the latter.

(*p*) *The Xantho*, supra.

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accidents of the sea" in a contract of affreightment and in a policy of insurance (*p*). But in fact, owing to the difference in the purpose of the two contracts, the words will not protect the shipowner in circumstances in which the insurer would be liable.

The exemption, unless limited, would apply to such perils at any time after the charterparty was entered into (*q*). Usually the words "during the voyage" are added. Whether this phrase would include perils at the place of landing is a question as to which there have been conflicting decisions. But the authorities, on the whole, seem in favour of the opinion that it would (*r*).

If no time be fixed for loading or unloading, it must be performed within a reasonable time, which appears to mean "reasonable" having regard to the whole circumstances (*s*). Frequently the words "with all dispatch according to the custom of the port," are added. This is no more than is implied; the charter-party will be construed with reference to the custom of the port of discharge. In construing what is reasonable dispatch the number of ships and appliances is to be taken into account (*ss*). But the charterer usually covenants to load and unload within a specified time, called lay days (*t*); or if he detain the ship for a longer time, which he sometimes receives liberty to do, to pay a daily sum, which, as well as the delay itself, is called demurrage (*u*). The charterparty sometimes ends with a clause pur-

(*p*) *Hamilton, Fraser & Co.* v. *Pandorf & Co.*, 12 App. Cas. 518; *The Xantho*, 12 App. Cas. 503; and *infra*, Chapter IV., sect. 4.

(*q*) *Barker* v. *M'Andrew*, 18 C. B. N. S. 759.

(*r*) *Bruce* v. *Nicolopulo* (1855), 11 Ex. 129; *Barker* v. *M'Andrew* (1865), 18 C. B. N. S. 759; *Hudson* v. *Hill*, 30 L. T. 555 (1874). On the other hand, *Crow* v. *Falk* (1840), 8 Q. B. 467; *Valente* v. *Gibbs* (1859), 6 C. B. N. S. 270.

(*s*) *Wright* v. *New Zealand Shipping Co.*, 4 Ex. D. 165; *Postlethwaite* v. *Freeland*, 5 App. Cas. p. 621; *Norden Steamship Co.* v. *Dempsey*, 1 C. P. D. 654.

(*ss*) *Postlethwhaite* v. *Freeland*, 5 App. Cas. 599.

(*t*) Sometimes the covenant is to load or unload "in turn," "or usual dispatch of the port," "or according to the custom of the port." As to these, and as to the interpretation of the expressions "days," "running days," "working days," see *Nielsen* v. *Wait*, 16 Q. B. D. 67 (C. A.); *Wyllie* v. *Harrison*, 13 Sc. Sess. Cas., 4th series, 92.

(*u*) As to the meaning of this word, see *Gray* v. *Carr*, L. R. 6 Q. B. 522; *Lockhart* v. *Falk*, L. R. 10 Ex. 132; *Harris* v. *Jacobs*, 15 Q. B. D. 247. The word is often used to denote damage for detention due, in addition to demurrage proper: Id. 250.

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porting to bind the ship's freight and cargo in a pecuniary penalty to the performance of the contract. But this seems to be inoperative (*x*); the party suing may, according to the nature of the breach, recover more or less than that sum (*y*).

The stipulations must, of course, be strictly performed on both sides. With respect to the time allowed for loading and unloading, it is held that the charterer must pay demurrage for any delay beyond the arranged period, even though not attributable to his fault, but to some unforeseen impediment to loading or unloading (*z*), such as the crowded state of the docks; for he has expressly engaged, and is bound by the terms of his own positive contract (*a*).

"The duty of providing, and making proper use of, sufficient means for the discharge of cargo, when a ship which has been chartered arrives at its destination and is ready to discharge," says Lord *Selborne*, L.C., in *Postlethwaite* v. *Freeland* (*b*), "lies (generally) upon the charterer. If by the terms of the charterparty he has agreed to discharge it within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it, and which cause the ship to be detained in his service beyond the time stipulated. If, on the other hand, there is no fixed time, the law implies an agreement on his part to discharge the cargo within a reasonable time; that is, as was said by Mr. Justice *Blackburn* in *Ford* v. *Cotesworth* (*c*), 'a reasonable time under the circumstances.'"

Consequently, a delay of thirty-one days, owing to the absence of lighters, caused by the custom of the port, did not impose liability for demurrage on charterers bound to "discharge with all despatch according to the custom of the port" (*d*).

(*x*) Abbott, Part 4, c. 2, s. 2 (12th ed.); *The Juliana*, 2 Dodson, 504, 521.

(*y*) *Godard* v. *Gray*, L. R. 6 Q. B. at p. 147.

(*z*) *Barker* v. *Hodgson*, 3 M. & S. 267; *Thiie* v. *Byers* (bad weather), 1 Q. B. D. 244; *Thompson* v. *Wagner*, 4 Camp. 335, n.; *Kearon* v. *Pearson*, 7 H. & N. 386; *Fenwick* v. *Schmalz* (detention by snowstorm), L. R. 3 C. P. 313; *Waugh* v. *Morris*, L. R. 8 Q. B. 202 (impossibility of discharging cargo owing to an Order in Council, made without knowledge of either party).

(*a*) See *Dahl* v. *Nelson*, 6 App. Cas. 38; *Harris* v. *Jacobs*, 15 Q. B. D. 247; *Ford* v. *Cotesworth*, L. R. 4 Q. B. 127; 5 Q. B. 544; *Cunningham* v. *Dunn*, 3 C. P. D. 443, as to failure to load owing to acts of a foreign state.

(*b*) 5 App. Cas. 599, at p. 608.

(*c*) Supra.

(*d*) *Postlethwaite* v. *Freeland*, 5 App. Cas. 599; *Wyllie* v. *Harrison*, 13 Sc. Sess. Cas., 4th series, 92.

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The charterer must pay demurrage though he may be unable to take delivery owing to the delay of other consignees, as in *Porteus* v. *Watney* (*b*), where the defendants' grain was stowed under the goods of other shippers; so, too, though he may not have been apprised of the ship's arrival (*c*), or the bill of lading may not have come to his hands, without which, or an indemnity, the master, as he has a right, refuses to deliver the goods (*d*). But where the detention was occasioned, not by any impediment to the ship's loading, but by ice (*e*), which prevented her from sailing after she was loaded, it was held that demurrage was not payable, since to render the freighter liable to it the delay should have been for the purpose of loading (*f*). And when the owners interrupted the unloading by their wrongful interference, they were not allowed to receive demurrage, though the unloading in fact occupied a greater number of days than would, under the charterparty, have been allowed, had the owners abstained from such interference (*g*). If a certain demurrage be agreed on for the time during which the ship may be obliged to wait for convoy, or to receive a cargo, it ceases, in the former case, as soon as the convoy is ready (*h*); and, in the latter, as soon as the cargo is laden and the clearances obtained (*i*), though the ship be longer detained by tempestuous weather, or set out and be driven into port again.

The days mentioned in the clause of demurrage were, by a special jury in London, understood to be working days (*k*), that is, days on which, according to the custom of the port, work

(*b*) 3 Q. B. D. 227, 534.

(*c*) *Harman* v. *Clarke*, 4 Camp. 159.

(*d*) *Erichsen* v. *Barkworth*, 3 H. & N. 894.

(*e*) In *Hudson* v. *Ede*, L. R. 2 Q. B. at p. 578, and *Postlethwaite* v. *Freeland*, 5 App. Cas. at pp. 608, 619, Lord *Blackburn* and Lord *Selborne* appear to regard detention by quarantine as similar in its legal effects to detention by ice or other natural impediments. In *White* v. *Winchester Co.*, 13 Sc. Sess. Cas., 4th series, 524, the Court of Session held otherwise. But quære.

(*f*) *Pringle* v. *Mollett*, 6 M. & W. 80. Detentions from various causes are occasionally expressly excluded. As to the construction of such clauses, see supra, and *Hudson* v. *Ede*, L. R. 2 Q. B. 566; 3 Q. B. 412; *Carr* v. *Wallachian Co.*, L. R. 2 C. P. 468; *Morris* v. *Levison*, 1 C. P. D. 155; *Kay* v. *Field*, 10 Q. B. D. 241; *Grant* v. *Coverdale*, 9 App. Cas. 470.

(*g*) *Benson* v. *Blunt*, 1 Q. B. 870. And see *Taylor* v. *Clay*, 9 Q. B. 713.

(*h*) *Lannoy* v. *Werry*, 2 Bro. P. C. 60.

(*i*) *Jamieson* v. *Laurie*, 6 Bro. P. C. 474. But see *Barret* v. *Dutton*, 4 Camp. 333.

(*k*) *Cochran* v. *Retbergh*, 3 Esp. 121.

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is done (*l*); in the absence of custom, running days are taken to be meant (*m*). It is proper to state whether working or running days be intended (*n*).

Where a certain number of lay days are allowed for unloading, they are to be reckoned from the vessel's arrival, not at the entrance of the port, but at the usual place of discharge (*o*); to hold otherwise would be extremely inconvenient in many ports, *ex. gr.*, that of London, which extends to Yantlet Creek (*p*). In *Nielsen* v. *Wait* (*q*), the charterparty provided that the vessel should proceed to a port in the Bristol Channel or "so near thereto as she may safely get," "eight running days, Sundays excepted, to be allowed the merchants for loading and discharging the steamer, and ten days on demurrage, &c." The vessel went to Sharpness Dock, in the Bristol Channel, which is within the port of Gloucester. She could not get nearer than Sharpness until part of her cargo was discharged. This having been done, she went through the canal to a place of discharge at Gloucester. The Court of Appeal held that a custom, in the case of vessels laden with grain of too heavy a burthen to come up the canal, to count as lay days the days occupied in part discharge, but not to count as such days the time occupied in coming up the canal, was reasonable. Nor was such a custom inconsistent with the provision in the charterparty as to "running days."

(*l*) *Nielsen* v. *Wait*, 16 Q. B. D. 67, p. 77.

(*m*) *Brown* v. *Johnson*, 10 M. & W. 331: "Running days" mean every day, including Sundays and holidays, and they mean the whole of each day, but they are not necessarily consecutive; there may be a custom to the contrary: *Nielsen* v. *Wait*, 16 Q. B. D. 67.

(*n*) This is sometimes expressed inferentially: *Commercial S. S. Co.* v. *Boulton*, L. R. 10 Q. B. 346. Part of a day is reckoned as a whole day: Ib. If demurrage be by the hour, it will run during the night: *Laing* v. *Hollway*, 3 Q. B. D. 437.

(*o*) *Capper* v. *Wallace*, 5 Q. B. D. 163; *Hayton* v. *Irwin*, 5 C. P. D. 130; *Nielsen* v. *Wait*, 16 Q. B. D. 67. But see *The Alhambra*, 6 P. D. 68; and *Nelson* v. *Dahl*, 6 App. Cas. 38.

(*p*) *Brereton* v. *Chapman*, 7 Bing. 559; accord. *Brown* v. *Johnson*, 10 M. & W. 331, where the words were "for discharging at her destined port," and were held to mean from her arrival in *dock*, not from her arrival at *the entrance of the port*, or at *the place in the dock* where she was to unload. And see *Nielsen* v. *Wait*, supra. But this may be controlled by the custom of the port: *Norden Steam Co.* v. *Dempsey*, 1 C. P. D. 654.

(*q*) 16 Q. B. D. 67. See *Horsley* v. *Price*, 11 Q. B. D. 244; *Allen* v. *Coltart*, 11 Q. B. D. 782.

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Primâ facie the loading is to be completed at the port where the vessel is ordered. In *Hudson* v. *Ede* (*r*), it was proved to be the custom at Sulinah, the port specified, not to load grain, but to take it from Galatz and other points higher up the Danube than Sulinah; and the Exchequer Chamber held, that where the parties excluded detention by ice from the lay days, this extended to the detention by ice between Sulinah and Galatz (*s*).

It would seem that each of several holders of a bill of lading may be answerable for the whole demurrage. In *Straker* v. *Kidd* and *Porteus* v. *Watney* (*t*), the bills of lading contained the clause, "three working days to discharge the whole cargo, or 30*l.* sterling per day for demurrage." The goods belonging to the defendant were at the bottom of the hold, under the goods of other consignees. The defendant was ready to take delivery; but owing to the goods above not being unloaded in time, he could not clear the ship within the three lay days. The defendant was held liable for the whole demurrage (*u*).

The substitution, by mutual consent, of a new port for that named in the charterparty, without mention of lay days, will not have the effect of depriving the merchant of the lay days stipulated for in the original contract (*v*).

Where the charterer fails to load within the stipulated time, the master may, of course, sail home again (*x*); and in that case any cargo which may have been loaded, although not the stipulated one, will go in reduction of the freight for the benefit of the merchant (*y*), unless, indeed, a particular sum have been

(*r*) 37 L. J. Q. B. 166.

(*s*) Compare *Grant* v. *Coverdale*, 9 App. Cas. 470; and *Stephens* v. *Harris*, 57 L. J. Q. B. 203. But quære whether the cases are consistent with *Hudson* v. *Ede*.

(*t*) 3 Q. B. D. 223, 534.

(*u*) The Court supports this "startling conclusion," on the ground that "the negligence of the owners of the cargo above is not the negligence of the shipowner:" *Brett*, L. J., p. 543. Suppose that the shipowner or master puts the goods in such a position that by no diligence on the part of all concerned, the owners of cargo above and below, can the ship be cleared within the lay days; is there no implied duty so to stow that it shall be possible to clear within the lay days?

(*v*) *Jackson* v. *Galloway*, 5 Bing. N. C. 71; which was reversed, but not on this point, by *Galloway* v. *Jackson*, 3 M. & G. 960.

(*x*) *Bradford* v. *Williams*, L. R. 7 Ex. 259.

(*y*) *Puller* v. *Staniforth*, 11 East, 232; *Smith* v. *McGuire*, 27 L. J. Ex. 465.

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agreed on as the forfeiture in case of the merchant's default; in which case, the owner would be entitled to receive that sum, and also anything more the ship might earn, even though he might thereby get a larger sum than the freight stipulated for (*z*).

On the other hand, where a charterparty provided that a vessel should proceed to *Trieste*, and there load a full cargo, *the vessel to sail from England on or before the 4th of February next*, it was held, that the breach of the owner's contract to sail by that day discharged the merchant from his obligation to procure a cargo (*a*).

"The very words, *to sail on or before a given day*, import," said *Tindal*, C. J., "the same as the words *conditioned to sail* . . . . . And, looking at the subject-matter of the contract, without regarding the precise words, we think that construing the words as a condition precedent will carry into effect the intention of the parties with more certainty than holding them to be matter of contract only, and merely the ground of an action for damages. Both parties were aware that the whole success of a mercantile adventure does, in ordinary cases, depend upon the commencement of the voyage by a given time. The nature of the commodity to be imported, the state of the foreign and home market at the time the contract of charterparty is made, and the various other calculations which enter into commercial speculations, all combine to show that despatch and certainty are of the very first importance to their success; and certainly nothing will so effectually insure both despatch and certainty as the knowledge that the obligation of the contract itself shall be made to depend upon the actual performance of the stipulation which relates to them."

So, in the case of *Ollive* v. *Booker* (*b*), where the ship was to take in her cargo at Marseilles, after delivering her present cargo at Genoa, the Court held, that a description of her in the charterparty as "now at sea, having sailed three weeks ago," amounted to a warranty or condition precedent; and that, the ship not having sailed at that time, the charterer was discharged.

(*z*) *Bell* v. *Puller*, 2 Taunt. 285; Abbott, 12th ed. 199.

(*a*) *Glaholm* v. *Hays*, 2 M. & G. 257; *Crookewit* v. *Fletcher*, 1 H. & N. 893.

(*b*) 1 Exch. 416.

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The same principle of construction was subsequently recognised and adopted by the Exchequer Chamber in *Behn* v. *Burness* (*c*).

Apparently, in the event of a breach by the charterer, the master is bound to endeavour to procure a cargo, so as to diminish the loss (*d*).

The charterer is bound to name a safe port for the discharge of the vessel (*e*).

Not unfrequently a stipulation is introduced into the charterparty that all liability on the part of the charterers shall cease as soon as they have shipped the cargo, or to the like effect. The following is a common form :—

"This charter being entered into on behalf of others, all liability of the parties signing to cease after shipment of cargo, in consideration of which it is agreed that for the payment of all freight, dead freight, and demurrage, the said owner shall have an absolute lien and charge on the said cargo."

Such a provision, known as the "cesser clause," is perfectly valid; and when the charterers have shipped the cargo their liability on the charterparty is at an end (*f*). *Primâ facie*, this will not extend to demurrage in the course of loading (*g*), but if a *lien* be given on the cargo for that as well as the freight, the disposition is to hold the exemption to be entire (*h*)—the lien on the cargo is substituted for the charterer's personal liability (*i*).

(*c*) 1 B. & S. 877; *Oliver* v. *Fielden*, 4 Exch. 135; *Corkling* v. *Massey*, L. R. 8 C. P. 395, and see *ante*, p. 327, note (*s*); *Cranston* v. *Marshall*, 5 Exch. 395 (case of a passenger's contract). As to a *representation*, that is, a statement not forming part of the contract, see *Elliott* v. *Von Glehn*, 13 Q. B. 632.

(*d*) *Harries* v. *Edmonds*, 1 C. & K. 686; *Bradford* v. *Williams*, L. R. 7 Ex. at p. 262.

(*e*) *Smith* v. *Dart*, 14 Q. B. D. 105; *The Alhambra*, 6 P. D. 68.

(*f*) *French* v. *Gerber*, 1 C. P. D. 737; 2 C. P. D. 247.

(*g*) *Oglesby* v. *Yglesias*, E. B. & E. 930; *Milvain* v. *Perez*, 3 E. & E. 495; *Christoffersen* v. *Hansen*, L. R. 7 Q. B. 509; *Lockhart* v. *Falk*, L. R. 10 Ex. 132: in these cases there was no lien. Of course, each case must depend on the precise expressions used: *Lister* v. *Van Haansbergen*, 1 Q. B. D. 269.

(*h*) *Francesco* v. *Massey*, L. R. 8 Ex. 101; *Bannister* v. *Breslauer*, L. R. 2 C. P. 497; and not only for demurrage proper, but damages *ultra* for detention: *Kish* v. *Cory*, L. R. 10 Q. B. 553; *Sanguinetti* v. *Pacific Steam Nav. Co.*, 2 Q. B. D. 238; *French* v. *Gerber*, 2 C. P. D. 247; *Harris* v. *Jacobs*, 15 Q. B. D. 331; *Restitution Co.* v. *Pirie & Co.*, 61 L. T. N. S. 330. As to its effect on freight payable before loading, see *Lockhart* v. *Falk*, L. R. 10 Ex. 132.

(*i*) *Salvesen* v. *Guy*, 13 Sc. Sess. Cas., 4th series, 85; *Benyon* v. *Kennett*, 8 ib. 594.

Affreightment by charterparty.

It often becomes important to determine whether, according to the true construction of a charterparty, the possession of the ship passes to the merchant, so as to constitute him an owner *pro hâc vice*, and cause the general owner to stand to him in the relation of a lessor rather than a carrier. On this question may depend the owner's right of *lien* for the freight, of which description of remedy we shall speak more fully hereafter (*j*), or his own liability to the suit of third parties (*k*). It is impossible, however, to lay down general rules for its solution, which must, in each case, be gathered from the terms of the instrument, or its purpose and object. Rarely in modern cases is it held that such a transfer of possession takes place. In the case of a ship let to the Commissioners of the Transport Board, the possession was held to pass to the king, on account of the nature of the service on which she was to be engaged (*l*). On the other hand, though the charterparty in *Wagstaff* v. *Anderson* (*m*) provided that the whole ship should be at the disposal of the charterers except the space necessary for the crew and stores, that the master was to sign bills of lading at any rate of freight which the charterers might require, without prejudice to the charterparty; it was held the charterers were not liable for improper sale of goods by the master. It is questionable whether the decision in the former case would now be followed. Lord *Ellenborough* relied

(*j*) See Abbott, Part 4, c. 2, 12th ed.; *Campion* v. *Colvin*, 3 Bing. N. C. 17; *Small* v. *Moates*, 9 Bing. 574; *Belcher* v. *Capper*, 4 M. & G. 502. See also *Marquand* v. *Banner*, 6 E. & B. 232; *Croockewit* v. *Fletcher*, 1 H. & N. 893; *Thompson* v. *Small*, 1 C. B. 328; *Sandeman* v. *Scurr*, L. R. 2 Q. B. 86.

(*k*) *Newberry* v. *Colvin*, 1 C. & J. 192; 1 Cl. & F. 283; *Dean* v. *Hogg*, 10 Bing. 345; *Reeve* v. *Davis*, 1 Ad. & E. 312; *Fenton* v. *City of Dublin Steam Packet Co.*, 8 Ad. & E. 835; *Marquand* v. *Banner*, 6 E. & B. 232 (which is doubtful); *Meiklereid* v. *West*, 1 Q. B. D. 428; and see per *Cresswell* and *Willes*, JJ., in *Gilkison* v. *Middleton*, 2 C. B. N. S. 154; *Schuster* v. *M'Kellar*, 7 E. & B. 704; *Sandeman* v. *Scurr*, L. R. 2 Q. B. 86; *The Omoa Coal Co.* v. *Huntley*, 2 C. P. D. 464; *Steel* v. *Lester*, 3 C. P. D. 121.

(*l*) *Trinity H.* v. *Clark*, 4 M. & S. 288. See *Dean* v. *Hogg*, 10 Bing. 345; *Yates* v. *Railstone*, 3 Taunt. 293; *Neill* v. *Ridley*, 9 Ex. 677 (freight of deck cargo payable to owner). In *Fenton* v. *City of Dublin Steam Packet Co.*, 8 A. & E. 835, the owners were to keep the vessel in order, and the charterers to pay all wages and disbursements; it was held, that the owners continued in possession of the ship, and liable for mischief done by the negligence of the crew.

(*m*) 5 C. P. D. 171.

Affreightment by charterparty.

much on the fact that the construction which he adopted would "enable the Crown fully and beneficially" to enjoy the use of the ship, which seems immaterial. He also said of the agreement that "it is the same thing as the hire of a waggon and team for a certain term, the proprietor stipulating that the waggon should be driven, and the horses taken care of, by his own waggoner and boy" (*n*).

A charterparty, or written contract for the conveyance of goods, &c. on board ship, is liable to a duty of 6*d.*, which may be denoted by an adhesive stamp. This must be cancelled by the person who last executes it, or by whose execution it is completed. If it be executed abroad, it may be so stamped within ten days after its receipt here and before it has been executed by anyone in this country, and the stamp must be cancelled. An executed instrument, not stamped, may have a stamp impressed within seven days after its execution on payment of the duty and 4*s.* 6*d.* penalty; after seven days and within one month, on payment of the duty and a penalty of 10*l.* In no other case shall the stamp be impressed (*o*).

Section II.—*Contract for Conveyance in a General Ship.*

Contract for conveyance in a general ship.

When the masters and owners of a ship engage with separate merchants to convey their goods to the place of her destination, the contract is said to be for conveyance in a *general ship* (*p*). It is usual to advertise such ship in the newspapers, or in cards and handbills; and care should be taken to insert nothing in these advertisements which it is not the shipowner's intention to make strictly good; since it is not clear that some of the terms of such advertisements may not be looked upon as incorporated into the contract (*q*). But the instrument to which reference is

(*n*) See *Quarman* v. *Burnett*, 6 M. & W. 499.

(*o*) 33 & 34 Vict. c. 97, sched., and ss. 23, 66, 67, 68.

(*p*) As to the liability of the owner of such a ship as a common carrier, and therefore insurer of goods carried, see *Nugent* v. *Smith*, 1 C. P. D. 19, 432; *Liver Alkali Co.* v. *Johnson*, L. R. 7 Ex. 267; *Hayn* v. *Culliford*, 4 C. P. D. 182; *Pandorf* v. *Hamilton*, 16 Q. B. D. at p. 633, and article in Law Quarterly Review, vol. v., p. 15.

(*q*) Abbott, Pt. 4, c. 4, 12th ed.; *Phillips* v. *Edwards*, 3 H. & N. 813; *Lightbody* v. *Hutchison*, 14 Sc. Sess.

generally had for the terms of such a contract is the *Bill of Lading* (*r*).

Contract for conveyance in a general ship.

There has been much discussion as to whether a bill of lading is a contract of affreightment or merely a receipt. It may not be the whole evidence of the contract; *e. g.*, when advertisements have been issued by the owner and brought to the notice of the shipper, or where the terms of the charterparty are incorporated by reference. It is not evidence of the contract when the goods have not in fact been received, or the shipper never assented to the terms of the bill of lading (*s*). There may be an implied contract before the bills of lading are signed (*t*). But when the goods are put on board and the bill of lading signed, it is, in general, the evidence of the contract, and cannot be varied by parol evidence (*u*).

"Where there is no charterparty, as between the grantee of the bill of lading and the shipowner, the bill of lading is, no doubt, a receipt for the goods, and, as such, like any other receipt, may be controverted by evidence showing that the goods were not received; the question whether it will be more than a receipt, as between the *shipper* and *shipowner*, depends on whether the captain has received the goods, for he has no authority to make a contract of carriage to bind the shipowner, except in respect of goods received by him" (*x*).

The bill of lading the master, or agent generally in the case of steam-ships, signs (*y*), and delivers to the holder of the receipt given by him or the mate for the goods when shipped, on having

Cas., 4th series, R. 4; *Psek* v. *Larsen*, L. R. 12 Eq. 378. As to the right of the shipper to demand back his goods, see post, pp. 354, 355.

(*r*) Bills of lading are usually signed where the vessel is chartered, but as between shipowner and charterer, they do not supersede the contract under the charterparty: *Wagstaffe* v. *Anderson*, 5 C. P. D. at p. 177.

(*s*) See *Crooke* v. *Allan*, 5 Q. B. D. at pp. 40, 41.

(*t*) Lord *Bramwell* in *Sewell* v. *Burdick*, 10 App. Cas. at p. 105.

(*u*) *Leduc* v. *Ward*, 20 Q. B. D. 475. In *Pollard* v. *Vinton*, 15 Otto, Supreme Court, 7, the twofold character of a bill of lading as a receipt and a contract to carry is clearly brought out. See also *Shaw* v. *Railroad Co.*, 11 Otto, p. 561.

(*x*) Lord *Esher*, M.R., in *Leduc* v. *Ward*, 20 Q. B. D. at p. 479.

(*y*) As to the duty of the master, see *Jones* v. *Hough*, 5 Ex. D. 115. Often the brokers sign the bills of lading: *Hayn* v. *Culliford*, 4 C. P. D. 182.

Contract for conveyance in a general ship.

that receipt returned to him (*z*). This is the *usual* course, and the owner will be bound only by bills of lading given in accordance with the master's usual or express authority. Therefore a master will not make the owner responsible, even to an innocent indorsee for value, by signing bills of lading for goods which have never been shipped (*a*).

Nor will the owner be liable to an indorsee for value if the goods are not of the quality stated.

"It is clearly impossible, consistently with that decision," said Lord *Esher*, M. R., in *Cox* v. *Bruce* (*b*), referring to *Grant* v. *Norway* (*c*), "to assert that the mere fact of a statement being made in the bill of lading estops the shipowner and gives a right of action against him if untrue, because it was there held that a bill of lading signed in respect of goods not on board the vessel did not bind the shipowner. . . . The doctrine of the case is not confined to the case where the goods are not put on board the ship. That the captain has authority to bind his owners with regard to the weight, condition, and value of the goods under certain circumstances may be true; but it appears to me absurd to contend that persons are entitled to assume that he has authority, though his owners really gave him no such authority, to estimate and determine and state on the bill of lading, so as to bind his owners, the particular mercantile quality of the goods before they are put on board; as for instance, that they are goods containing such and such a percentage of good or bad material, or of such and such a season's growth. To ascertain such matters is obviously quite outside the scope of the functions and capacities of a ship's captain and of the contract of carriage with which he has to do."

Of course, as in *Lishman* v. *Christie* (*d*), the shipowners may agree that the bills of lading shall be conclusive as to the quantity received (*e*).

(*z*) *Schuster* v. *McKellar*, 7 E. & B. 704; *Hathesing* v. *Laing*, L. R. 17 Eq. 92.

(*a*) *Grant* v. *Norway*, 10 C. B. 665; *McLean* v. *Fleming*, L. R. 2 H. L. Sc. 128; *Brown* v. *Powell Coal Co.*, infra; *Cox* v. *Bruce*, 18 Q. B. D. 147; *Thorman* v. *Burt*, 54 L. T. 349.

(*b*) 18 Q. B. D. 147, at p. 151.

(*c*) 10 C. B. 665.

(*d*) 19 Q. B. D. 333. See also *Owners of the Immanuel* v. *Denholm*, 15 Sc. Sess. Cas., 4th series, 152.

(*e*) The bill of lading may be signed before the goods are actually received. "We do not say," observed the Supreme Court of the United States, in *The Idaho*, 3 Otto, p. 582, "that a

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Whether the acknowledgment of the receipt of the goods would in any case be conclusive, even against the master, was for a time by no means a settled point. The statute 18 & 19 Vict. c. 111, s. 3, therefore provided, that—

"Every bill of lading in the hands of a *consignee or indorsee* for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same (*f*), notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same, that the goods had not in fact been laden on board: provided that the master or other person so signing may exonerate himself in respect of such misrepresentation, by showing that it was caused without any default on his part, or wholly by the fraud (*g*) of the shipper, or of the holder, or some person under whom the holder claims."

To relieve himself from liability, the master often, especially when the goods are in packages, does not give "a clean bill of lading," but qualifies the description by saying, "contents unknown," and "not responsible for weight," "quantity and quality unknown," "weight, value, and contents unknown," or similar words. The effect of such words is to permit evidence to be given that the master was ignorant of the contents, &c., and that he delivered what was received (*h*).

The master will be responsible to the owner for negligence in signing a bill of lading. "He is not bound to superintend in person the receipt and stowage of the goods; but if he is not personally cognisant of the fact and time of shipment, it is his personal duty to inform himself upon both these points by an examination of the mate's receipts or of the log-book, or otherwise, before he signs a bill of lading" (*i*). It will be no

title to personal property may not be created between the issue of a bill of lading therefor and its delivery to the ship; but, in the absence of any such intervening right, a bill of lading does cover goods subsequently delivered and received to fill it, and will represent the ownership of the goods."

(*f*) *Brown* v. *Powell Coal Company*, L. R. 10 C. P. 562.

(*g*) See *Valieri* v. *Boyland*, L. R. 1 C. P. 382.

(*h*) *Jessel* v. *Bath*, L. R. 2 Ex. 267; *Lebeau* v. *General Steam Navigation Co.*, L. R. 8 C. P. 88. But see *The Peter der Grosse*, 1 P. D. 414.

(*i*) *Stumore, Weston & Co.* v. *Breen*, 12 App. Cas. 698, at p. 702.

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answer to an action for negligence that a broker at a foreign port was employed by the owners to find a cargo and arrange the terms (*l*).

It is the practice to issue bills of lading in sets of three,—two delivered to the shipper, another retained by the owner. Should they differ, those given to the shipper would no doubt be presumed to be evidence of the contract (*m*). Where one part of the set has been validly indorsed, no subsequent indorsement of any other copy will affect the property in the goods (*n*). The fact, however, that only one of the set of a bill of lading drawn in triplicate is tendered, is no ground to a purchaser, who has agreed to pay in exchange for bills of lading, for refusing to pay (*o*).

There is some doubt whether a *Bill of Lading*, properly so called, be not confined to marine adventures; and whether an instrument so worded, given by a boat-master in a canal navigation, would operate in any way, except as a receipt or memorandum (*p*).

The following form contains the principal terms of a Bill of Lading in use as regards sailing-vessels:—

J. W. No. 1. *a.* 20. "Shipped in good order (*q*) by A. B., merchant, in and upon the good ship called the —— (*r*), whereof C. D. is master, now riding at anchor in the river Thames, and bound for Barcelona, in Spain, 20 bales, containing 100 pieces of broad cloth, marked and numbered as per margin, and are to be delivered in the like good order and condition at Barcelona aforesaid (the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever excepted), unto E. F., merchant there, or his assigns, he or they paying freight for the said goods —— per piece freight, with primage and average accustomed. *In Witness* whereof, the master or purser of the said ship hath affirmed to three bills of

(*l*) Ibid.

(*m*) See *The Thames*, 14 Wall. 98.

(*n*) *Barber* v. *Meyerstein*, L. R. 4 H. L. 317.

(*o*) *Sanders* v. *Maclean*, 11 Q. B. D. 327.

(*p*) *Bryans* v. *Nix*, 4 M. & W. 775, and *Iron Mountain Railway* v. *Knight*, 15 Davis, p. 87.

(*q*) *Hastings* v. *Pepper*, Pars. on Shipping, 1, 188, n.

(*r*) 28 L. J. Ch. 582.

lading of this tenor and date; one of which bills being accomplished, the other two to stand void.
"Dated at London, the —— day of ——."

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But in the bills of lading actually used, especially by steamship companies, are introduced many other provisions limiting the liability of the owners.

A bill of lading should bear a 6*d.* stamp, and cannot be stamped after its execution. A person who executes an unstamped bill of lading is liable to a penalty of 50*l.* (*s*).

In the above form, a consignee (*t*) of the goods, viz., E. F., is mentioned, to whom, or to whose assigns, they are to be delivered. But the bill is sometimes made out for delivery "to —— order or —— assigns," which imports an engagement to deliver to the person whom the consignor shall nominate, and his assigns, or sometimes to the *shipper* himself, his order, or his assigns. If no such words appear in the bill of lading, it will be in no sense negotiable (*u*).

Primâ facie a delivery of goods on board a vessel, under a bill of lading in the latter form, or to the order of the vendor, though it be the vessel of the intended consignee, imports an intention on the part of the consignor, especially if he be an unpaid vendor, to reserve to himself the property in the goods, and that that shall pass by the indorsement of the bill of lading. In such case, until it has been indorsed *and accepted* by the indorsee, the goods remain the vendor's, so as to preserve his rights, whether as an unpaid vendor or otherwise (*x*); and he has a perfect right to vary their destination (*y*), and if payment of the price be refused, to sell them (*z*). But such a bill of

(*s*) 33 & 34 Vict. c. 97, sched. and s. 56.

(*t*) As to the effect of this, and his right to sue for loss, &c. of the goods, see *Tronson* v. *Dent*, 8 Moore, P. C. Ca. 419.

(*u*) *Henderson* v. *Comptoir d'Escompte de Paris*, L. R. 5 P. C. 253. The contrary opinion was expressed in *Renteria* v. *Ruding*, M. & M. 511.

(*x*) *Mirabita* v. *Imperial Ottoman Bank*, 3 Ex. D. at p. 172; *Wait* v. *Baker*, 2 Exch. 1; *Hoare* v. *Dresser*, 7 H. L. Ca. 290; *Ogg* v. *Shuter*, L. R. 10 C. P. 159, overruled 1 C. P. D. 47; *Gabarron* v. *Kreeft*, L. R. 10 Ex. 274.

(*y*) *Ellershaw* v. *Magniac*, 6 Exch. 570, n.; *Scothorn* v. *South Staffordshire Rail. Co.*, 8 Exch. 341; *Ogg* v. *Shuter*, 1 C. P. D. 47.

(*z*) *Ogg* v. *Shuter*, ubi supra.

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lading is not conclusive—it merely creates a presumption (*e*); and it will be a question of fact, looking at the whole of the circumstances under which the shipment took place, what was the intention of the parties: whether the delivery was not really for and on account of the vendee, and the bill of lading was made out to the vendor on behalf of, and as agent for, the vendee, in which event the property will have passed and vested in the intended consignee; or whether it was not intended to preserve the rights of the unpaid vendor, until some further act was done, by transferring the bill of lading (*f*). In the decision of this question, the circumstance of the shipment being on board the vessel of the intended consignee, and the bill of lading being expressed to be *freight free*, or an invoice being sent by the consignor stating the shipment to have been made for and at the risk of the intended consignee, will be material for the consideration of the jury (*g*). If a bill of exchange be sent with the bill of lading, the consignee is bound to accept the bill drawn against the cargo if he retain the bill of lading, and until such acceptance the property in the goods should not pass to the consignee (*h*).

Other clauses than those above mentioned may be, and often are, introduced into the bill of lading, according to the nature of the contract between the parties to it. It is impossible to state here all or even many of them. The following are examples:—A clause to provide for the payment of demurrage by the consignee, the effect of which will be to raise an implied undertaking on his part to pay it, if he receive the goods under such bill of lading, and that, too, though he have no valuable interest in them; for the "acceptance of the goods in pursuance

(*e*) The burthen of proof lies on the party contradicting this presumption: *Shepherd* v. *Harrison*, L. R. 5 H. L. 116.

(*f*) *Van Casteel* v. *Booker*, 2 Exch. 691; *Turner* v. *Trustees of Liverpool Docks* (goods on purchaser's own ship), 6 Exch. 543; *Shepherd* v. *Harrison*, L. R. 5 H. L. 116; and see *Brown* v. *North*, 8 Exch. 1; *Key* v. *Cotesworth*, 7 Exch. 595; *Ogg* v. *Shuter*, ubi supra. So in the case of the mate's receipt: *Falk* v. *Fletcher*, 18 C. B. N. S. 403.

(*g*) But see *Ogg* v. *Shuter*, ubi supra; and *Turner* v. *Trustees of Liverpool Docks*, ubi supra, where the goods were on the vendee's ship.

(*h*) *Shepherd* v. *Harrison*, L. R. 5 H. L. 116; *Mirabita* v. *Imperial Ottoman Bank*, ubi supra; *National Bank* v. *Merchants' Bank*, 1 Otto, 92.

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of a bill of lading, whereby the shipper has expressly made the payment of freight or demurrage a condition precedent to their delivery, is evidence of a contract by the consignee to pay such demand"(*i*). So, too, there may be a clause "with liberty to call at any port," which permits of calling at any port for any purpose connected with, and in furtherance of, the scope of the adventure. We shall have occasion to advert again to this subject.

It has been seen that the bill of lading is usually made out for the delivery of the goods to the order of some person, *ex. gr.*, E. F., *or his assigns*. E. F. can, therefore, by naming *an assign*, transfer his right to them to some other person (*j*). The mode of appointing an *assign* is by indorsing and handing over (*k*) to him the negotiable instrument. Accordingly, it is the common practice of merchants to negotiate it, and, by such assignment, the property in the goods is held to pass to the indorsee of the bill of lading if such was the intention of the parties (*l*). "The bill of lading," says *Bowen*, L. J., in *Sanders* v. *Maclean* (*m*), "until complete delivery of the cargo has been made on shore to some one rightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner." Nay, though the consignee named in the bill of lading should become insolvent, without having paid for the goods, yet his assignment, made for a valuable consideration, and without notice to the assignee that the goods were not paid for, or that they were paid for by bills

(*i*) *Scaife* v. *Tobin*, 3 B. & Ad. 523, per *Parke*, J.; see post, p. 375.

(*j*) *Henderson* v. *Comptoir d'Escompte de Paris*, L. R. 5 P. C. 253. The receipt of the goods by the indorsee under these circumstances would be evidence from which a contract to pay freight might be inferred. See post, pp. 375, 376. As to special and blank indorsements, see *Sewell* v. *Burdick*, 10 App. Cas. at p. 83.

(*k*) *Dracachi* v. *The Anglo-Egyptian N. Co.*, L. R. 3 C. P. 190. Until the bill of lading has been received and *accepted* by the indorsee, or the property somehow appropriated, the property does not pass: *Wait* v. *Baker*, 2 Exch. 1; *Hoare* v. *Dresser*, 7 H. L. Ca. 290.

(*l*) *Wright* v. *Campbell*, 4 Burr. 2046; *Sewell* v. *Burdick*, 1 Bla. 628; *Caldwell* v. *Ball*, 1 T. R. 205; *Hibbert* v. *Carter*, 1 T. R. 745.

(*m*) 11 Q. B. D. 327, p. 341; *Barber* v. *Meyerstein*, L. R. 4 H. L. 317.

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sure to be dishonoured, has been held to pass them absolutely to his assignee, and to deprive the consignor of his right to stop *in transitu*, which, as against the original consignee, he might have exercised (*n*). But if the assignee of the bill of lading have not given valuable consideration or acted *bonâ fide;* for instance, if he knew that the consignee was insolvent, and assisted to defraud the consignor of the price of his goods (*o*), he stands in the same situation as the consignee, and the consignor retains his right to stop *in transitu*. And, if there be any condition, either in the bill of lading or in the indorsement thereof, *ex. gr.*, if the goods are to be delivered *provided E. F. pay a certain draft*, all subsequent indorsees take subject to that condition, and have no title until it is complied with (*p*). But although the bill of lading is so far negotiable, it is not negotiable in the sense in which a bill of exchange or promissory note is so; property does not pass by mere delivery to a *bonâ fide* holder for valuable consideration; it is negotiable only as a symbol of the goods. Therefore, save in cases within the Factors Act (*q*), delivery by a person who has improperly obtained it, or without authority from the true owner, of a bill of lading indorsed in blank to a *bonâ fide* transferee for value, confers no title to the goods which it represents (*r*). Its indorsement, too, formerly transferred no more than the property in the goods—it did not transfer the contract between the original parties to it. Therefore, the assignee of such an instrument could not maintain an action founded upon that contract (*s*), nor could an action founded upon it be brought against him.

(*n*) *Lickbarrow* v. *Mason*, 2 T. R. 63; 1 Sm. L. C., 9th ed. 737; which was reversed in error, 1 H. Bl. 357, and error brought on the reversal in Dom. Proc., and the cause directed to be tried anew; which it was, and adjudged as at first, 5 T. R. 683; which judgment was acquiesced in. See *Newsom* v. *Thornton*, 6 East, 17; *Salomons* v. *Nissen*, 2 T. R. 674; *Gloahec* v. *Pease*, L. R. 1 P. C. 219.

(*o*) *Cuming* v. *Brown*, 9 East, 506; *Rodger* v. *The Comptoir d'Escompte de Paris*, L. R. 2 P. C. 393.

(*p*) *Barrow* v. *Coles*, 3 Camp. 92.

(*q*) The above passage is cited by *Whiteside*, C. J., as a correct statement of the law in *Bateman* v. *Green*, 2 Ir. C. L. p. 197.

(*r*) *Gurney* v. *Behrend*, 3 E. & B. 622.

(*s*) Lord *Esher*, M. R., in *Cox* v. *Bruce*, 18 Q. B. D. at p. 150.

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This was found to be inconvenient, and therefore, by 18 & 19 Vict. c. 111, s. 1, it was provided that—

"Every consignee (*t*) of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property (*u*) in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit (*v*), and be subject to the same liabilities (*w*) in respect of such goods, as if the contracts contained in the bill of lading had been made with himself."

Neither at common law nor under the statute does every transfer of a bill of lading transfer a property, with the effect of making the transferee necessarily subject to all the liabilities of the transferor.

"The preponderance of principle and reason," said Earl *Selborne*, in *Sewell* v. *Burdick* (*x*)—a case in which it was sought to make the pledgees of a bill of lading liable for demurrage, &c.—"appears to me to be against the proposition that, as between those parties, it can have been intended by, or can be the effect of, the statute to make the creditor of the shipper liable (in effect) as his surety to the shipowner (with whom he was never brought in contact), by reason only of the deposit with him, by way of security, of a bill of lading indorsed in blank, his right under that deposit being (whether at law or in equity) special and not general, and the shipper retaining (whether at law or in equity) the real and substantial property in the goods, subject to the security. It had not, until the present case, been directly or indirectly determined by any authority that such is the effect of the statute."

The decision in terms applies only to a pledge; but there can be little doubt that the same result would follow if there was a mortgage (*y*).

Nor does the statute alter the rule that a bill of lading gives, in general, no better rights to the indorsee than the indorser himself had under the bill of lading (*z*). It was not

(*t*) See *Lewis* v. *McKee*, L. R. 2 Ex. 37; 4 Ex. 58.

(*u*) As to the meaning of this word, see *Sewell* v. *Burdick*, 10 App. Cas. 74.

(*v*) He may sue in the Admiralty Court, see *The Felix*, L. R. 2 A. & E. 273.

(*w*) *Smurthwaite* v. *Wilkins*, 11 C. B. N. S. 842; *The Nepoter*, L. R. 2 A. & E. 375.

(*x*) *Sewell* v. *Burdick*, 10 App. Cas. 74, at p. 90.

(*y*) See Lord *Blackburn's* remarks, ibid. at p. 97.

(*z*) 1 Smith's L. C. 814, 9th ed.; *Gurney* v. *Behrend*, 3 E. & B. 622.

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intended by the statute to divest the original parties of their rights. Therefore, it is provided (*a*) that nothing therein contained shall prejudice or affect any right of stoppage *in transitu*, or any right to claim freight against the original shipper (*b*) or owner, or any liability of the consignee or indorsee, by reason or in consequence of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement. The consignee or indorsee does not, however, at all events, incur a permanent responsibility: it may be terminated by his indorsement of the bill of lading, so as to part with the property in the goods (*c*). But parting with the property without assigning the bill of lading will not have that effect (*d*).

Several parts of a bill of lading, signed by the master, are generally delivered to the shipper, and, in some instances, these parts have been indorsed to different persons; in such case, the shipmaster may deliver the goods to the first person, whether the original consignee or an indorsee, presenting one part of the bill of lading, provided, of course, the master has no notice of a prior assignment (*e*).

The power of thus transferring the property in the goods by an assignment of the bill of lading remains to the shipper as long as the goods are in the hands of any agent of his, and he may alter their destination while they are on board, provided the bill of lading has not been transferred; thus, if the captain sign a bill of lading for the delivery of the goods to A. or his assigns, and the shipper afterwards obtain and transmit to B. a bill of lading, making them deliverable to him, B. will be entitled to them, if nothing further had been done to vest the property in A. (*f*). The power, too, of thus transferring the

(*a*) Sect. 2.

(*b*) *Fox* v. *Nott*, 6 H. & N. 630.

(*c*) *Smurthwaite* v. *Wilkins*, 11 C. B. N. S. 842. See *Lewis* v. *McKee*, L. R. 2 Ex. 37; 4 Ex. 58.

(*d*) *Fowler* v. *Knoop*, 4 Q. B. D. 299.

(*e*) *Glyn* v. *East & West India Dock Co.*, 7 App. Cas. 591, and see *Sanders* v. *Maclean*, 11 Q. B. D. 327. Though a shipowner may deliver the goods to the first person presenting a bill of lading, this does not affect the legal ownership of the goods as between the holders of the different bills of lading. *Barber* v. *Meyerstein*, L. R. 4 H. L. 317.

(*f*) *Mitchel* v. *Ede*, 11 Ad. & E. 888; *Ellershaw* v. *Magniac*, 6 Exch. 570, n.; *Gabarron* v. *Kreeft*, L. R. 10 Ex. 274.

property in goods by means of the bill of lading continues until there has been a complete delivery under it, even though they may have been landed (*g*).

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The above observations regarding the negotiation of the bill of lading by a consignee, apply to the case of consignment of goods to a *purchaser;* for where they were consigned to a *factor*, his power of altering the property in them, by indorsement of the bill of lading, was less extensive, since it was thought that, though he might bind his principal by a *sale* of the bill of lading, because a factor's usual employment is to sell, yet he could not by a pledge thereof, for that is not within the scope of his authority (*h*). The Factors Act, 1889, repealing 6 Geo. 4, c. 94, 5 & 6 Vict. c. 39, and 40 & 41 Vict. c. 39, gives effect to his *pledge* also (*i*). The provisions are set out and commented upon *ante*, Book I. Chap. 5 (*j*).

Bills of lading may be given for goods put on board by the charterer. Usually the bill of lading contains some such words as "without prejudice to the charterparty." But even if there are no such words, the contract will be presumed to be in the charter. "As between the charterers and the shipowners," says Lord *Esher*, M. R., in *Rodocanachi* v. *Milburn* (*k*), "the bill of lading does not alter the contract between them contained in the charterparty." A holder of the bill who is merely an agent of the charterer will be in the same position as the charterer (*l*).

A master may give bills of lading which will in effect vary the charter as against the charterers. In *Gullischen* v. *Stewart* (*m*), the charterparty contained the usual provisions as to freight and demurrage, and also the cesser clause, namely, that all liability of the charterers ceased as soon as the cargo was on board. A bill of lading whereby the goods were made deli-

(*g*) *Barber* v. *Meyerstein*, L. R. 4 H. L. 317; 25 & 26 Vict. c. 63, s. 68. As to the position of the warehouseman, see *Brett*, L. J., in *Glyn* v. *East & West India Dock Co.*, 6 Q. B. D. p. 486.

(*h*) *Newsom* v. *Thornton*, 6 East, 17. See ante, Book I. Ch. 5.

(*i*) See Appendix.

(*j*) See also post, Book IV. Ch. 1, and Appendix.

(*k*) 18 Q. B. D. 67, at p. 75; *The San Roman*, L. R. 3 Ad. 583, at p. 592.

(*l*) *Kern* v. *Deslandes*, 10 C. B. N. S. 205.

(*m*) 11 Q. B. D. 186; 13 Q. B. D. 317.

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verable to themselves at the port of discharge, "they paying freight and all other conditions as per charter," was given. It was held that, notwithstanding the cesser clause, the charterers, who were consignees of the goods, were liable, as consignees, for demurrage at the port of discharge.

As between indorsees of a bill of lading, strangers to the charterer, and the person issuing the bill of lading (shipowner or charterer), the charterparty has no effect, unless its terms are distinctly incorporated. Mere notice of the existence of the charterparty will not make the indorser liable for the fulfilment of its conditions. Even when a bill of lading refers to the charterparty, the Courts are averse to making the shippers or their indorsees liable for demurrage, &c. Thus, in *Chappel* v. *Comfort* (*m*), decided in 1861, the words, "paying freight as per charterparty," were held not to import the terms as to lien; and in *Fry* v. *Mercantile Bank of India* (*n*), where the words were "freight as per charterparty," it was held that the shipowner had no lien for the whole chartered frieght as provided by the charterparty. On the other hand, the words "paying freight for the same goods and all other conditions as per charterparty," were held to import demurrage as per charter; and in *Gray* v. *Carr* (*o*), where the shipper took a bill of lading stating goods to be delivered as per charter to order of Carr or assigns, he or they paying freight and all other conditions or demurrage (if any should be incurred) for the goods as per charter, it was held that the holder of the bill of lading was liable, not only for the demurrage before loading, but for damages for detention beyond demurrage. No very clear rule can be laid down. As the charterparty is primarily the contract between the charterer and the shipowner, so the bill of lading is the contract between the holder of the bill of lading and the indorsee; and consequently the tendency is to import, "only those clauses of the charterparty which are applicable to the contract contained in the bill of lading (*p*), and those clauses of

(*m*) 10 C. B. N. S. 802.
(*n*) L. R. 1 C. P. 689.
(*o*) L. R. 6 Q. B. 522.
(*p*) *Gardner* v. *Trechmann*, 15 Q. B. D. 154, at p. 157, per Lord *Esher*, M. R.

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the charter cannot be brought in which would alter the stipulations in the bill of lading." Or, to quote another exposition of the law by the same judge, in *Porteus* v. *Watney* (*q*) :—

"I take the decision in *Gray* v. *Carr* to have been that those words in a bill of lading are to be treated as words of reference to the charterparty, and that they, therefore, introduce into the bill of lading every condition that is in the charterparty by way of reference; so that they bring into the bill of lading every condition of the charterparty in its terms, and make every one of those conditions part of the bill of lading, as if they had been originally written into it. But then there is another rule which applies, which is, that, if taking all the conditions to be in the bill of lading, some of them are entirely and absolutely insensible and inapplicable, they must be struck out as insensible; not because they are not introduced, but because, being introduced, they are impossible of application."

There is the further question, With whom in the case of a chartered vessel is the contract contained in the bill of lading, the charterer or the shipowner? The authorities seem to show:—(1) Where there is such a demise of the vessel as to make the charterer the temporary owner of the vessel and the master his agent, the charterer is responsible, as was decided in *Newberry* v. *Colvin* (*r*), for the performance of the contract (2) When the charter is not of that character, and the shipper is not aware of it, he is entitled to treat the contract as made with the shipowner (*s*). *Primâ facie* the master is the agent of the owner: and shippers or indorsees of bills of lading without notice of a charter will be entitled to sue the shipowner, if the bill of lading is within the ordinary authority of the master (*t*). Though they have notice of the charter, they may sue or be sued upon the bill of lading unless they had notice that the master had no authority to give such bill (*u*).

In many trades it is common to give a through bill of

(*q*) 3 Q. B. D. at p. 541, per *Brett*, L. J.

(*r*) 7 Bing. 190, and see *Marquand* v. *Banner*, 25 L. J. Q. B. 313.

(*s*) *Sandeman* v. *Scurr*, L. R. 2 Q. B. 86; *Hayn* v. *Culliford*, 3 C. P. D. 410; 4 C. P. D. 182.

(*t*) *Sandeman* v. *Scurr*, L. R. 2 Q. B. at p. 97; *Grant* v. *Norway*, 10 C. B. 665; *Wagstaff* v. *Anderson*, 5 C. P. D. 171.

(*u*) Carver, Law of Carriage by Sea, s. 157.

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lading, that is, a bill of lading engaging to carry from A. to B. by different means of conveyance. Thus, in *Moore* v. *Harris* (*h*), the bill of lading provided that the goods were to be "delivered from the ship's deck, &c. into the Grand Trunk Railroad Company's trucks, then to be forwarded thence per railway to Toronto, and at the aforesaid station delivered." This was treated as one contract, binding the parties to it through the whole journey (*i*). As has been seen in dealing with carriers, the other companies may be liable in an action for tort (*j*). The authorities are not clear as to what law will govern a contract under such a bill of lading, if part of the transit is in one country and part in another. *Primâ facie* the law of the place where the contract was made would seem to be that applicable (*k*). But the intention of the parties may be that the contract shall be governed by the law of the place of performance, or that it shall at different parts of the transit be regulated by different laws (*l*); and effect will be given to such intention.

Section III.—*Duties of Master and Owners.*

Duties of master and owners.

We now come to consider the obligations which the two sorts of contracts of affreightment equally impose. These are divided by a celebrated author (*m*) into duties to be performed—

1. By the master and owners.
2. By the merchant.

The former class are again divided into those which respect, 1st, The preparation for; 2nd, The commencement; 3rd, The course; and 4th, The completion of the voyage.

1. *Seaworthiness at Starting.*—With respect to the *preparation* (*n*), the vessel must be tight, staunch, and strong, and

(*h*) 1 App. Cas. 318.

(*i*) See also *Greeves* v. *West India and Pacific S.S. Co.*, 22 L. T. 615.

(*j*) *Self* v. *L. B. & S. C. Rail. Co.*, 42 L. T. 173; *Foulkes* v. *M. D. Rail. Co.*, 4 C. P. D. 267.

(*k*) See *Cohen* v. *South Eastern Rail. Co.*, 2 Ex. D. 253; *Lloyd* v. *Guibert*, L. R. 1 Q. B. 122; *Jacobs* v. *Crédit Lyonnais*, 12 Q. B. D. p. 600.

(*l*) *Re Missouri Steamship Co.*, 61 L.T. N. S. 316.

(*m*) Abbott, Pt. 4, cc. 5, 8, 12th ed.

(*n*) See, generally, Abb. on Shipp. Pt. 4, c. 5.

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furnished with proper necessaries and crew. This a charterparty usually requires; but it is equally required by law, though there be no bill of lading or charterparty (*o*). "In whatever way," said the Court, in *Kopitoff* v. *Wilson* (*p*), "a contract for the conveyance of merchandise be made, where there is no agreement to the contrary, the shipowner is, by the nature of the contract, impliedly and necessarily held to warrant that the ship is good, and is in a condition to perform the voyage then about to be undertaken, or, in ordinary language, is *seaworthy*, that is, fit to meet and undergo the perils of the sea and other incidental risks to which she must of necessity be exposed in the course of the voyage." The implied warranty is not satisfied by seaworthiness at the time when the vessel, in pursuance of the charter, takes in cargo; she must be so at the time when she sails (*q*); it will not avail that she is subsequently repaired (*r*). The same observation applies to her crew, who must be sufficient in number and ability (*s*). So, if usage or the law of the country require that she should have a pilot, there must be one on board; as there must also when the ship comes in the course of her voyage to any place where there is an establishment of pilots, and it is possible to procure one before she enters on the difficult part of the navigation (*t*). The obligation of seaworthiness is satisfied if the vessel is seaworthy at the time of starting (*u*). But if a vessel become unseaworthy in the course of the voyage, and she puts into port, and has an opportunity of repairing, as in *Worms* v. *Storey* (*x*), and she proceeds to

(*o*) *Steel* v. *State Line S.S. Co.*, 3 App. Cas. 72; *Cohn* v. *Davidson*, 2 Q. B. D. 455; *Kopitoff* v. *Wilson*, 1 Q. B. D. 377; *The Glenfruin*, 10 P. D. 103; and see *Tully* v. *Howling*, 2 Q. B. D. 182; *Tattersall* v. *National Steamship Co.*, 12 Q. B. D. 297. This warranty is not excluded by a special clause in a bill of lading exonerating the shipowner from liability, even in respect of the negligence of his servants (*Steel* v. *State Line S.S. Co.*, supra), or a clause excepting "perils of the seas, and of navigation of whatsoever nature or kind." *The Glenfruin*, supra.

(*p*) L. R. 1 Q. B. D. at p. 380.

(*q*) *Cohn* v. *Davidson*, 2 Q. B. D. 455.

(*r*) *Quebec Marine Ins. Co.* v. *Commercial Bank of Canada*, L. R. 3 P. C. 234.

(*s*) *Shore* v. *Bentall*, 7 B. & C. 798, n.

(*t*) *Phillips* v. *Headlam*, 2 B. & Ad. 380.

(*u*) *Cohn* v. *Davidson*, 2 Q. B. D. 455.

(*x*) 11 Exch. 427.

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sea without being repaired, there will be a breach of the warranty. The goods are to be taken by the master or owner, whose responsibility commences with their receipt from the shipper (*y*), and stored carefully on board. All things necessary for that purpose, such, for instance, as ropes, must be provided by the master, since, if the goods be injured by or in consequence of improper stowage, he and his owners are responsible (*z*).

Primâ facie in the absence of agreement or custom, it is the duty of the owner or master to stow. Often, however, the charter states that the charterer shall appoint a stevedore (*a*). In such case neither the master nor owner will be liable if the master does not in fact interfere (*b*). But a shipper who has not notice of the charter will, nevertheless, be entitled to sue the owner for bad stowage (*c*). Of course, if there is evidence that the shipper or charterer assented to the mode of stowing, as in *Ohrloff* v. *Briscall* (*d*), no action for improper stowage will lie. The master must have on board the proper manifest and other documents necessary for the protection of the vessel, or her admission at the port of discharge (*e*), and must carry no false papers or contraband goods, whereby she may be forfeited.

He must give a receipt for the cargo to the shipper, and sign bills of lading as he may direct, on having that receipt returned to him. The charterer who has put goods on board under a charterparty, by which he has the entire use of the ship, may demand their re-delivery, the payment for the hire

(*y*) *British Columbia Co.* v. *Nettleship*, L. R. 3 C. P. 499.

(*z*) *Gould* v. *Oliver*, 2 M. & G. 208; see *Wright* v. *Marwood*, 7 Q. B. D. 62; *Steel* v. *State Line S.S. Co.*, 3 App. Cas. 72. The Legislature has introduced certain statutory provisions as to overloading and as to loading grain and deck cargoes: 39 & 40 Vict. c. 80, and 43 & 44 Vict. c. 43; *Goff* v. *Clinkard*, 1 Wils. 282, n.; *Alston* v. *Herring*, 11 Exch. 822; *Hutchinson* v. *Guion*, 5 C. B. N. S. 149.

(*a*) *Willes*, J., in *Blaikie* v. *Stembridge*, 6 C. B. N. S. at p. 907.

(*b*) *Blaikie* v. *Stembridge*, supra; compare *Omoa Coal Co.* v. *Huntley*, 2 C. P. D. 464.

(*c*) *Sandeman* v. *Scurr*, L. R. 2 Q. B. 86, at p. 98.

(*d*) L. R. 1 P. C. 231.

(*e*) *Wilson* v. *Rankin*, L. R. 1 Q. B. 162; *Dutton* v. *Powles*, 30 L. J. Q. B. 169.

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of the vessel being independent of the delivery of cargo (*g*). The shipper of goods on a general ship may, by the usage of trade, if he re-demand the goods in a reasonable time before the ship sails, have them delivered back to him on paying the freight that might become due for the carriage of them, and on indemnifying the master against the consequences of any bills of lading signed for them (*h*). If, by agreement, the master is to proceed to a particular place (*i*), or in the usual form, "as near thereto as he can safely get" (*k*), for the cargo, he must use due diligence, or the freighter may be discharged, if the delay be such as to frustrate the object of the voyage (*l*); and if the vessel takes out a cargo, in which the freighter has no interest, the captain should give notice when the vessel is ready to receive the cargo, or the freighter will not be liable for omitting to provide it (*m*).

2ndly. *Reasonable dispatch in Sailing.*—With respect to the commencement and continuance of the voyage—the proper clearances being obtained (*n*), the ship must set sail at the stipulated time, or, if no time for sailing has been expressly agreed upon, must sail within a reasonable time; for, upon general principles in all contracts by charterparty, where there is no express agreement as to time, it is an implied stipulation that there shall be no unreasonable or unusual delay in commencing the voyage (*o*); and the charterer will be warranted in throwing up the charter if there has been undue or unreasonable delay, such as will de-

(*g*) *Thompson* v. *Small*, 1 C. B. 328.

(*h*) Per cur., *Tindall* v. *Taylor*, 4 E. & B. 219.

(*i*) That is, as a laden ship: *The Alhambra*, 6 P. D. 68.

(*k*) As to the meaning of these words, see *Dahl* v. *Nelson*, 6 App. Cas. 38, and cases cited; *Hayton* v. *Irwin*, 5 C. P. D. 130; *The Alhambra*, 6 P. D. 68; *Horeley* v. *Price* ("at all times of the tide and always afloat"), 11 Q. B. D. 244; *Allen* v. *Coltart*, 11 Q. B. D. 782; *General Steam Navigation Co.* v. *Slipper*, 11 C. B. N. S. 493; *Shield* v. *Wilkins*, 5 Exch. 304; *The Gazelle*, 21 Davis, 474.

(*l*) *Freeman* v. *Taylor*, 8 Bing. 124; *MacAndrew* v. *Chapple*, L. R. 1 C. P. 643, per *Willes*, J.; *Stanton* v. *Richardson*, L. R. 7 C. P. 421; 9 C. P. 390; *Tully* v. *Howling*, 2 Q. B. D. 182.

(*m*) *Fairbridge* v. *Pace*, 1 C. & K. 317; *Nelson* v. *Dahl*, 12 Ch. D. at p. 581; *Stanton* v. *Austin*, L. R. 7 C. P. 651.

(*n*) See 39 & 40 Vict. c. 36, ss. 127—133.

(*o*) *Jackson* v. *Union Marine Insurance Co.*, L. R. 10 C. P. 125; *Tully* v. *Howling*, 2 Q. B. D. 182.

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feat the object of the undertaking (*p*). If there be a stipulation to that effect, he must do so under the safeguard of a convoy; concerning the nature of which escort, and the rules respecting it, we treat under another head, viz., that of *Insurance*.

3rdly. *Ship not to Deviate.*—The ship having sailed must then proceed to her destined port without unnecessary delay (*q*) or deviation (*r*). If she deviate unnecessarily (at all events, where the purpose of the deviation is not to save life, and where there is no express stipulation (*s*)), and be lost, the master and owners are responsible, although the loss be by an excepted peril, such as the act of God or the Queen's enemies (*t*). It would seem, too, that this will be the case if the loss occur after, and not during deviation (*u*). A bill of lading stated that the vessel was "lying in the port of Fiume, and bound for Dunkirk, with liberty to call at any ports in any order, and to deviate for the purpose of saving life or property" (*x*). Instead of proceeding direct to Dunkirk, she went to Glasgow, and was lost off the mouth of the Clyde. Evidence was tendered that the shippers of the goods knew that the vessel was to proceed by way of Glasgow to Dunkirk. The evidence was declared by the Court of Appeal to be inadmissible, on the ground that, as between the indorsee of the bill of lading, by whom the action was brought, and the shipowner, the contract was contained in the bill of lading. The Master of the Rolls said:—

"If the description of the voyage had been merely from Fiume to Dunkirk, I think the contract would have been for a voyage on the ordinary sea track of a voyage from Fiume to Dunkirk, and any departure from that track, in the absence of necessity, would be a deviation. Of course, when I speak of the ordinary sea track, I do

(*p*) *Jackson* v. *Union Marine Insurance Co.*, L. R. 10 C. P. 125. Compare *MacAndrew* v. *Chapple*, L. R. 1 C. P. 643.

(*q*) As to measure of damages in case of delay, *The Parana*, 2 P. D. 118.

(*r*) *The Express*, L. R. 3 A. & E. 597; *The Teutonia*, L. R. 4 P. C. 171.

(*s*) *Scaramanga* v. *Stamp*, 5 C. P. D. 295.

(*t*) *Davis* v. *Garrett*, 6 Bing. 716. See *Phillips* v. *Clark*, 2 C. B. N. S. 164, per *Willes*, J.

(*u*) *Davis* v. *Garrett*, 6 Bing. 716; Carver, p. 288.

(*x*) *Leduc* v. *Ward*, 20 Q. B. D. 475; *The Thetis*, L. R. 2 Adm. 368.

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not mean an exact line, for it would necessarily vary somewhat according to circumstances; the ordinary track for sailing vessels would vary according to the wind; the ordinary track for a steamer, again, might be different from that for a sailing vessel. I mean the ordinary track of such a voyage according to a reasonable construction of the term. In the present case, liberty is given to call at any ports in any order. It was argued that that clause gives liberty to call at any port in the world. Here, again, it is a question of the construction of a mercantile expression used in a mercantile document, and I think that as such the term can have but one meaning, namely, that the ports, liberty to call at which is intended to be given, must be ports which are substantially ports which will be passed on the named voyage. Of course, such a term must entitle the vessel to go somewhat out of the ordinary track by sea of the named voyage, for going into the port of call in itself would involve that. For 'call' at a port is a well-known sea term; it means to call for the purposes of business generally, to take in or unload cargo or to receive orders; it must mean that the vessel may stop at the port, or call for a time, or else the liberty to call would be idle. I believe the term has always been interpreted to mean that the ship may call at such ports as would naturally and usually be ports of call on the voyage named. If the stipulation were only that she might call at any ports, the invariable construction has been that she would only be entitled to call at such ports in their geographical order, and therefore the words 'in any order' are frequently added. But in any case, it appears to me that the ports must be ports substantially on the course of the voyage" (*y*).

The master is to use every effort to convey the cargo safely to its destination; and if, by reason of a storm, or some other unexpected cause the cargo is damaged or it becomes impossible to carry it on in his own vessel, he is to do what a prudent man would think most for the benefit of all concerned (*z*). He must, if possible, communicate with the owner before selling (*zz*). We have high authority for saying that,

"Transhipment for the place of destination, if it be practicable, is the first object, because that is in furtherance of the original

(*y*) Ib., per Lord *Esher*, M. R., at p. 481.

(*z*) *Tronson* v. *Dent*, 8 Moo. P. C. Ca. 419; *Notara* v. *Henderson*, L. R. 5 Q. B. 346; 7 Q. B. 225; *Cargo ex Argos*, L. R. 4 A. & E. 13.

(*zz*) *Acatos* v. *Burns*, 3 Ex. D. 282.

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purpose (*a*); if that be impracticable (*b*), return or a safe deposit (*c*) may be expedient. The merchant should be consulted, if possible (*d*). A sale is the *last thing* that the master should think of, because it can only be justified by that necessity which supersedes all human laws. If he sells without necessity, his owners as well as himself will be answerable to the merchant (*e*); and they will be equally answerable if he places the goods at the disposal of a Vice-Admiralty Court in a British colony, and they are sold under an order of the Court, such Court having no authority to order a sale (*f*). And the persons who buy under such circumstances will not acquire a title as against the merchant (*g*), but must answer to him for the value of the goods" (*h*).

The shipowner, being at liberty to tranship, will be entitled to freight if he, within a reasonable time, conveys the goods to their destination in a substituted ship (*i*); and it matters not that he has paid less freight than that which the cargo-owner agreed to pay. If the shipowner delivers the goods short of the port of destination, he will not be entitled to freight *pro ratâ:* he must "show a dispensation or a new contract" (*k*). The master's authority extends to hypothecate the cargo, or even sell a part of it where it is necessary to do so, for repairs, in order to the preservation of the entire venture (*l*). If he do the

(*a*) See *Shipton* v. *Thornton*, 9 Ad. & E. 314, and compare *Atwood* v. *Sellar*, 4 Q. B. D. 342.

(*b*) As to when it shall be considered to be so, see *Moss* v. *Smith*, 9 C. B. 94; *Michael* v. *Gillespy*, 2 C. B. N. S. 627.

(*c*) See an instance of deposit, which seems not to have been questioned, in *Liddard* v. *Lopes*, 10 East, 526.

(*d*) *The Australasian S. N. Co.* v. *Morse*, L. R. 4 P. C. 222; *Kleinwort* v. *Cassa Marittima of Genoa*, 2 App. Cas. 156.

(*e*) *The Australasian S. N. Co.* v. *Morse*, ubi sup.; *Acatos* v. *Burns*, 3 Ex. D. 282; *Atlantic Insurance Co.* v. *Huth*, 16 Ch. D. 474, which case shows that the circumstance that the master acted prudently will not necessarily validate the sale.

(*f*) *Cannan* v. *Meaburn*, 1 Bing. 243; 8 B. Moore, 127.

(*g*) *Morris* v. *Robinson*, 3 B. & C. 196; *Atlantic Insurance Co.* v. *Huth*, supra.

(*h*) Abbott, Part 4, c. 5, s. 4, p. 313, 12th ed.

(*i*) See *Mathews* v. *Gibb*, 3 E. & E. 282, at p. 301; *The Soblomsten*, L. R. 1 A. & E. 293; *The Bernina*, 12 P. D. 36.

(*k*) *Bramwell*, L. J., in *Metcalfe* v. *Britannia Ironworks Co.*, L. R. 2 Q. B. D. at p. 428; *Brett*, J., in *Hopper* v. *Burness*, 1 C. P. D. p. 140.

(*l*) *The Gratitudine*, 3 Chr. Rob. Adm. R. 240; *The Bonaparte*, 3 W. Rob. 298; *The Gaetano and Maria*, 7 P. D. 137. The master in borrowing acts exclusively as agent of the shipowner: *Benson* v. *Duncan*, 3 Exch. 644.

former, the owner must indemnify the merchant (*m*); and if he do the latter, the merchant, on the ship's safe arrival at the place of destination, will have a right to receive what the goods would have fetched if brought thither (*n*), or may elect to take the sum they actually sold for, and may in that case, if he please, deduct it from the freight payable (*o*). "The shipper," said *Brett*, J., in *Hopper* v. *Burness* (*p*), "has an option to treat the proceeds of the sale as a loan; or he may say, 'You have sold my goods against my will, and though by the maritime law that is not a wrongful sale, still I am entitled to and claim an indemnity against any loss occasioned by the sale.' . . . . Though he could not claim an indemnity (in the case of loss of the ship) he could treat the transaction as a forced loan, and claim the amount of the price for which the goods were sold" (*q*). Duties of master and owners.

4thly. On the *completion of the voyage*, the master must have the vessel properly moored, report his ship and crew, exhibit his manifest and other papers to the proper officers, and deliver up the cargo to the consignee named in the bill of lading, or the indorsee, on payment (*r*) of the freight and other charges in respect thereof. These other charges are generally *primage* and *average*, the nature whereof will presently be stated; and the master need not, in general, part with the goods till they are liquidated. If, indeed, it appear from the bill of lading that the freight or other charges have been paid (*s*), he is estopped from claiming them as against the assignee of such bill of lading (*t*); nor can he detain the goods of one person for charges

(*m*) *Benson* v. *Duncan*, 3 Exch. 644. But see, in the case of a foreign ship on a charge made abroad, *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115.

(*n*) *Alers* v. *Tobin*, Abb. p. 317, n. (*i*), 12th ed., s. 10; *Atkinson* v. *Stephens*, 7 Exch. 567.

(*o*) *Campbell* v. *Thompson*, 1 Stark. 490.

(*p*) 1 C. P. D. at p. 141.

(*q*) This had been doubted in *Atkinson* v. *Stephens*, 7 Exch. at p. 578.

(*r*) *Paynter* v. *James*, L. R. 2 C. P. 348. "Under an ordinary bill of lading the freight would be payable concurrently with the delivery of the goods": *Keating*, J., in *Duthie* v. *Hilton*, L. R. 4 C. P. at p. 143; and see *The Energie*, L. R. 6 P. C. 306, at p. 314.

(*s*) Though it be by a bill which has been dishonoured: *Tamvaco* v. *Simpson*, 19 C. B. N. S. 453; L. R. 1 C. P. 363.

(*t*) *Howard* v. *Tucker*, 1 B. & Ad. 712. See Bills of Lading Act, 18 & 19 Vict. c. 111, s. 1, ante, p. 347.

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upon those of another, though he may any part of what is consigned to one and the same person for the charges upon it all (*u*). Nor will he be able to sue for primage if the goods be received under a charterparty, the terms of which exclude primage (*x*).

The manner of delivering up the goods, and consequently the period at which the master ceases to be responsible for them, depends, in the absence of agreement, on the custom of the place (*y*). In the absence of any custom upon the subject, the consignee's right has been decided to be to have reasonable time and opportunity for coming and receiving them from the ship's side (*z*). The consignee must, in the absence of a special agreement, discharge the vessel with reasonable dispatch (*a*). If the consignee send a lighter for the goods, the master must, by the custom of the river Thames, watch them in the lighter till it is fully laden (*b*), but not afterwards (*c*). In the case of a transferable bill of lading, if it be not produced, the master, after waiting a reasonable time, may deliver the goods to a third person to keep till it is produced (*d*).

In consequence of the difficulties to which a shipowner was subjected in the case of goods imported from foreign parts, peculiar powers have been conferred on him by statute (*e*). If the owner of such goods "fails (*f*) to make entry thereof," or having made entry, to land or take delivery of them at the time

(*u*) *Sodergren* v. *Flight*, Abb. p. 323, 12th ed., cited 6 East, 622.

(*x*) *Caughey* v. *Gordon*, 3 C. P. D. 419.

(*y*) *Petrococchino* v. *Bott*, L. R. 9 C. P. 355; *Marzetti* v. *Smith*, 49 L. T. 580. See when he is prevented from landing them there, *Cargo ex Argos*, L. R. 4 A. & E. 13.

(*z*) *Gatliffe* v. *Bourne*, 4 Bing. N. C. 314; *Bourne* v. *Gatliffe*, 3 M. & G. 643; confirmed on writ of error in House of Lords, 7 M. & G. 850; 11 C. & F. 45; *Ford* v. *Cotesworth*, L. R. 5 Q. B. 544; *Cunningham* v. *Dunn*, 3 C. P. D. 443.

(*a*) *Fowler* v. *Knoop*, L. R. 4 Q. B. D. 299.

(*b*) *Catley* v. *Wintringham*, Peake, N. P. C. 150.

(*c*) *Robinson* v. *Turpin*, Abb. p. 325, 12th ed.

(*d*) *Howard* v. *Shepherd*, 9 C. B. 297; *Gatliffe* v. *Bourne*, supra.

(*e*) 25 & 26 Vict. c. 63, ss. 67 *et seq.* See these sections, App., and *Glyn* v. *East and West India Dock Co.*, 7 App. Cas. 591.

(*f*) See *The Energie*, L. R. 6 P. C. at p. 316, as to the meaning of "fails."

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appointed by the charterparty or bill of lading, or if no time be specified, within seventy-two hours after the ship is reported, the shipowner is enabled to make entry of, land the goods, and place them in a wharf or warehouse, and give the wharfinger or warehouse keeper notice of his lien, for which they may be retained (*g*). They then may be detained, not only for this lien but also for rent, and in the event of the lien not being paid or deposit made for it, the wharf or warehouse owner, if required by the shipowner, is to sell (*h*) at the expiration of ninety days from the time of their deposit with him, or if the goods be perishable, at an earlier period at his discretion. Notice of this sale is to be published, and also given to the owner of the goods if he be known. The freight and other charges may then be deducted from the proceeds (*i*). In cases to which the Merchant Shipping Act does not apply, *i.e.*, goods not imported, the shipowner ceases, if the consignee does not take delivery, to hold them as carrier; he is liable only as a warehouseman (*k*).

All the duties which the law has thus imposed upon shipowners, at all events when common carriers, and their agents are, after all, no more than consequences of the general rule before stated respecting carriers (*kk*), viz., that they are responsible at common law for everything, except the act of God (*l*) and the Queen's enemies, and wear and tear, or natural decay and deterioration of goods (*m*). However, this, their common

(*g*) *The Energie*, L. R. 6 P. C. 306; *Meyerstein* v. *Barber*, L. R. 4 H. L. 317. As to his power to do this abroad, see *More Le Blanch* v. *Wilson*, L. R. 8 C. P. 227; and as to the construction of sect. 67, *The Clan Macdonald*, 8 P. D. 178; *Bereeford* v. *Montgomerie*, 34 L. J. C. P. 41. As to the duties of a shipowner after goods are landed, see *Glyn* v. *East India Dock Co.*, supra.

(*h*) Sect. 73.

(*i*) Sect. 75.

(*k*) *Crouch* v. *Great Western Ry. Co.*, 2 H. & N. 491.

(*kk*) See *Liver Alkali Co.* v. *Johnson*, L. R. 9 Ex. 338, and *Notara* v. *Henderson*, L. R. 7 Q. B. p. 236.

(*l*) As to the meaning of the phrase, see per *Mellish*, L. J., in *Nugent* v. *Smith*, 1 C. P. D. at p. 444; *Liver Alkali Co.* v. *Johnson*, L. R. 9 Ex. 338.

(*m*) *Liver Alkali Co.* v. *Johnson*, supra; *Nugent* v. *Smith*, 1 C. P. D. 423; *Blower* v. *G. W. Rail. Co.*, L. R. 7 C. P. 655; *Farrar* v. *Adams*, B. N. P. 69. As to "Queen's enemies," see *The Teutonia*, L. R. 4 P. C. 171; *Russell* v. *Niemann*, 34 L. J. C. P. 10.

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law liability, is usually narrowed by their own express stipulations in the charterparty or bill of lading, and has also been qualified by the intervention of the legislature.

The bill of lading contains, as we have seen, these words: "the act of God or the Queen's enemies (*n*), fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted" (*o*). The first two of these were, as we have seen, exceptions, even at common law. The third is made so by stat. 17 & 18 Vict. c. 104, s. 503, which enacts (*p*), that no owner of any sea-going ship, or share therein, shall be liable to make good any loss or damage which may happen without his actual fault or privity of or to any goods, merchandise, or other things whatsoever, taken in or put on board any such ship, by reason of any fire happening on board such ship.

In this clause the master is not mentioned, and it may therefore be doubtful whether his responsibility is in this case removed by the statute; but the insertion of the word "fire" in the bill of lading certainly removes it (*q*). "Fire" means fire on board the vessel; it does not extend to fire on board a lighter on which goods have been placed for the purpose of landing them (*r*). The exception "fire on board" would not exempt the shipowner from liability for general average for loss by water being poured on the cargo to extinguish a fire (*s*).

An injury by rats is not a danger or accident within this ordinary exception in the bill of lading, unless it led to sea damage; and the owner has been held liable for such damage, even though he had cats on board (*t*). He was also, like an

(*n*) See the preceding note. It is usual to except, also, "restraints of princes," as to which, see *Finlay* v. *Liverpool & G. W. S. Co.*, 23 L. T. N. S. 251.

(*o*) See ante, p. 342.

(*p*) This was a substitution for the statute 26 Geo. 2, c. 86, s. 2, which was repealed by 17 & 18 Vict. c. 120, ss. 4 and 14.

(*q*) Abb. Part 4, c. 3, s. 3, 12th ed.

(*r*) *Morewood* v. *Pollok*, 1 E. & B. 743.

(*s*) *Crooks* v. *Allan*, 5 Q. B. D. 38; *Schmidt* v. *Royal Mail S.S. Co.*, 45 L. J. Q. B. 646.

(*t*) *Laveroni* v. *Drury*, 8 Exch. 166; *Kay* v. *Wheeler*, L. R. 2 C. P. 302; and *Hamilton Fraser & Co.* v. *Pandorff*, 12 App. Cas. 518.

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ordinary carrier, liable for the felonious acts of his servants or strangers. Whence it has become not unusual to extend the exception to the acts of robbers, and sometimes thieves. But the former has been held not to apply to thefts without force (*u*), and the latter not to thefts by persons belonging to the ship (*x*).

The shipowner's contract in the case of a bill of lading, says *Willes*, J., in *Grill* v. *General Iron Screw Colliery Co.* (*y*), "is to carry with reasonable care, unless prevented by the excepted perils." Before he can avail himself of the exceptions, he must have acted with "reasonable care," and he will be responsible for the result of these, or other like excepted causes, if the loss happen through the fault of himself or the master (*z*). Thus, damage in consequence of a collision from negligence, or barratry of the crew (*a*), or bad stowage (*b*), or defective fastening of the ports (*c*), or deviation (*d*), are not within the exceptions (*e*).

The 17 & 18 Vict. c. 104, also enacts (*f*) that no owner of any sea-going ship, or share therein, shall be liable to make good any loss or damage that may happen without his actual fault or privity of or to any gold, silver, diamonds, watches, jewels, or precious stones, taken in or put on board any such ship, *by reason of any robbery, embezzlement, making away with or secreting thereof*, unless the owner or shipper thereof has, at the time of shipping the same, inserted in his bills of lading, or otherwise declared in writing to the master, or owner, of such ship, the true nature

(*u*) *De Rothschild* v. *Royal Mail S. P. Company*, 7 Exch. 734.

(*x*) *Taylor* v. *Liverpool and G. W. Steam Co.*, L. R. 9 Q. B. 546.

(*y*) L. R. 1 C. P. 600, at p. 612, cited by Lord *Herschell* in *The Xantho*, 12 App. Cas. p. 510.

(*z*) *Phillips* v. *Clark*, 2 C. B. N. S. 156.

(*a*) *Lloyd* v. *General Iron S. C. Co.*, 3 H. & C. 284; *Grill* v. *The G. I. S. C. Co.*, L. R. 1 C. P. 600; 3 C. P. 476; *The Chasca*, L. R. 4 Ad. 446; *Czech* v. *G. S. N. Co.*, L. R. 3 C. P. 14. See *ante*, p. 329.

(*b*) *Hayn* v. *Culliford*, 4 C. P. D. 182.

(*c*) *Steel* v. *State Line S.S. Co.*, 3 App. Cas. 72.

(*d*) *Scaramanga* v. *Stamp*, 5 C. P. D. 295.

(*e*) *Chartered Mercantile Bank of India* v. *N. I. S. N. Co.*, 10 Q. B. D. at p. 531, per *Brett*, L. J.; *The Chasca*, supra; and see *Dixon* v. *Sadler*, 5 M. & W. 405; *Davidson* v. *Burnand*, L. R. 4 C. P. 117.

(*f*) Sect. 503.

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and value of such articles. It is sufficient to describe the article by the ordinary name, and the value by the coin of the place of shipment (*g*). The section does not extend to foreign ships (*h*). It is the duty of shippers of goods of a dangerous character, or unsuitable for carriage, of the defects of which the shipowner cannot be aware, to give notice to the master, otherwise they will be answerable for the probable consequences of their omission (*i*).

Being frequently an insurer of the goods, the shipowner was also liable, though damage to them had resulted from the misconduct of a pilot, whom he was compelled to take on board (*j*); the stat. 17 & 18 Vict. c. 104, s. 388, therefore, enacts that no owner or *master* of any ship shall be answerable to any person whatever for any loss or damage occasioned by the default or incapacity of any qualified pilot in charge of such ship within any district where the employment of such pilot is compulsory by law (*k*). The above enactment does not require that the pilot should be compulsorily employed where the accident happened, but only that he should have been compulsorily employed within the district where it happens (*kk*). If the mischief arise partly from the neglect or misconduct of the master or crew, the owner is liable (*l*).

(*g*) *Gibbs* v. *Potter*, 10 M. & W. 70. But though it be gold dust, the value must be stated: *Williams* v. *The African S. S. Co.*, 1 H. & N. 300.

(*h*) *Gibbs* v. *Potter*, 10 M. & W. 70; *Cope* v. *Doherty*, 27 L. J. Ch. 600; *General Iron Screw Co.* v. *Schurmanns*, 29 L. J. Ch. 877.

(*i*) *Brass* v. *Maitland*, 26 L. J. Q. B. 49; *Farrant* v. *Barnes*, 31 L. J. C. P. 137. Certain statutes impose restrictions upon the shipping of dangerous or explosive goods, and confer large powers upon master and owners of vessel as to such goods. See 36 & 37 Vict. c. 85, ss. 23—28; 38 & 39 Vict. c. 17, s. 42.

(*j*) Upon general principles a shipowner, unless he be bound by contract, is not liable for the negligence or unskilfulness of a pilot whom he is *compelled* to employ either here or abroad: *The Halley*, L. R. 2 P. C. 193.

(*k*) As to when the employment of a pilot is compulsory, see *The Tyne Commissioners* v. *General Steam N. Co.*, L. R. 2 Q. B. 65; *The Calabar*, L. R. 2 P. C. 238; *The Conservators of the Thames* v. *Hall*, L. R. 3 C. P. 415; *The Hankow*, 4 P. D. 197; *The Cachapool*, 7 P. D. 217; *The Sutherland*, 12 P. D. 154; 17 & 18 Vict. c. 104, part v.; 52 & 53 Vict. c. 68.

(*kk*) *The G. S. N. Co.* v. *The B. and C. S. N. Co.*, L. R. 3 Ex. 330; 4 Ex. 238; *The Guy Mannering*, 7 P. D. at p. 134; *The Cachapool*, ibid. 217.

(*l*) *The Diana*, 1 W. Rob. 131;

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Such are the exemptions from liability conferred by this statute. It likewise contained a limitation of the amount of the shipowner's responsibility (*m*), which, however, has been repealed; and now (*n*) the owners of any ship, whether British (*o*) or foreign, without whose actual fault or privity the event has occurred (*p*), shall not—

"Where any damage or loss is caused to any goods, merchandise or other things whatsoever on board any such ship . . . . be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding 15*l.* for each ton of the ship's tonnage, nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be, in addition, loss of life or personal injury, or not, to an aggregate amount exceeding 8*l.* for each ton of the ship's tonnage"(*q*).

This tonnage, in case of sailing ships, is to be the registered tonnage, and in case of steamers, the gross tonnage (*r*). In the

Clyde Navigation Co. v. *Barclay*, 1 App. Cas. 790. As to the onus of proof, see *Clyde Navigation Co.* v. *Barclay*, supra. As to what matters are within the province of the pilot, see *The George*, 2 W. Rob. 386; *The Gipsey King*, ibid. 537; *The Batavier*, 9 Moore, P. C. Ca. 286; *The Calabar*, L. R. 2 P. C. 238; *The Guy Mannering*, 7 P. D. 132; *The Ripon*, 10 P. D. 65; and, as to the ships to which this provision extends, see *The Girolamo*, 3 Hagg. 169; *The Vernon*, 1 W. Rob. 316; *The Maria*, 1 W. Rob. 95; *The Annapolis*, 30 L. J. P. M. & Ad. 201; *The Hanna*, L. R. 1 A. & E. 283.

(*m*) Sect. 504.

(*n*) 25 & 26 Vict. c. 63, s. 54. This section also contains a limitation to the responsibility of shipowners in case of loss of life, or injury to persons, whether carried in the same or another vessel, and also in case of injury to another vessel or the goods on board of it; but these are foreign to the subject of the present chapter on "Affreightment," and are therefore omitted.

(*o*) See *The Andalusian*, L. R. 3 P. D. 182, ante, p. 195.

(*p*) *The Spirit of the Ocean*, 34 L. J. Ad. 74.

(*q*) Goods owners have no priority as regards the 8*l.* per ton over claims for loss of life in cases where the latter exceed 7*l.* per ton: *The Victoria*, 13 P. D. 125.

(*r*) 25 & 26 Vict. c. 63, s. 54. As to the measurement of tonnage, see 17 & 18 Vict. c. 104, ss. 20—24, and *The Franconia*, L. R. 3 Ad. 164. As to the claim of a cargo owner for damage arising from a collision in which both vessels were to blame, see *The Milan*, 31 L. J. Ad. 105; *The Independence*, 14 Moore, P. C. C. 103.

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case of foreign ships, they are to be measured, where practicable, by English measurement. The owners also are liable (*s*), in respect of loss or damage arising on distinct occasions (*t*), to the same extent as if no other loss or damage had arisen. If several claims are made or apprehended, an owner may apply (*u*), admitting his liability (*v*), to the Court (*x*) for the purpose of determining the amount, and distributing it rateably among the claimants, and staying any other proceedings. All sums paid in respect of losses or damage as to which the responsibility is thus limited, and all costs incurred, may be brought into account among the part owners as money disbursed for the use of the ship (*y*).

It will be observed, that only one of these sections contains any provision in favour of the master, viz., in the case of damage arising from the fault of the pilot. The exemption thus granted is unqualified in its terms; but so far as the provisions in the Merchant Shipping Act, 1854, as to the limitation of liability of shipowners, are concerned, it is declared (*z*), that nothing contained in those provisions shall be construed to lessen or take away any liability to which any master or seaman, being part owner of the ship, may be subject in his capacity of master or seaman (*a*).

Beyond these statutory exemptions, to use the language of Lord *Ellenborough* (*b*), with reference to contracts of affreightment, "no exception (of a private nature at least), which is not contained in the contract itself, can be engrafted upon it by implication as an excuse for its non-performance;" and therefore a seizure and condemnation of goods as contraband in

(*s*) 17 & 18 Vict. c. 104, s. 506.

(*t*) See *The Rajah*, L. R. 3 A. 539.

(*u*) 17 & 18 Vict. c. 104, s. 514; *Leycester* v. *Logan*, 26 L. J. Ch. 306; *L. & S. W. Rail. Co.* v. *James*, L. R. 8 Ch. 241.

(*v*) *Hill* v. *Audus*, 24 L. J. Ch. 229.

(*x*) *L. & S. W. Rail. Co.* v. *James*, L. R. 8 Ch. 241; 36 & 37 Vict. c. 66, s. 3.

(*y*) 17 & 18 Vict. c. 104, s. 515.

(*z*) Ibid. s. 516.

(*a*) If the master be sued, the owner generally cannot: *Priestly* v. *Fernie*, 3 H. & C. 977.

(*b*) *Atkinson* v. *Ritchie*, 10 East, 530, at p. 533; *Alston* v. *Herring*, 11 Exch. 822.

a foreign port, in the absence of any fraud or criminal act on the part of the freighters, will not afford a defence to the shipowner (*d*). Duties of master and owners.

Section IV.—*Duties of the Shipper.*

The merchant who has taken a ship to freight must lade her within the stipulated time; and, even if no time be expressly stipulated, must do so in a reasonable time (*f*). His duty is fulfilled if the loading be completed, though it becomes necessary to unload the vessel (*g*). He must lade her with the stipulated cargo (*h*), and must put on board no contraband goods, whereby she may be subjected to forfeiture, or goods of a dangerous nature (*i*), without notice. For a default in any of these Duties of the shipper.

(*d*) *Spence* v. *Chodwick*, 10 Q. B. 517; *Benson* v. *Duncan*, 3 Ex. 644.

(*f*) Supra, pp. 330—334; *Matthews* v. *Lowther*, 5 Exch. 574; *Kearon* v. *Pearson*, 7 H. & N. 386; see per cur., *Ford* v. *Cotesworth*, L. R. 4 Q. B. at p. 134; and see *Woolley* v. *Reddelien*, 5 M. & G. 316. As to the meaning of *safe* port, see *Ogden* v. *Graham*, 1 B. & S. 773; *The Alhambra*, 6 P. D. 68.

(*g*) *General Steam Navigation Co.* v. *Slipper*, 31 L. J. C. P. 185.

(*h*) A merchant who covenants by a charter-party to load "a full and complete cargo," is bound to put on board as much goods as the ship can carry with safety: *Hunter* v. *Fry*, 2 B. & Ald. 421. As to the meaning of "a full and complete cargo, say about —— tons," see *Morris* v. *Levison*, 1 C. P. D. 155, and *Windle* v. *Barker*, 25 L. J. Q. B. 349. As to the duties of the merchant upon the true construction of the charter-party where various goods are specified to be loaded, see *Moorsoom* v. *Page*, 4 Camp. 103; *Southampton Steam Colliery Co.* v. *Clarke*, L. R. 6 Ex. 53; *Irving* v. *Clegg*, 1 Bing. N. C. 53; *Capper* v. *Forster*, 3 Bing. N. C. 938; *Cockburn* v. *Alexander*, 6 C. B. 791; *Warren* v. *Peabody*, 8 C. B. 800. As to bringing goods "alongside," see *Fletcher* v. *Gillespis*, 3 Bing. 635. As to what is comprehended in "a full and complete cargo of oats or other lawful merchandise," see *Southampton Steam Colliery Co.* v. *Clarke*, L. R. 6 Ex. 53; *Cockburn* v. *Alexander*, 6 C. B. 791. As to when evidence of the usage of the port is admissible to explain the mode of loading, see *Cuthbert* v. *Cumming*, 11 Exch. 405; *Hudson* v. *Clementson*, 18 C. B. 213. Whether the specified quantity of an ascertained cargo is matter of description only or warranty, see *Gibbs* v. *Grey*, 2 H. & N. 22. A fire which destroys part of the cargo on board will not excuse the merchant from supplying the rest: *Jones* v. *Holm*, L. R. 2 Ex. 335.

(*i*) *Brass* v. *Maitland*, 6 E. & B. 470; *Alston* v. *Herring*, 11 Exch. 822; *Hutchinson* v. *Guion*, 5 C. B. N. S. 149; *Farrant* v. *Barnes*, 11 C. B. N. S. 553. But see *Acatos* v. *Burns*, 3 Ex.

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particulars he will be liable to make good the injury sustained in consequence, and in the last he will be subject to severe penalties, and the goods may be refused, or thrown overboard, or forfeited (*k*). He must also pay the charges due on his commodities. These are usually primage, average, demurrage, and freight.

Primage was originally a small customary payment to the master for his care and trouble. In practice it is generally treated as a part of the freight (*l*).

Average denotes several petty charges, such as towage, beaconage, &c., which it would be difficult and useless to enumerate (*m*); there is a more important charge called *General Average*, of which we shall treat in the next section.

Demurrage has been already spoken of (*n*).

Freight is the payment made for the conveyance of the merchandise (*o*) to its destination. It denotes the price of *carriage*, not of receiving goods *to be carried*; and, therefore, though a merchant may, of course, contract to pay a sum of money to a shipowner for taking goods on board, yet such payment is not, strictly speaking, *freight* (*p*). Nor, as a rule, is a sum to be paid before the expiration of the voyage freight. Freight may, however, be advanced, and such a sum is irrecoverable, though the ship and goods are lost, and the freight is not earned (*q*). On the other hand, a sum advanced as a loan upon the security of freight is recoverable (*r*). But if the advance be a part of the freight, it is by English law irrecoverable. Whether an advance be a loan or of the nature of freight is to

D. 282, where the master had the same opportunity of knowing the cargo as the shipper.

(*k*) See note (*i*), ante, p. 364.

(*l*) *Best* v. *Sanders*, 3 M. & R. 4; *Caughey* v. *Gordon*, 3 C. P. D. 419.

(*m*) What these expenses are is a matter of custom; they are often computed for a specific sum: Abbott, 12th ed. p. 345.

(*n*) See ante, pp. 330—332.

(*o*) *Lewis* v. *Marshall*, 7 M. & G. 729; *Kirchner* v. *Venus*, 12 Moo. P. C. Ca. 361.

(*p*) *Blakey* v. *Dixon*, 2 B. & P. 321; *Andrew* v. *Moorhouse*, 5 Taunt. 435; Abbott, 12th ed. p. 347; *Lidgett* v. *Perrin*, 11 C. B. N. S. 362.

(*q*) *Blackburn*, J., in *Allison* v. *Bristol Marine Ins. Co.*, 1 App. Cas. 209, at p. 229.

(*r*) *Byrne* v. *Schiller*, L. R. 6 Ex. 20, 319; *Watson* v. *Shankland*, L. R. 2 H. L. Sc. 304.

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be determined by reference to the charterparty or the conduct of the parties. The circumstance that the charterer insures such an advance is strong evidence that it is on account of freight, and that it cannot be recovered (*s*).

"Dead freight," which is often spoken of as payable by the merchant, is a conventional inaccurate expression, signifying "unliquidated compensation for loss of freight," arising, for instance, from short delivery (*t*).

It follows, from the above definition, that no freight becomes due, unless the carriage of the goods be completely performed (*u*); *e.g.*, if the cargo has not been carried to its destination (*v*). If the voyage be not completed, though from causes excepted in the contract, the freight will not be due (*w*). In consequence of this rule, when a ship has been engaged to sail from one port to another, as from A. to B. and back again, it often becomes important to know whether this employment is to be looked upon as consisting of one or of two distinct voyages; since if the ship be lost after her transit from A. to B., but before that from B. back to A. has been completed, freight will, by adopting the latter construction, be due for the carriage from A. to B., but not by adopting the former. In solving this question, the Court must be guided by the intention of the parties, as collected from the words and subject-matter of the agreement (*x*).

A *part payment* of freight may sometimes be claimed: this happens in some cases in which only part of the cargo is delivered, or part only of the voyage is performed. In the former case, if the ship were a general one, or if she were chartered for freight to be paid according to the quantity of the goods, freight is due for as much as is delivered (*y*). But if a ship chartered

(*s*) *Allison* v. *Bristol Marine Insurance Co.*, 1 App. Cas. 209, at p. 229; *Hicks* v. *Shield*, 26 L. J. Q. B. 205.

(*t*) *McLean* v. *Fleming*, L. R. 2 H. L. Sc. 128.

(*u*) *Ex parte Nyholm, In re Child*, 43 L. J. Bank. 21; *Dakin* v. *Oxley*, 15 C. B. N. S. at pp. 664, 665; *Cargo ex Argos*, L. R. 5 P. C. at p. 159. The shipowner must be ready and willing to deliver the goods: *Duthie* v. *Hilton*, L. R. 4 C. P. 138.

(*v*) *Metcalfe* v. *Britannia Ironworks Co., Limited*, 2 Q. B. D. 423.

(*w*) *Hunter* v. *Prinsep*, 10 East, 378, at p. 394.

(*x*) *Mackrell* v. *Simond*, *Byrne* v. *Pattison*, Abbott, 12th ed. pp. 393, 394; *Crozier* v. *Smith*, 1 M. & G. 407.

(*y*) *Christy* v. *Row*, 1 Taunt. 300;

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at a specific sum for the voyage, without reference to the quantity of goods, were to lose part of her cargo, it has been doubted whether freight would be payable for the remainder (*z*).

If the merchant, having the option of having his goods sent on, prefer receiving them where they are, he must pay freight *pro ratâ itineris peracti* (*a*). And this, not on the original contract of affreightment, upon which the owner, if obliged to sue, must not proceed, but under a new one, which the law *implies* from the merchant's behaviour (*b*).

And if there were any circumstances whence it could be inferred, such for instance, as an acceptance by the freighter of the remaining portion of the cargo, a new contract to pay freight *pro ratâ* might be held to arise by implication (*c*). But the mere circumstance that the owner of the goods accepted them at the intermediate port will be no proof of a new contract (*d*).

If the master, being at too great a distance from the merchant to consult him, and, acting for the best, direct a sale, having good grounds to believe it necessary, it was thought by some that there was no reason why an implied contract to pay freight *pro ratâ* should not arise on the merchant's receiving the proceeds, as it certainly will where the goods are seized, and sold by a competent prize court under a sentence which is afterwards reversed, and the proceeds restored (*e*). It has, however, long been decided that no such contract arises (*f*). "A sale under such circumstances," said *Lindley*, L. J., in *Hill* v. *Wilson* (*g*), "whether approved by the plaintiffs beforehand, or ratified

and *Mitchell* v. *Darthez*, 2 Bing. N. C. 555; not exceeding the quantity put on board, see *Gibson* v. *Sturge*, 10 Exch. 622; *Dakin* v. *Oxley*, 16 C. B. N. S. 646; *Duthie* v. *Hilton*, L. R. 4 C. P. 138.

(*z*) Malynes, Lex Mercat. p. 100; *Bright* v. *Cowper*, 1 B. & G. 21.

(*a*) Malynes, Lex Mercat. 98; *Hill* v. *Wilson*, 4 C. P. D. 329; *The Soblomsten*, 1 Ad. 293. If he *prevent* the master from re-shipping or transhipping, he will be liable to the entire freight: *The Galam*, 33 L. J. P. M. & Ad. 97; per Dr. *Lushington*, *The Soblomsten*, 1 Ad. at p. 297.

(*b*) *Luke* v. *Lyde*, 2 Burr. 882; 1 Bl. 190; *Hopper* v. *Burness*, 1 C. P. D. 137; *Metcalfe* v. *Britannia Ironworks Co.*, 2 Q. B. D. 423; *Castel* v. *Trechmann*, 1 Cab. & El. 276.

(*c*) *Mitchell* v. *Darthez*, 2 Bing. N. C. 555; *Dakin* v. *Oxley*, 15 C. B. N. S. at p. 665; *The Soblomsten*, L. R. 1 Ad. 293.

(*d*) *Metcalfe* v. *Britannia Ironworks Co.*, 2 Q. B. D. 423.

(*e*) *Baillie* v. *Moudigliani*, Park, c. 2, p. 90.

(*f*) *Vlierbloom* v. *Chapman*, 13 M. & W. 230; *Hopper* v. *Burness*, 1 C. P. D. 137.

(*g*) 4 C. P. D. at p. 335.

afterwards by claiming the proceeds of sale, is not enough by English law to render distance freight payable; see *Hopper* v. *Burness* (*g*), and the cases there cited. To have that effect the circumstances must be such as to give the owner an option of having his goods sent on to their destination, or of accepting them at an intermediate port. If, having that option, he accepts the goods at the intermediate port he is bound to pay *pro ratâ* freight." If the master sell without necessity, or refuse to forward the goods to their destination, no freight is due (*h*). And as, in the absence of express stipulation, the voyage does not commence till the ship has broken ground, her owners, if she be prevented from sailing, are entitled to no compensation for work already done, such as loading the goods on board (*i*). Duties of the shipper.

The owner will not lose his freight in consequence of an interruption, without his fault, of the voyage, which is afterwards completed, such as a capture and re-capture (*k*). If the ship and cargo be taken, re-taken, and carried by the re-captors into a port short of its destination, and there, in consequence of some legal doubt or of the merchant's delay, the ship be restored before the cargo, the owners need not wait to convey the latter to its destination, but are entitled to the freight subject to salvage (*l*).

Freight, strictly speaking, cannot exist if a person carries his goods in his own ship; and though a purchaser or mortgagee of a ship acquires a right to freight earned, he will have no claim against the owner for the carriage of his goods (*m*).

Where goods are sent in a general ship, the amount of freight depends on the agreement of the parties (*n*), or the value of the service performed, estimated according to the usage of trade in like cases (*o*). If there be a charter-party, and a gross

(*g*) Supra.

(*h*) *Hunter* v. *Prinsep*, 10 East, 378; *Liddard* v. *Lopes*, 10 East, 526; *Osgood* v. *Groning*, 2 Camp. 466; *Hill* v. *Wilson*, 4 C. P. D. 329.

(*i*) *Curling* v. *Long*, 1 B. & P. 634.

(*k*) *The Race Horse*, 3 Rob. 101; *Beale* v. *Thompson*, 3 B. & P. 405. See this question elaborately discussed, *Blasco* v. *Fletcher*, 14 C. B. N. S. 147.

(*l*) *The Race Horse*, 3 Rob. 101.

(*m*) *Keith* v. *Burrows*, 2 App. Cas. 636; *Weguelin* v. *Cellier*, L. R. 6 H. L. 286; *Swan* v. *Barber*, 5 Ex. D. 130.

(*n*) See *Brown* v. *North*, 8 Exch. 1; *Barker* v. *Windle*, 6 E. & B. 675.

(*o*) *Gumm* v. *Tyrie*, 34 L. J. Q. B. 124.

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sum is to be paid for the whole or part of a ship, it becomes due although the merchant do not provide a complete lading, or part of the cargo be lost by excepted perils (*p*). If the payment be so much per ton, it must be calculated on the number of tons the ship or part thereof contains; not on the number mentioned in the description in the charter-party (*q*), or the quantity of goods laden on board. If the payment be so much per quarter or cubic ton of the goods, this is to be calculated on the quantity loaded and carried, not on that discharged (*r*). Accordingly, where the cargo has swelled or shrunk, in the absence of usage or agreement, freight is payable on the quantity shipped (*s*). On the other hand, if the master improperly refuse to take the entire quantity of goods agreed on, he will, nevertheless, if the payment was to be per cask or bale, have a right to a compensation for what he has carried (*t*); as he will, in case of his deviating (*u*), or sailing with his ship out of repair (*x*), or not sailing according to stipulation with the first wind or convoy (*y*); the rule being, as stated by Lord *Ellenborough* (*z*), that "unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured may be compensated in damages."

The circumstance that the goods carried are injured, or that the consignee may be entitled to damages against the shipowner or mortgagee, does not deprive the shipowner of his right to

(*p*) *Robinson* v. *Knights*, L. R. 8 C. P. 465; *Merchant Shipping Co.* v. *Armitage*, L. R. 9 Q. B. 99; *Blanchet* v. *Powell's L. Collieries Co.*, L. R. 9 Ex. 74; *The Norway*, 13 L. T. N. S. 50.

(*q*) *Hunter* v. *Fry*, 2 B. & Ald. 421. See note (*h*), supra, p. 366.

(*r*) *Gibson* v. *Sturge*, 10 Exch. 622; *Buckle* v. *Knoop*, L. R. 2 Ex. 125, 333; *Speight* v. *Farnworth*, 5 Q. B. D. 115, 118; aliter if it be per quarter "*delivered*:" *Coulthurst* v. *Sweet*, L. R. 1 C. P. 649.

(*s*) *Willes*, J., in *Dakin* v. *Oxley*, 15 C. B. N. S. at p. 665.

(*t*) *Ritchie* v. *Atkinson*, 10 East, 295.

(*u*) *Bornmann* v. *Tooke*, 1 Camp. 377; *McAndrew* v. *Chapple*, L. R. 1 C. P. 643.

(*x*) *Havelock* v. *Geddes*, 10 East, 555.

(*y*) *Constable* v. *Cloberie*, Palm. 397; *Hall* v. *Cazenove*, 4 East, 477.

(*z*) *Davidson* v. *Gwynne*, 12 East, 381; at p. 389; *Dakin* v. *Oxley*, 15 C. B. N. S. 646, 665; *McAndrew* v. *Chapple*, L. R. 1 C. P. 643. And see *Clipsham* v. *Vertue*, 5 Q. B. 265.

freight if the goods have been substantially carried (*p*). "If he carry part," said Willes, J., in *Dakin* v. *Oxley* (*q*), "but not the whole, no freight is payable in respect of the part not carried, and freight is payable in respect of the part carried unless the charter-party made the carriage of the whole a condition precedent to the earning of any freight—a case which has not, within our experience, arisen in practice." Duties of the shipper.

If the agreement be to pay so much per month, week, or other aliquot part of the voyage, the merchant takes the risk of its duration, and the freight will begin to run against him from the day the ship breaks ground, and continue to do so, not only while she is at sea, but during any unavoidable delay which does not suspend the contract, *ex. gr.*, for repairs, blockade, or embargo (*r*). But if the agreement be in any other form, the owner takes the risk of the duration of the voyage, and is only entitled to the same amount, however long it may continue. If refused payment of freight the shipowner may bring back the goods to their destination. He may land and warehouse them in his own warehouse, or warehouse them in accordance with 25 & 26 Vict. c. 63, ss. 66—78 (*s*). This point is so important that we quote the judgment of the Privy Council in *Cargo ex Argos* (*t*).

"Not merely is a power given, but a duty is cast on the master in many cases of accident and emergency to act for the safety of the cargo in such manner as may be best under the circumstances in which it may be placed; and as a correlative right, he is entitled to charge its owner with the expenses properly incurred in so doing. Most of the decisions have related to cases where the accident happened before the completion of the voyage; but their Lordships think that it ought not to be laid down that all obligation on the part of the master to act for the merchant ceases after a reasonable time for the latter to take delivery of the cargo has

(*p*) *Dakin* v. *Oxley*, supra; *Meyer* v. *Dresser*, 33 L. J. C. P. 289. See *Duthie* v. *Hilton*, L. R. 4 C. P. 138.

(*q*) 15 C. B. N. S. at p. 665.

(*r*) *Havelock* v. *Geddes*, 10 East, 555; *Ripley* v. *Scaife*, 5 B. & C. 167. Compare *Gibbon* v. *Mendez*, 2 B. & Ald. 17; *Smith* v. *Wilson*, 8 East, 437; *Commercial S. S. Co.* v. *Boulton*, L. R. 10 Q. B. 346. See *Beale* v. *Thompson*, 3 B. & P. 405.

(*s*) *Cargo ex Argos*, L. R. 5 P. C. 134.

(*t*) Ibid. at p. 165.

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expired. It is well established that, if the ship has waited a reasonable time to deliver goods from her side, the master may land and warehouse them at the charge of the merchant; and it cannot be doubted that it would be his duty to do so rather than to throw them overboard. In a case like the present, where the goods could neither be landed nor remain where they were, it seems to be a legitimate extension of the implied agency of the master to hold that, in the absence of all advices, he had authority to carry or send them on to such other place as in his judgment, prudently exercised, appeared to be most convenient for their owner; and if so, it will follow from established principles that the expenses properly incurred may be charged to him."

The owner has a lien on the goods until the freight is paid, if he do not agree to waive it (*x*), have not lost it by conduct inconsistent with its continuance (*y*), or have not framed his charter-party in such a manner as to part with the possession of the vessel to the charterer (*z*). This right he will retain against the charterer or his agent with notice of the charter, though bills of lading be signed making the goods deliverable on payment of less freight (*a*). But as against assignees or consignees who have purchased or made advances on the faith of the bill of lading without notice of the charter-party, he can only retain the goods for the freight mentioned in the bill of lading (*b*). It has been held, even in case of a charter-party by which part of the freight was payable during the voyage and the rest by bills at two and four months' date from the day of the arrival of the ship in the Thames on her homeward voyage, that the charterer, having failed before the ship's return, the owner might insist on retaining a lien on the goods

(*x*) *How* v. *Kirchner*, 11 Moore, P. C. Ca. 21; *Kirchner* v. *Venus*, 12 Moore, P. C. Ca. 361; *Kern* v. *Deslandes*, 10 C. B. N. S. 205; *Gledstanes* v. *Allen*, 12 C. B. 202; *Gilkison* v. *Middleton*, 2 C. B. N. S. 134.

(*y*) *Bunney* v. *Poyntz*, 4 B. & Ad. 568; Carver, s. 679.

(*z*) See *Omoa Coal Co.* v. *Huntley*, 2 C. P. D. 464, and *Kirchner* v. *Venus*, 12 Moore, P. C. 361, as to lien for freight.

(*a*) *McLean* v. *Fleming*, L. R. 2 H. L. Sc. 128; *Gray* v. *Carr*, L. R. 6 Q. B. 522.

(*b*) *Gardner* v. *Trechmann*, 15 Q. B. D. 154; and see *Fry* v. *The C. M. B. of India*, L. R. 1 C. P. 689. As to the meaning "without prejudice to the charter-party," see *Foster* v. *Colby*, 3 H. & N. 705; *Shand* v. *Saunderson*, 4 H. & N. 381.

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for his freight (*e*). But it would seem that, in the absence of special agreement, there is no lien for freight due before delivery. The lien, too, is sometimes extended to dead freight and demurrage, but this must be by agreement The shipowner has not, in the absence of a general usage, a right to a general lien (*d*).

Whether the shipowner exercise that right or no, he may sue the charterer upon his contract to pay freight (*e*). When there is no charter-party, a contract to pay freight may generally be inferred from the fact of shipment (*f*); though the shipper may be freed from liability by the express terms of the bill of lading, or by delivery of a bill of lading, with an indorsement freeing the shipper (*g*). Where a bill of lading expressed goods to be consigned *on account and risk* of William Beckford, to Messrs. P. & W. or their assigns, *they paying freight*, the owner had a right to sue the consignor, Beckford, for freight in the absence of any evidence of a custom among merchants to the contrary. This appears to be the effect of the Bills of

(*e*) *Campion* v. *Colvin*, 3 Bing. N. C. 17. See *Saville* v. *Campion*, 2 B. & Ald. 503; *Christie* v. *Lewis*, 2 B. & B. 410. In *Campion* v. *Colvin*, the Court appears to rest its decision on the ground of *special agreement*, rather than on the general right of *lien*. "Looking," says *Tindal*, C. J., "to the intention of the parties, it is clear the shipowner meant to insist on the delivery of the bills before the delivery of the cargo; so that with respect to the time at which the freight was payable, there is no difference between this and the preceding cases." And see *Alsager* v. *St. Katherine's Dock Company*, 14 M. & W. 794, where it was held there was no lien for freight, it having been made payable "in cash two months after the vessel's inward report;" though another clause provided that the ship should deliver her cargo "on being paid freight," at 4*l.* per ton, and the charterer had become bankrupt. So in *Tanvaco* v. *Simpson*, 19 C. B. N. S. 453; L. R. 1 C. P. 363; where bills had been given which had been dishonoured.

(*d*) *Rushforth* v. *Hadfield*, 6 East, 519.

(*e*) *Tapley* v. *Martens*, 8 T. R. 451; *Christy* v. *Row*, 1 Taunt. 300; *Shepard* v. *De Bernales*, 13 East, 565; Abbott on Shipping, 12th ed., p. 355.

(*f*) *Fox* v. *Nott*, 6 H. & N. 630.

(*g*) *Domett* v. *Beckford*, 2 N. & M. 374; 5 B. & Ad. 521; overruling the opinion expressed by Lord *Tenterden* in *Drew* v. *Bird*, M. & M. 156. It might, however, be otherwise if the consignment were from vendor to vendee. (See *Barker* v. *Havens*, 17 Johns. 284, cited M. & M. 157, *in notis.*) In such a case, it might be urged that the consignor, in employing the shipowner, acted as agent for the consignee (see *Freeman* v. *Birch*, 1 N. & M. 420); and perhaps *Domett* v. *Beckford*, and the opinion of Lord *Tenterden* in *Drew* v. *Bird*, might, if this distinction were adopted, prove not completely irreconcileable.

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Lading Act, 1855 (18 & 19 Vict. c. 111), which states (sect. 2) that nothing in the Act shall affect any right to claim freight against the original shipper or owner. Where the goods were deliverable to assigns *on paying freight*, and the consignees indorsed to C. & Co., their agents, who obtained the goods, it was held, before the Bills of Lading Act, that the consignees were not liable for freight (*h*); the plaintiffs had debited C. & Co. with the freight.

At common law the consignee or the indorsee of the bill of lading may be sued if he have received the goods *in pursuance of a bill of lading, imposing* the payment of freight or demurrage upon him (*i*). "Where a cargo," said *Parke*, B., in *Young* v. *Moeller* (*j*), "is received under a bill of lading, that, though not necessarily raising a contract in law, is evidence from which a jury may infer a contract to pay freight in consideration of the captain giving up his lien on the goods." But if the consignee appears upon the face of the bill of lading to be a mere agent, no contract to become personally liable for freight can at common law be implied from his receipt of the goods under it (*k*). Nor was the acceptance of the goods *of itself* sufficient to impose charges in respect of them, although other circumstances concurring with acceptance may (*l*); such, for instance, as the previous dealings of the parties (*m*). And if there be only a bill of lading the *law* will not, from his mere receipt of goods under the bill of lading,

(*h*) *Tobin* v. *Crawford*, 9 M. & W. 716. In *Lewis* v. *M'Kee*, L. R. 2 Ex. 37; 4 Ex. 58, the consignee had indorsed the bill of lading to "W. & K. or order, &c., looking to them for all freight, &c." But there was no proof of assent by the plaintiffs discharging the consignees.

(*i*) *Wegener* v. *Smith*, 15 C. B. 285; *Weguelin* v. *Cellier*, L. R. 6 H. L. Cas. 286; *Young* v. *Moeller*, 5 E. & B. 755; *Allen* v. *Coltart*, 11 Q. B. D. at p. 785. See *Michenson* v. *Begbie*, 6 Bing. 190.

(*j*) 5 E. & B. at p. 760.

(*k*) *Amos* v. *Temperley*, 8 M. & W. 798.

(*l*) *Wilson* v. *Kymer*, 1 M. & S. 157; *Scaife* v. *Tobin*, 3 B. & Ad. 523 (consignee not liable for general average contribution); and see per *Blackburn*, J., in *Kingston* v. *Wendt*, 1 Q. B. D. 371.

(*m*) *Coleman* v. *Lambert*, 5 M. & W. 502, ubi, by *Parke*, B.: "The consignee is, primâ facie, the owner of the goods; but if he be not, he is not liable, simpliciter, as consignee, except on a new contract to pay the freight. That is evidenced in ordinary cases by the bill of lading. I accede, also, to the decision in *Wilson* v. *Kymer* (supra), that the same evidence may be deduced from the previous dealings between the parties."

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raise an implied promise from an indorsee to pay freight or charges (*n*), though it is evidence of such a promise, which may be submitted to the jury, and on which they may find it (*o*). But if there be a charter-party containing an express contract by the charterer to pay freight, referred to in the bill of lading, it is questionable whether, apart from the Bills of Lading Act, a jury would be warranted in finding an agreement on the part of the consignee or indorsee to pay freight, as the reference in the bill of lading may have been introduced simply for the purpose of keeping the charter-party unvaried, and preserving the lien for freight under it (*p*); and it is clear that the mere acceptance of goods under a bill of lading, making them deliverable to the consignee, "paying for the goods as per charter-party," does not render him liable for demurrage at the port of loading stipulated for by the charter-party (*q*).

Now the Bills of Lading Act, 1855 (*r*), s. 1, enacts that—

"Every *consignee* of goods named in a bill of lading, and every *indorsee* of a bill of lading to whom the property (*s*) in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading *had been made with himself.*"

Apparently these words would include freight to be paid in advance, but not actually so paid (*t*).

There are some cases in which an utter stranger to the contract may become chargeable with freight. Thus, if a

(*n*) *Moorsom* v. *Kymer*, 2 M. & S. 303. See *Pinder* v. *Wilks*, 5 Taunt. 612; Abb. on Shipping, p. 359, 12th ed. See, however, the statute, ante, p. 347.

(*o*) *Moeller* v. *Young*, 5 E. & B. 755, per *Parke*, B. at p. 760; *Sanders* v. *Vanzeller*, 4 Q. B. 260; *Kemp* v. *Clark*, 12 Q. B. 647; *Wegener* v. *Smith*, 15 C. B. 285. These are cases before the statute.

(*p*) *Sanders* v. *Vanzeller*, ubi sup. The lien for freight is not necessarily reserved; "without prejudice to this charter-party," may mean that the *contract* by that is to remain unvaried: *Foster* v. *Colby*, 3 H. & N. 705; *Shand* v. *Saunderson*, 4 H. & N. 381.

(*q*) *Smith* v. *Sieveking*, 4 E. & B. 945; 5 E. & B. 589; and see *Chappe* v. *Comfort*, 10 C. B. N. S. 802.

(*r*) 18 & 19 Vict. c. 111.

(*s*) See supra, p. 347.

(*t*) Carver, s. 606.

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neutral vessel, laden with the goods of one of two belligerents, be captured by the other, the ship is to be restored, and the goods confiscated, the captor paying the full freight; for he has by his own act put himself in the place of the consignee with respect to the goods, and waived the completion of the voyage (*x*). But this is only where the goods are such as a neutral ship may, by the law of nations, carry (*y*). On the other hand, if the ship be hostile, and the goods those of a neutral, the captor is entitled to the freight, if he convey them to their destination, but not otherwise (*z*).

If the ship, having performed part of her voyage, be disabled from completing the remainder, the master may, as we have seen, tranship the goods in order to convey them to their destination. In that case it was long a question whether the remainder of the voyage, after the transhipment, was to be considered as performed under the old contract or under a new one, and whether the remuneration was to be at the rate of freight originally contracted for, or on a *quantum meruit*. It is, however, now settled, that if the goods be conveyed safely to their destination, the freight paid shall be that originally contracted for. That was decided in *Shipton* v. *Thornton* (*a*), where goods shipped on board the *James Scott* at Singapore for London, under bills of lading to one Merchant, were, under circumstances of necessity, transhipped at Batavia into the *Mountaineer* and *Sesostris* under bills of lading to one Ellward or assigns. The goods arrived safe. Ellward indorsed the bills to Merchant, and he received the goods. And it was held that he was liable to the original freight as per *James Scott*, not to the freight as per *James Scott* to Batavia only, and then to the rates (which were smaller) as per *Mountaineer* and *Sesostris*.

"It may be taken," said the Court, "to be either the *duty* or the *right* of the shipowner to tranship. If it be the former, it must be so

(*x*) *The Copenhagen*, 1 C. Rob. 289.

(*y*) Abbott on Shipping, Pt. 4, ch. 9, s. 11, p. 399, 12th ed.

(*z*) *The Fortuna*, 4 C. Rob. 278; Ed. Ad. 56.

(*a*) 9 Ad. & E. 314; *Matthews* v. *Gibbs*, 3 E. & E. 282; and *Svensden* v. *Wallace*, 10 App. Cas. at p. 418.

in virtue of his original contract; and it should seem to result from a performance by him of that contract, that he will be entitled to the full consideration for which it was entered into, without respect to the particular circumstances attending its fulfilment. If it be the latter, a right to the full freight seems to be implied. The master is at liberty to tranship: but for what purpose, except for that of earning his full freight at the rate agreed on?" Duties of the shipper.

And the full freight will be due though, in fact, the shipowner has procured them to be conveyed at a less freight than that agreed for in the charter or bill of lading.

There was a question incidentally mooted in *Shipton* v. *Thornton* (*i*), on which the language of the judgment is important, viz.:—If the transhipment can only be effected at a higher than the original rate of freight, which party is to stand to the loss? The opinion of the Court appeared to be, that, in such case, the master's *right* to tranship would be at an end; but that he would become the freighter's agent to do what was most for his benefit under the circumstances; and that, consequently, if it were for the freighter's advantage that the goods should be forwarded and an increased rate of freight incurred, the freighter would be bound by his agreement to pay such increased rate (*j*). The effect of the authorities appears to be that the freighter will not be bound unless communication with him was impossible, and unless it was reasonable under the circumstances to forward the goods at the higher freight.

Where advance freight has been paid no portion of it is recoverable (*k*), though the goods or ship be lost.

Space does not permit stating the other duties of the charterer, but it may be mentioned that if the charterer is required to name a port of delivery he must do so with reasonable diligence,

(*i*) Ante, p. 377.

(*j*) See *Gibbs* v. *Grey*, 2 H. & N. 22; and see on this *Matthews* v. *Gibbs*, ubi sup.; and *Cargo ex Argos*, L. R. 5 P. C. 134, at p. 165. *Quære*, whether, the captain can charter a larger vessel and thus charge the owners for dead freight? It would seem that he cannot: Ibid.

(*k*) *Byrne* v. *Schiller*, L. R. 6 Ex. 20, 319; *Allison* v. *Bristol Mar. Ins. Co.*, 1 App. Cas. 209. But see *Dufourcet* v. *Bishop*, 18 Q. B. D. p. 378.

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and will be answerable in damages if he fails (*l*). The port named must be safe, having regard to the vessel and the cargo (*m*). The master is not bound to lighten. When, as in *Dahl* v. *Nelson* (*n*), the charter-party required the vessel to proceed to certain docks, or "so near thereunto as she may safely get," it was held that, in the circumstances, the shipowner had satisfied the obligation by proceeding to the dock gates. The docks being full, the ship could not get a discharging berth, and the dock authorities refused to allow her to enter. "The legal effect of the contract," said Lord *Blackburn* (*o*), "in my opinion, as far as regards the shipowner is, that he binds himself that his ship shall (unless prevented by some of the excepted perils) proceed to the discharging place agreed on in the charter-party. That is, in this case, the Surrey Commercial Docks (which must, I think, mean inside the docks), with an alternative 'or so near thereto as she may safely get and lie always afloat.' The legal effect, as regards the obligation on the merchant, is, I think, that he binds himself, on the ship arriving at the place where it is to deliver, to take the cargo from alongside, and for that purpose to provide the proper appliances for taking delivery there. If, as both parties wished and expected, it got to a discharging berth within the dock, the merchant was, by himself, or the dock company as his agents, to provide proper means for landing the cargo on the quay. If the ship may not get safely further than the entrance of the docks, and is entitled to require the merchant to take delivery in the river (which is what, it is said by the plaintiffs, has happened in this case), the merchant must provide lighters or other craft to take the cargo from alongside, unless it is arranged by the parties that, instead, it should go into some other dock."

(*l*) *Sieveking* v. *Maas*, 25 L. J. Q. B. 275; *Stewart* v. *Rogerson*, L. R. 6 C. P. 424.

(*m*) *The Alhambra*, 6 P. D. 68; *Allen* v. *Coltart*, 11 Q. B. D. 782.

(*n*) 6 App. Cas. 38.

(*o*) Ibid., at pp. 42, 43.

Section V.—*General Average.*

General average.

There are two charges which frequently accrue during the prosecution of the adventure, and fall sometimes on the merchant, sometimes on the owner, and sometimes on both: these are, general average (*s*) and salvage.

Whenever damage or loss is incurred by any particular part of the ship or cargo, *for the preservation of the rest* (*t*), it is called *General Average:* that is, the several persons interested in the ship, freight, and cargo, shall contribute their respective proportions to indemnify the owner of the particular part against the damage which has been incurred *for the good of all* (*u*). But the damage must be for the *general good*, or to avert a common danger (*x*); and, consequently, in order that there may be a general average, the whole adventure, that is, ship and cargo, must have been in jeopardy. The peril, too, must have been imminent. The general average loss need not, however, consist in the actual loss or injury of the subject-matter in respect of

(*s*) "In insurance law, the phrase 'general average' is commonly used to express what is chargeable on all, ship, cargo, and freight, and *particular average*, to express a charge against some one thing"; *Blackburn*, J., in *Hingston* v. *Wendt*, 1 Q. B. D. at p. 371. As to particular average, see infra, pp. 438—441.

(*t*) The definition in the text is a curtailed statement of the definition of general average given by *Lawrence*, J., in *Birkley* v. *Presgrave*, 1 East, 220, which was as follows: "All loss which arises in consequence of extraordinary sacrifices made, or expenses incurred, for the preservation of the ship and cargo, come within general average." Compare the following definition by *Brett*, L. J., in *Whitecross Wire Co.* v. *Savill*, 8 Q. B. D. at p. 662: "If there is an imminent danger, and if the captain sacrifices part in order to save the rest of the adventure, a claim for a general average contribution arises." And see the remarks of the same learned judge in *Svensden* v. *Wallace*, 13 Q. B. D. 69, p. 72. See as to the general principle, *Wilson* v. *Bank of Victoria*, L. R. 2 Q. B. 203; *Harrison* v. *Bank of Australia*, L. R. 7 Ex. 39; *Stewart* v. *West India and Pacific Steamship Co.*, L. R. 8 Q. B. 88, 362; *Achard* v. *Ring*, 31 L. T. N. S. 647; *Strang* v. *Scott*, 14 App. Cas. 601.

(*u*) *Da Costa* v. *Newnham*, 2 T. R. 407; *Williams* v. *London Assurance Co.*, 1 M. & S. 318; *Price* v. *Noble*, 4 Taunt. 123; *Oppenheim* v. *Fry*, 3 B. & S. 873; 5 B. & S. 348.

(*x*) *Job* v. *Langton*, 6 E. & B. 779; *Svensden* v. *Wallace*, 13 Q. B. D. at p. 84.

General average.

which average is claimed; it may be any expense incurred with relation to it for the common good, *e.g.*, money paid for salvage services (*y*), voluntary stranding to avoid total loss (*z*). In recent times, the chief controversy has been as to expenses incurred by a vessel putting into a port of refuge. No difficulty arises where the vessel puts in to repair original defects; expenses so incurred are not the subject of general average. But when the vessel takes refuge to avoid a common peril, the authorities are agreed that the pilotage, towing and other expenses of going in are general average expenses (*a*). Probably, too, the necessary expenses of coming out are to be so treated, if the vessel put into port owing to a general average act, and if "the going into port, the unloading, warehousing, and reloading of the cargo, and the coming out of port," were parts of one operation for the common safety (*b*). The discharge of the cargo in the port of refuge, if reasonable, having regard to the safety of the ship, will form a general average expenditure (*e*). According to the decision of the House of Lords in *Svensden* v. *Wallace* (*f*), the expense of reloading after the repairs are effected is not the subject of a general average, though the cargo was reasonably and properly, for the safety of the ship, discharged (*g*). It is to be observed that, in that case, the original damage, to repair which the vessel put

(*y*) *Anderson* v. *Ocean SS. Co.*, 10 App. Cas. 107. In *Royal Mail Steam Packet Co.* v. *English Bank of Rio de Janeiro*, 19 Q. B. D. 362, the question was whether specie, part of the cargo of a vessel, was subject to average contribution in these circumstances: the vessel ran aground and the specie was landed; afterwards the master jettisoned part of the cargo, and she was enabled to complete her voyage. Held, that the specie was not liable to contribute.

(*z*) *Barnard* v. *Adams*, 10 How. U. S. 270; *Whiteeross Wire Co.* v. *Savill*, 8 Q. B. D. 653 (pumping water into hold to extinguish fire).

(*a*) *Atwood* v. *Sellar*, 5 Q. B. D. 286; *Svensden* v. *Wallace*, 10 App. Cas. 404.

(*b*) *Atwood* v. *Sellar*, supra. But see *Svensden* v. *Wallace*, 13 Q. B. D. 69 (Lord *Esher*, M. R., *Bowen*, L. J.; diss., *Baggallay*, L. J.).

(*e*) *Svensden* v. *Wallace*, 10 App. Cas. 404.

(*f*) 10 App. Cas. 404.

(*g*) Lord *Blackburn's* reason appears to be that the captain might have transhipped, in which case the expenses would have been chargeable to freight, and that if he waits until the original ship is repaired he ought to be in no better position.

General average.

into port, was accidental, and not the subject of general average.

The loss or expense must have been voluntarily incurred; there must be some sacrifice. The cutting or casting away of something which must be lost by reason of its state, even if the whole adventure be saved, gives no claim to contribution (*h*). Masts and sails destroyed in consequence of carrying an unusual press of canvas, are not subjects of general average (*i*), though if so cut away and abandoned for the preservation of the ship, they are (*k*). Nor will the ordinary use of the vessel's tackle, engines, &c., be matter of general average.

If a ship be obliged to put into port to repair damage, and the master be compelled to hypothecate or sell a part of the cargo to enable him to effect the repairs and prosecute the voyage for the common benefit, the value of that does not form a subject for general average (*l*); it is not enough that the voyage is impeded; the ship and cargo must be imperilled. It is not settled whether, if a ship be obliged to go into port for necessary repairs, for acts the subject of general average, the wages of the seamen during the delay are subject of average (*m*). According to the majority of English authorities, *Hall* v. *Janson* (*n*) being the chief exception, general average includes, not all expenses necessary to bring the voyage and common adventure to a successful issue, but only sacrifices and expenditures for the common safety of vessel and cargo (*o*).

The injury done to a ship, the ammunition lost, or the expense of healing sailors wounded in action with the enemy, is not reimbursed, according to our law, by a general average (*p*).

(*h*) *Shepherd* v. *Kottgen*, 2 C. P. D. 585. Compare *Corry* v. *Coulthard*, cited 2 C. P. D. at p. 583.

(*i*) *Covington* v. *Roberts*, 2 B. & P. N. R. 378; *Power* v. *Whitmore*, 4 M. & S. 141. Compare *Robinson* v. *Price*, 2 Q. B. D. 295.

(*k*) *Birkley* v. *Presgrave*, 1 East, 220.

(*l*) *Hallett* v. *Wigram*, 9 C. B. 580; *Benson* v. *Duncan*, 3 Exch. 644; *Benson* v. *Chapman*, 2 H. L. Cas. 696.

(*m*) *Power* v. *Whitmore*, supra. See, *Atwood* v. *Sellar*, 5 Q. B. D. at p. 291; *Svensden* v. *Wallace*, 13 Q. B. D. 69.

(*n*) 4 E. & B. 500.

(*o*) Per *Bowen*, L. J., in *Svensden* v. *Wallace*, 13 Q. B. D. at p. 85.

(*p*) *Taylor* v. *Curtis*, 2 Marsh. 309; 6 Taunt. 608.

General average.

The owners of deck cargo, if jettisoned, are not entitled to average contribution, unless such cargo is permitted to be carried according to an established custom, or by the consent of the other owners of cargo (*q*). Nor are wrongdoers whose default led to the jettison so entitled (*qq*).

It is no answer to a claim on a general average bond or an average contribution that the ship was unseaworthy. But if the loss was occasioned by the unseaworthiness, it would be a defence (*r*).

Speaking generally, "property," says *Wills*, J., in *Royal Mail Steam Packet Company* v. *English Bank of Rio de Janeiro* (*s*), "whether ultimately saved or jettisoned, actually at risk at any time during which the operation causing loss has been going on (comprehending under that phrase all such acts as may be properly considered as forming together one whole), is liable to contribution; provided that in consequence of that operation the whole adventure be preserved from destruction; because, if it was not at risk during any part of that time, no adventure of which it formed one of the constituents was saved by the operation."

But there are exceptions. Only those objects of value which fall under the denomination of *merces* are liable, and which pay freight. Hence provisions are exempt (*t*), as is the wearing apparel of passengers. The owners contribute according to the clear value of ship and freight (*u*) at the end of the voyage, after deducting the expense thereof. Cargo stowed on deck, though not entitled to contribution if jettisoned, contributes even where by the bill of lading goods are so carried "at merchant's risk" (*x*).

(*q*) *Wright* v. *Marwood*, 7 Q. B. D. 62; *Royal Exchange Shipping Co.* v. *Dixon*, 12 App. Cas. 11; *Gould* v. *Oliver*, 4 Bing. N. C. 134; *Milward* v. *Hibbert*, 3 Q. B. 120; *Strang, Steel & Co.* v. *Scott & Co.*, 14 App. Cas. at p. 609. As to what words in a charter-party or bill of lading will exclude liability for general average, see *Burton* v. *English*, 12 Q. B. D. 218.

(*qq*) *Strang, Steel & Co.* v. *Scott & Co.*, 14 App. Cas. 601.

(*r*) *Schloss* v. *Heriot*, 14 C. B. N. S. 59.

(*s*) 19 Q. B. D. 362, at p. 372.

(*t*) *Brown* v. *Stapyleton*, 4 Bing. 119.

(*u*) But not in respect of freight paid in advance: *Frayes* v. *Worms*, 19 C. B. N. S. 159. See *Byrne* v. *Schiller*, L. R. 6 Ex. 20, 319. The charterer must contribute for that.

(*x*) *Burton* v. *English*, L. R. 12 Q. B. D. 218.

General average.

Mariners do not contribute for their wages, save in the instance of the ransom of the ship (*z*).

A consignee not owner of the goods at the time the average sacrifice was made is not bound to contribute (*a*), unless he took delivery under a bill of lading which expressed, or under circumstances which implied, a contract to pay. An owner of goods entitled to average contribution may sue other cargo owners for contribution (*b*).

As to the time and place of adjusting:—Where the voyage has been completed, or the adventure has been frustrated, all interests or goods which were at risk when the sacrifice or expenditure was made, contribute, and receive contributions, according to their value at the place; goods, for example, are valued, both for the purpose of contributing and receiving contribution, at the market prices at the place of adjustment. The value of the ship is taken at the place of adjustment before any repairs are effected (*c*). Where new work has been done, or materials supplied to the ship, the general rule is to deduct one-third of the actual cost of repairs, renewals, and materials. No deductions are made when perfectly new materials, such as ropes or sails, have been lost or sacrificed; nor for the value of anchors, provisions, &c., which do not deteriorate. Only one-sixth is deducted for the cost of new chain cables (*d*).

Goods sold at an intermediate port in the course of the voyage contribute in respect of the benefit which they have derived from the sacrifice (*e*).

As to goods jettisoned:—

"If the goods jettisoned," said *Bovill*, C. J., in *Fletcher* v. *Alexander* (*f*), "were in such a condition that they would in all probability have arrived undamaged at the place of adjustment, I see no reason why their value at the time of the jettison should

(*z*) See 27 & 28 Vict. c. 25, s. 45.

(*a*) *Scaife* v. *Tobin*, 3 B. & Ad. 523; *Hingston* v. *Wendt*, 1 Q. B. D. 367.

(*b*) *Dobson* v. *Wilson*, 3 Camp. 480.

(*c*) 2 Arnould, 903; Lowndes, 192.

(*d*) *Aitchison* v. *Lohre*, 4 App. Cas. 755, p. 762; *Pitman* v. *Universal Mar. Ins. Co.*, 9 Q. B. D. 192; Carver, 407; Lowndes, 187. See p. 474, *infra*.

(*e*) *Hill* v. *Wilson*, 4 C. P. D. 329.

(*f*) L. R. 3 C. P. 375, at pp. 383, 385; *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115.

General average.

not be taken . . . . On the other hand, it may be that if they had not been thrown overboard they would not in all probability have arrived at their destination in a sound or saleable condition . . . . The value for the purpose of contribution to general average must be taken to be what it would realize in such damaged state."

The practice is, to make an account of the articles that are to contribute, in which the property sacrificed is included, otherwise its owners would receive its value without paying towards the loss. Another account is made of the losses to be replaced: the average is then commonly adjusted by the brokers, and paid by the insurers (*g*) of the different parties chargeable; and, if there be any dispute, it may be recovered by action (*h*).

There is a lien for general average when due by the cargo (*i*), but the owners of the cargo have no lien for it on the ship (*j*).

This law of general average is of extreme antiquity, being confessedly derived from that passage in the Rhodian Code preserved by Justinian:—"Lege Rhodiâ cavetur, ut, si levandæ navis gratiâ jactus mercium factus sit, omnium contributione sarciatur quod pro omnibus datum est." It is scarcely necessary to point out the reasonableness of this regulation.

"When the ship," writes Lord *Tenterden*, "is in danger of perishing from the violent agitation of the wind, or from the quantity of water that may have forced a way into it, or is labouring on a rock or a shallow, upon which it may have been driven by a tempest, or when a pirate or an enemy pursues, gains ground, and is ready to overtake it, no measure that may facilitate the motion and passage of the ship can be really injurious to any one who is interested in the welfare of any part of the adventure, and every such measure *may* be beneficial to almost all. In such emergencies, therefore, when

(*g*) See *Dickenson* v. *Jardine*, L. R. 3 C. P. 639; *Stewart* v. *W. India & Pacific S. S. Co.*, L. R. 8 Q. B. 362.

(*h*) *Birkley* v. *Presgrave*, 1 East, 220; *Dobson* v. *Wilson*, 3 Camp. 480; *Sheppard* v. *Wright*, Shower, P. C. 23.

(*i*) See Lord *Tenterden's* judgment, *Scaife* v. *Tobin*, 3 B. & Ad. at p. 528; per cur., *Kemp* v. *Halliday*, L. R. 1 Q.B. 520; *Crooks* v. *Allan*, 5 Q. B. D. 38; Lord *Esher*, M. R., in *Huth* v. *Lamport*, 16 Q. B. D. 735, at p. 736.

(*j*) *The North Star*, 29 L. J. Adm. 73; 1 Lush. 45; *Crooks* v. *Allan*, 5 Q. B. D. 38.

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the mind of the brave is appalled, it is lawful to have recourse to every mode of preservation, and to cast out the goods in order to lighten the ship, for the sake of all. But if the ship and the residue of the cargo be saved from the peril by the voluntary destruction or abandonment of part of the goods, equity requires that the safety of some should not be purchased at the expense of others, and therefore all must contribute to the loss" (*i*).

The jurists of the middle ages sought to fritter away this useful law, by prescribing various, and sometimes intricate, forms to be observed on the occasion of the jettison. But, as Lord *Tenterden* has remarked,

"The regulations prescribed by persons at ease in the closet or senate-house will seldom be followed at the moment when life or liberty is in jeopardy—at such a moment every one present will exclaim, with the friend of Juvenal:—

'Fundite quæ mea sunt—etiam pulcherrima.'

And, provided that the jettison have been the effect of danger and the cause of safety, all writers agree that contribution ought to be made, although the forms have not been complied with" (*k*).

Indeed Emerigon, to whom his Lordship refers, cites a remark of Parga, who says, that during sixty years' experience as a Genoese magistrate, he had met with but five instances of regular jettison, all of which were suspected of fraud, because the forms had been too accurately observed.

The following tables show what matters may, according to the recent cases, be the subject of general average contribution:—

GENERAL AVERAGE CONTRIBUTION.

What allowed.

April, 1877. (C. A.)	Spars and cargo consumed as fuel for an engine used in pumping where the ship springs a leak in consequence of heavy weather. (*Robinson* v. *Price*, 2 Q. B. D. 295.)
March, 1882. (C. A.)	Damage to cargo by water used to extinguish fire. (*The Whitecross Wire Co.* v. *Savill*, 8 Q. B. D. 653.)

(*i*) Abbott, 12th ed. pp. 499—503. (*k*) Abbott, 12th ed. p. 503.

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Dec. 1879. Goods injured by water to extinguish fire, even though there be a clause in the bill of lading that the shipowner is not to be liable to any damage to goods capable of being covered by insurance. (*Crooks* v. *Allan*, 5 Q. B. D. 38.)

April, 1881. Loss of freight arising from cargo damaged by water used to extinguish fire. (*Pirie* v. *Middle Dock Co.*, 44 L. T. N. S. 426.)

Dec. 1883. (C. A.) Deck cargo of timber carried at full freight, but "at merchant's risk," if cargo be carried on deck by custom, and jettisoned. (*Burton* v. *English*, 12 Q. B. D. 218.)

What not allowed.

May, 1878. Salvage expenses incurred merely in the shipowner's own interest. (*Schuster* v. *Fletcher*, 3 Q. B. D. 418.)

Expenses incurred in the identification of goods mixed during voyage. (*Ibid.*)

Expenses of sale of unidentified goods. (*Ibid.*)

Nov. 1877. (C. A.) Cutting away a mast where the mast is a wreck and valueless when cut away, and must have been lost in any event. (*Shepherd* v. *Kottgen*, 2 C. P. D. 585.)

May, 1881. (C. A.) Deck cargo where there is no custom to carry deck cargo, and where it is not a coasting voyage. (*Wright* v. *Marwood*, 7 Q. B. D. 62.)

PORT OF REFUGE EXPENSES.

Where the Original Damage was a Subject of General Average; e. g., the Cutting Away of a Mast.

Towage, Pilotage, and Port Dues *inwards*—admitted as General Average (*l*).

Expenses of unloading the Cargo—admitted as General Average (*l*).

Expenses of warehousing Cargo—admitted as General Average (*m*).

Expenses of reloading Cargo—admitted as General Average (*m*).

Pilotage and Port Dues *outwards*—admitted as General Average (*m*).

Where the Original Damage was a Subject of Particular Average; e. g., a Dangerous Leak caused by a Tempest.

Towage, Pilotage, and Port Dues *inwards*—admitted as General Average (*n*).

(*l*) *Atwood* v. *Sellar*, 5 Q. B. D. 286; *Svensden* v. *Wallace*, 13 Q. B. D., pp. 76, 87.

(*m*) *Atwood* v. *Sellar*, supra; but see *Svensden* v. *Wallace*, 10 App. Cas. 404.

(*n*) *Svensden* v. *Wallace*, 10 App. Cas. 404, p. 412.

Expenses of unloading the Cargo—admitted as General Average (*g*). General average.
Expenses of reloading Cargo—not admitted as General Average (*h*).
Pilotage and Port Dues *outwards*—not admitted as General Average (*h*).

Section VI.—*Salvage.*

Salvage.

Salvage is defined to be a compensation to be made by the shipowner or merchant, to other persons, by whose assistance the ship or its lading may be saved from impending peril, or recovered after actual loss (*i*). The policy, as well as justice, of awarding such a compensation is so obvious, that it has been in all ages allowed by the codes of all civilized nations. *Salvage* may become due upon rescue (*k*), either from the perils of the sea, or from the hands of enemies (*l*). The property in respect of which salvage is claimed must be salved or saved (*m*). Even when there is a request and an agreement, the presumption is to hold that nothing is due unless something more than life is saved (*n*). Though there need not be actual or imminent danger to found a claim for salvage, there must be the possibility of destruction if the services are not performed (*o*). Towage, as a rule, gives no such claim; and the seamen or crew of a vessel, whose duty is to do the best they can, are not, in ordinary circumstances, entitled to it. But a tug engaged to tow, or a pilot, or even seamen, may be entitled to salvage if unforeseen perils arise and unusual services are performed. The test, as stated in one case in which pilots claimed salvage, is, "Were the acts of the pilots, by reason of the weather and the position of the ship, made so different in danger or responsibility from the ordinary acts of service of pilots, as that no fair and reasonable owner would have insisted on requiring such service for other than

(*g*) *Svensden* v. *Wallace*, 10 App. Cas. 404, p. 412.

(*h*) *Svensden* v. *Wallace*, 10 App. Cas. 404, at p. 416.

(*i*) Adopted by *Lindley*, L. J., in *The City of Chester*, 9 P. D. 182, at p. 201; Abb. Shipp. 12th ed. p. 536. See *The Chetah*, L. R. 2 P. C. 205. In *Raft of Timber*, 2 W. Rob. 251, timber was salvaged.

(*k*) *The Ed. Hawkins*, 31 L. J. Adm. 46.

(*l*) 13 & 14 Vict. c. 26; 27 & 28 Vict. c. 25, ss. 40, 41.

(*m*) *The Killeena*, 6 P. D. 193; *The Renpor*, 8 P. D. 115.

(*n*) The remarks in *The Renpor*, supra, seem irreconcilable with the judgment in *The Undaunted*, Lush. 90.

(*o*) Dr. *Lushington* in *The Charlotte*, 3 W. Rob. at p. 71; approved in *The Strathnaver*, 1 App. Cas. 58.

Salvage.

salvage reward?" (*p*). If a contract for specified and agreed salvage services—*e. g.*, to take the vessel to a particular port—cannot be performed by reason of supervening circumstances, such as the coming on of a hurricane, the salvors may recover for salvage services actually rendered (*pp*). There is no distinction between river and sea salvage (*q*). Originally salvage was not due for saving life without property. This, however, has been altered by statute (*r*).

When the rescue is from dangers of the sea, the salvor or rescuer has a lien on the goods preserved (*s*), and formerly might have kept them till a recompense had been made to him (*t*); but now, when the salvage of wreck occurs in the United Kingdom (*u*), they are to be delivered to, and taken charge of by, the receiver appointed by the Board of Trade, who may detain (*x*) them until satisfaction is made of the salvage, or security has been given by the owner for its payment. The amount of this recompense might, too, if the parties did not agree, have been ascertained by a jury in an action brought by the salvor against the owner of the goods, or by the owner of the goods (having first tendered what he thought sufficient) against the salvor (*y*). In most cases, the Admiralty Division will, on suit brought, fix the amount of salvage to be paid, and take care of the property *pendente lite* (*z*). If the parties have made an agreement as to salvage, the Court will enforce it, unless

(*p*) *Ackerblom* v. *Price*, 7 Q. B. D. 129, at p. 133.

(*pp*) *The Westbourne*, 14 P. D. 132.

(*q*) *Vivian* v. *Mersey Docks Board*, L. R. 5 C. P. at p. 28, per *Willes*, J.

(*r*) 17 & 18 Vict. c. 104, s. 458, and 24 & 25 Vict. c. 10, s. 9; *Cargo ex Schiller*, 2 P. D. 145; *Brett*, L. J., in *Ackerblom* v. *Price*, 7 Q. B. D. at p. 133.

(*s*) And so has the shipowner who pays salvage: *Briggs* v. *The Merchant Traders' Association*, 13 Q. B. 167; *Hingston* v. *Wendt*, L. R. 1 Q. B. D. at p. 373.

(*t*) *Hartfort* v. *Jones*, 1 Ld. Raym. 393; *Baring* v. *Day*, 8 East, 57.

(*u*) 17 & 18 Vict. c. 104, ss. 441, 443, 450, 468. *The Zeta*, L. R. 4 Ad. 460. As to the course to be pursued in case of salvage by Her Majesty's ships *abroad*, see 17 & 18 Vict. c. 104, ss. 486 et seq.

(*x*) 17 & 18 Vict. c. 104, s. 468; and in case of wreck, unless this be done, the right to salvage will be forfeited.

(*y*) Abb. Shipp. 12th ed. 537; but now see 17 & 18 Vict. c. 104, s. 460.

(*z*) 17 & 18 Vict. c. 104, ss. 460, 468, 476; 24 & 25 Vict. c. 10. See *The Rasche*, L. R. 4 Ad. 127. As to the limit of the amount it will award, see *Gore* v. *Bethel*, 12 Moore, P. C. Ca. 189.

Salvage.

manifestly unfair; but if the agreement be such, the Court will decree what remuneration, having regard to the value of the property sold and the nature of the services, is reasonable (*a*). The powers of the Court may, under the County Courts Admiralty Jurisdiction Act (*b*), be conferred on a county court in all cases where the value of the property saved does not exceed 1,000*l.*, or the amount claimed does not exceed 300*l.*, or the parties agree in writing that the Court shall have jurisdiction.

Besides these jurisdictions, a tribunal for the summary adjustment of salvage in certain cases has from time to time been provided by several statutes (*c*). By the Acts now in force, upon any dispute arising as to the amount of salvage within the United Kingdom which the parties cannot agree to settle, if the sum claimed does not exceed 200*l.*, or upon such a dispute, whether the services were rendered in the United Kingdom or not, where the value of the property saved does not exceed 1,000*l.* (*d*), it shall be referred to two justices, in the case of wreck, resident near where it is found, or, in the case of services to any ship or boat, or her cargo, &c., resident near the place where she is lying, or into which she is first brought after the accident, or to any stipendiary magistrate or county court judge. If the sum claimed exceed 200*l.*, the dispute may be referred to two justices, if the parties consent; if not, it is to be decided by the High Court, upon the application of either the salvors or owners. But if the claimants do not recover more than 200*l.* they will not recover costs, unless the Court certifies that it was a fit case for the Superior Court. If it be referred to two justices, they may (*e*) call in a person conversant with maritime affairs as assessor, or, whether they differ or not, appoint such a person sole umpire to decide the matter, and they, or he, will

(*a*) *Ackerblom* v. *Price*, 7 Q. B. D. 129; *The Silesia*, 5 P. D. 177. See also *Anderson* v. *Ocean Steam Ship Co.*, 10 App. Cas. 107, as to power of master to bind cargo owners by a salvage agreement.

(*b*) 31 & 32 Vict. c. 71, ss. 1, 2, 3; *The Glannibanta*, 2 P. D. 45.

(*c*) 12 Ann. stat. 2, c. 18 (repealed); 26 Geo. 2, c. 19 (repealed); 49 Geo. 3, c. 122 (repealed); 53 Geo. 3, c. 87 (repealed); 1 & 2 Geo. 4, cc. 75 (repealed) and 76. See 17 & 18 Vict. c. 120, s. 4; 9 & 10 Vict. c. 99, s. 21 (repealed).

(*d*) 25 & 26 Vict. c. 63, s. 49.

(*e*) 17 & 18 Vict. c. 104, s. 461.

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have perfect discretion as to the costs (*f*). Against any award thus made there is an appeal to the High Court, where the sum in dispute exceeds 50*l.* (*g*). These regulations do not apply to the Cinque Ports (*h*), where a summary jurisdiction is, however, provided by stat. 1 & 2 Geo. 4, c. 76 (*i*).

When ship, cargo, and freight are benefited by salvage services, all are bound to contribute (*j*). Passengers' wearing apparel and their personal effects are not liable to contribution (*k*).

With respect to *salvage* from enemies, the law formerly was, that where a ship was taken and re-taken before the captor had conducted her *infra præsidia*, or, at all events, before he had obtained a sentence of condemnation against her, the original owner had a right to her again on paying salvage to the re-captors. But, if not re-taken till a later period, she was deemed to have become the absolute property of the captors, and consequently the lawful prize of the re-captors; the original owner's possibility of reinstatement, or his right of *postliminium*, being considered extinguished by the carriage *infra præsidia*, or sentence of condemnation (*l*). This rule was, however, altered by the Legislature in favour of the original owner of the captured property, who is now entitled to have it again on payment of salvage of one-eighth, no matter at what period the re-capture may have taken place (*m*); and the benefit of this alteration is extended to the allies of Great Britain, whose vessels have been captured by the enemy and re-captured by British ships, unless, indeed, it appear that those allies themselves act towards British property on a less liberal principle; for, in that case, our Courts adopt *their* rule, and mete to them according to their own measure of justice (*n*).

(*f*) 17 & 18 Vict. c. 104, s. 462.

(*g*) Id. s. 464. *The Generous*, L. R. 2 A. & E. 57.

(*h*) Id. s. 460.

(*i*) And see 9 & 10 Vict. c. 99, s. 42, and 9 Geo. 4, c. 37. With regard to appeals in such cases, see 3 & 4 Vict. c. 65, s. 5; and as to small salvage claims, see 25 & 26 Vict. c. 63.

(*j*) *The Fusilier*, 3 Moo. P. C. C. N. S. 51.

(*k*) *The Willem III.*, L. R. 3 A. & E. 487. See Lowndes on General Average, 3rd ed., 212.

(*l*) See case of *L'Actif*, 1 Edw. 185.

(*m*) 27 & 28 Vict. c. 25, s. 40, which relates to the ships or goods belonging to Her Majesty's subjects.

(*n*) *Sir W. Scott's* judgment in *The Santa Cruz*, 1 C. Rob. 63; Wheaton's

Salvage.

The amount of salvage on re-capture has at various times been variously regulated by statute. In 1793, it was fixed at *one-eighth* for the Royal Navy, and *one-sixth* for private ships (*o*). By the Naval Prize Act, 1854 (27 & 28 Vict. c. 25), s. 40, the rate of salvage is fixed at one-eighth of the value. But the Prize Court may, when the re-capture has been effected under circumstances of special difficulty or danger, award a larger proportion, not exceeding one-fourth.

International Law, edited by Lawrence, 653.

(*o*) 33 Geo. 3, c. 66.

CHAPTER IV.

MARITIME INSURANCE.

SECT. 1. *Definition and Nature of the Contract.*
2. *The Parties, or who may be Insurers and Insured.*
3. *Subject-matter, or what may be Insured.*
4. *The Policy.*
5. *Results of Contract.*
6. *Proceedings on the Contract.*

SECTION I.—*Definition and Nature of the Contract.*

Definition and nature of the contract.

INSURANCE is a contract by which one person, in consideration of a premium, undertakes to indemnify another against a particular loss (*a*). The object of the contract in marine and fire insurances is that, in case of loss, the person insured shall be fully indemnified, but no more.

Contracts of life insurance, however, are, as we shall see hereafter, not contracts of indemnity (*b*); they are contracts to pay a specified sum in a certain event. Even contracts of marine insurance are not always contracts of *perfect* indemnity; the assured may recover more or less than the sum which would actually compensate him (*c*). Thus, under a valued policy, that is, where the value of the thing insured has been agreed on between the parties, if there has been a total loss of the thing insured, the assured, who has an insurable interest, recovers, in the absence of fraud, the sum agreed upon, which may be in

(*a*) 2 Bl. Com. 458; and see *Brett*, L. J., in *Castellain* v. *Preston*, 11 Q. B. D. at p. 386.

(*b*) See p. 493, infra.

(*c*) *Irving* v. *Manning*, 1 H. L. C. 287; *Aitchison* v. *Lohre*, 4 App. Cas. 755, at p. 761; *Marine Insurance Co.* v. *China Transpacific Co.*, 11 App. Cas. 573. See Lord *Herschell's* remarks at p. 588.

Definition and nature of the contract.

excess of the true value of the thing lost (*c*). On the other hand, the value of the thing lost may be in excess of the agreed value, yet the assured does not recover more than the sum in respect of which he paid a premium. It is an implied term in a contract of marine insurance that, in case the assured repair the damage to a ship of a certain age and character, the loss shall be estimated at two-thirds of the cost of the repairs, neither more nor less. It is evident that this can seldom be the accurate measure of the loss. Subject to these qualifications the foundation of insurance law is that, in marine and fire insurances, the assured, in case of a loss against which the insurance is made, shall be fully indemnified, but shall never be more than fully indemnified (*d*).

The instrument in which the contract of insurance is set forth is called the *policy*. The party who undertakes to indemnify is called the *insurer*, and, having subscribed the policy, the *underwriter*. The party indemnified is termed the *insured* or *assured*. The subject-matter of insurance is very extensive, since any description of interest may be insured against any species of danger; save only where the contract would be opposed to the common law, or to some statute (*e*). The three principal species of insurance, which will alone be taken notice of in this Treatise, are—1. Maritime insurance; 2. Insurance on Lives; 3. Insurance against Loss by Fire.

Maritime Insurance takes place when a merchant gives a premium to others to assure his ship or goods, from one port or place to some other port or place, on such terms as they agree to. Usually, there are several underwriters to each policy of marine insurance, each making himself responsible for a part only of the amount for which the insurance is effected. If the ship or goods, &c., perish, or are lost in whole or in part, every subscriber is to make a recompense either to the extent of his subscription, or *pro ratâ* in proportion thereto, "whereby," says

(*c*) See pp. 409, 410, infra.

(*d*) Per *Brett*, L. J., in *Castellain* v. *Preston*, ubi supra.

(*e*) *Wilson* v. *Rankin*, L. R. 1 Q. B. 162. The statute upon which this case was decided, viz., 16 & 17 Vict. c. 107, ss. 170, 171, 172, which forbade the loading of timber on deck, has since been repealed.

Definition and nature of the contract.

the statute 43 Eliz. c. 12 (*f*), "on the loss or perishing of any ship, there followeth not the undoing of any man, but the loss lighteth rather easily on many than heavily upon a few." Thus, if an insurance effected for 1,000*l.* be subscribed by five underwriters for 200*l.* each, in the event of a loss to the full amount of 1,000*l.* each underwriter pays 200*l.* only; if the loss be only-partial, for instance, to the extent of 250*l.* only, each underwriter pays 50*l.* only.

This contract, which was introduced into England by the Italians (*g*), appeared of so much importance to the legislature in the reign of Elizabeth, that, by the statute 43 of that Queen, c. 12 (*f*), the Chancellor was empowered to issue a commission, appointing the Recorder of London, the Judge of the Admiralty, two doctors of the civil law, two common lawyers, and three merchants, to form a court, of whom three were to be a quorum, who were to adjudicate on all controversies arising out of policies. But this jurisdiction, proving defective in many respects, soon fell into disuse, especially after it had been decided by the Court of Upper Bench, in *Came* v. *Moye* (*h*), that a judgment in the Court of Policies in the defendant's favour was no bar to a subsequent action against him for the same cause.

Insurance is always considered a contract *uberrimæ fidei*, and receives a liberal construction (*i*), for the benefit of trade and of the assured.

Section II.—*The Parties to a Contract of Insurance.*

The parties to a contract of insurance.

At common law, any individual, partnership, or corporation, might have become *insurers*. By stat. 6 Geo. 1, c. 18, the King was empowered to erect two chartered companies, viz., the Royal Exchange Assurance and London Assurance Companies, for insuring ships, and lending money on bottomry; and by the

(*f*) Repealed by Statute Law Revision Act, 1863.

(*g*) As to its history, see Malynes Lex Mercatoria, 106.

(*h*) 2 Sid. 121.

(*i*) 2 Wms. Saund. 200, in notis. See *Blackburn, Low, and Co.* v. *Vigors*, 12 App. Cas. 531.

12th section of that Act, a monopoly was conferred upon them, as against all, excepting individual underwriters (*k*); of which, however, they have since been deprived, and the common law on this subject is restored, by stat. 5 Geo. 4, c. 114 (*l*).

The parties to a contract of insurance.

Policies are often issued by mutual insurances or clubs. If composed of more than twenty members, they must be registered under the Companies Acts, and policies issued by them must conform to the requirements of 30 & 31 Vict. c. 23, s. 7 (*m*).

Any person, whether British or alien, may, generally speaking, be *insured*. No policy, however, can be effected, nor action maintained, by or on behalf of an *alien enemy* during war (*n*); unless, indeed, his ship be protected by the royal licence, in which case any person who effected the insurance as his trustee may sue (*o*). A neutral part-owner of goods, the residue of which belongs to one who, before the action, though subsequently to the loss, became an enemy, may sue on an insurance of his own share (*p*).

Whether a person is an alien enemy depends upon his domicile (*q*). An English subject living and trading *under the protection and for the benefit* of a foreign state, is looked on, if that state be hostile, as an enemy; if it be neutral, as a neutral (*r*). But it does not follow, that because a British or neutral merchant happens to be resident in an enemy's country, goods to be delivered for him at a neutral or friendly port are, on that account, uninsurable (*s*). Nor does the military occupation of a country by our enemies, *ipso facto*, constitute the natives of that

(*k*) Clifford's History of Private Bill Legislation, vol. 2, pp. 571 et seq.

(*l*) Almost all the policies effected in London by individual underwriters are effected with members of "Lloyd's," who are now incorporated and regulated by 34 Vict. c. xxi.

(*m*) Post, p. 408; *In re Arthur Average Association*, L. R. 10 Ch. 542; *Marine Mutual Ins. Association* v. *Young*, 43 L. T. 441.

(*n*) *Brandon* v. *Nesbitt*, 6 T. R. 23; *Bristow* v. *Towers*, 6 T. R. 35. See *Flindt* v. *Waters*, 15 East, 260.

(*o*) *Kensington* v. *Inglis*, 8 East, 273; recognised *Flindt* v. *Waters*, 15 East, 260.

(*p*) *Rotch* v. *Edie*, 6 T. R. 413. See the remarks on that case in the notes to *Bromley* v. *Hesseltine*, 1 Camp. 75.

(*q*) *The Indian Chief*, 3 C. Rob. 12; 1 Phillips' Law of Insurance, s. 153.

(*r*) *M'Connell* v. *Hector*, 3 B. & P. 113; *Willison* v. *Patteson*, 7 Taunt. 439; *The Gerasimo*, 11 Moo. P. C. C. 88.

(*s*) *Bromley* v. *Hesseltine*, 1 Camp. 75.

The parties to a contract of insurance.

country also enemies (*t*). There must be some public act indicative of the intention to conquer or acquire the territory.

Under the head of *Parties*, it seems proper to remark, that subscriptions to a policy are almost always procured by a *Broker* (*u*), concerning whom the practice is, that the underwriters, to whom, in most instances, the insured are unknown, look to the broker for the payment of the premium, and he to the insured. The latter pay the premiums to the broker only, and he is a middle-man between the insured and underwriter. But he is not solely an agent; he is a principal to receive the money from the insured, and pay it to the underwriter (*x*). The mode in which this payment, and the payment made to the insured in case of loss, is usually effected, is described in *Stewart* v. *Aberdein* (*y*), *Sweeting* v. *Pearce* (*z*), *Beckwith* v. *Bullen* (*a*), and *Xenos* v. *Wickham* (*b*).

"The broker now keeps two accounts with underwriters, called the 'credit account' and the 'cash account.' Till within a few years, only one account was kept, which was that now called the credit account. When the slip for any particular policy is signed, it is arranged between the broker and underwriter whether the premium is to go into the 'credit account,' or the 'cash account.' In either case the broker becomes debtor to the underwriter for the premium at once; but the time and manner of the payment are different in the two cases. If the premium goes into the 'credit account,' it is not payable till the end of the year. If, before the end of the year, any claim arising on one of the policies in the credit account is adjusted by the broker and underwriter, the broker on the adjustment has credit in the account against the under-

(*t*) *Hagedorn* v. *Bell*, 1 M. & S. 450; *Sorensen* v. *R.*, 11 Moo. P. C. C. 141; *The Gerasimo*, supra.

(*u*) In the absence of any precise instructions, it is the duty of the broker to procure the policy to be made and to obtain it from the insurers within a reasonable time; and he will be liable in an action for an omission to do this. If he seeks to excuse himself on the ground of the impossibility of finding persons willing to undertake the risk, or any other justifiable ground, *he* must set that up. See *Turpin* v. *Bilton*, 5 M. & G. 455; *Smith* v. *Price*, 2 F. & F. 748; *Hurrell* v. *Ballard*, 3 F. & F. 445.

(*x*) *Power* v. *Butcher*, 10 B. & C. 329. See a very clear explanation of this doctrine by Lord *Ellenborough*, C. J., in his judgment in *Jenkins* v. *Power*, 6 M. & S. 282.

(*y*) 4 M. & W. 211. See ante, p. 155.

(*z*) 7 C. B. N. S. 449; 9 ibid. 534.

(*a*) 8 El. & Bl. 683.

(*b*) 14 C. B. N. S. 435.

writer for the amount of the loss thus adjusted, if the account is good for that amount; and at the end of the year, and not till then, the balance on the account, and the balance only, is due in cash from the broker to the underwriter, under a discount of 12 per cent. If the premium, instead of going into the credit account, goes into the cash account, the custom is the same, except that the account is settled and the balance is due in cash at the end of each month instead of the end of the year, and the balance is paid under a small discount."

The parties to a contract of insurance.

Such is the account of the practice in *Beckwith* v. *Bullen* (*d*).

Section III.—*The Subject-matter, or what may be Insured.*

At common law, an interest on the part of the insured in the subject-matter of the insurance was not absolutely requisite, and might have been dispensed with by a policy containing the words *interest or no interest;* though, in the absence of such words, it was understood to exist, and must have been proved (*e*). But by stat. 19 Geo. 2, c. 37, s. 1, it is enacted that

The subject-matter, or what may be insured.

"No assurance or assurances shall be made by any person or persons, bodies corporate or politick, *on any ship or ships belonging to his Majesty or any of his subjects*, or on any goods, merchandises, or effects laden or to be laden on board any *such* ship or ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer, and every such assurance shall be null and void to all intents and purposes."

By sect. 2, however, "assurance on private ships of war, fitted out by any of his Majesty's subjects solely to cruise against his Majesty's enemies, may be made by or for the owners thereof, interest or no interest, free of average, and without benefit of salvage to the assurer;" and by sect. 3, any merchandises or effects from any ports or places in Europe or America, in possession of the crowns of Spain or Portugal, may

(*d*) 8 E. & B., at p. 685.

(*e*) See *Cousins* v. *Nantes*, 3 Taunt. 513; *Lucena* v. *Crauford*, 3 B. & P. at p. 101, per *Chambre*, J.; *Saddlers' Co.* v. *Badcock*, 2 Atk. at p. 556, per Lord *Hardwicke*.

The subject-matter, or what may be insured.

be insured in the same manner as if this Act had not been made. It will be observed that, in consequence of the words printed in italics, foreign ships are not within the statute (*f*).

A policy not conforming to this statute is called a *Wager Policy*, and is void (*g*). In the recent case of *Berridge* v. *Man On Insurance Co.* (*h*), a policy insuring cash advances on a ship, containing the term "full interest admitted," was held to be avoided by the statute. Its operation is not limited to policies upon "ships, goods, merchandises, and effects." Wherever the subject-matter of a policy is such that, if ships, goods, merchandises, or effects at risk are lost, the subject-matter of the policy will be lost,—the policy is within the statute. Thus, in the case last mentioned (*i*), a policy insuring *cash advances* on a ship was deemed to be within the statute, although "cash advances" are not there named, because the cash advances would be lost if the ship were lost. In ordinary cases, therefore, it is now requisite that the subject-matter of insurance should be one in which the insured is *interested*, and, of course, it must be such as it is possible to have an interest in; and it has been decided, that, if the insured has before the loss assigned away his interest, *e. g.*, by selling the vessel insured, he cannot sue upon the policy for his own benefit, nor as trustee for the assignee, unless the policy was expressly or impliedly assigned (*k*). The most satisfactory account of what is an insurable interest is that given by *Lawrence*, J., in *Lucena* v. *Crauford* (*l*):—

"A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it, and whom it importeth that its condition as to safety or other quality should continue; interest does not necessarily imply a right to the whole or any part of a thing, nor necessarily and exclusively that which may be the subject of privation, but the having some

(*f*) *Thellusson* v. *Fletcher*, 1 Doug. 315; *Craufurd* v. *Hunter*, 8 T. R. 13; *Nantes* v. *Thompson*, 2 East, 385. But now see 8 & 9 Vict. c. 109, s. 18, post, p. 407.

(*g*) Apart from statute 19 Geo. 2, c. 37, a policy may be void by reason of 8 & 9 Vict. c. 109. See post, p. 407.

(*h*) 18 Q. B. D. 346.

(*i*) *Berridge* v. *Man On Ins. Co.*, 18 Q. B. D. 346, following *Smith* v. *Reynolds*, 1 H. & N. 221; 25 L. J. Ex. 337 (profits on goods); *De Mattos* v. *North*, L. R. 3 Ex. 185; *Allkins* v. *Jupe*, 2 C. P. D. 375.

(*k*) *Powles* v. *Innes*, 11 M. & W. 10.

(*l*) 2 B. & P. N. R. 269, at p. 302.

relation to, or concern in, the subject of the insurance, which relation or concern, by the happening of the perils insured against, may be so affected as to produce a damage, detriment, or prejudice to the person insuring. And where a man is so circumstanced with respect to matters exposed to certain risks or dangers as to have a moral certainty of advantage or benefit but for those risks or dangers, he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing, is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction."

The subject-matter, or what may be insured.

"I know no better definition,"

says *Blackburn*, J., in *Wilson* v. *Jones* (*l*),

"of an interest in an event than that by *Lawrence*, J., that if the event happens, the party will gain an advantage; if it is frustrated, he will suffer a loss."

"In order to constitute an insurable interest against any peril,"

says Phillips, in his work on the Law of Marine Insurance,

"or render a subject insurable against any peril, it must be such an interest or subject that the peril may have a direct effect upon it, instead of a remote, circuitous, consequential effect" (*m*).

Ships, goods, a special property therein, *e. g.*, that of a carrier (*n*) and charterer (*o*), or a shipper, who makes the bill of lading deliverable to himself and indorses it to his own agent, or attaches it to a negotiable bill of exchange as a security in the hands of the holder of the bill (*p*), vendor's lien after stoppage *in transitu* (*q*), money expended by a captain for the ship's use, his commission and privileges (*r*), expected profits (*s*), bottomry

(*l*) L. R. 2 Ex. at p. 150.

(*m*) 1 Phillips on Insurance, s. 175.

(*n*) Park, 14; *Crowley* v. *Cohen*, 3 B. & Ad. 478; *Waters* v. *Monarch Life Ass. Co.*, 5 E. & B. 870.

(*o*) 1 Arnould, 61.

(*p*) *Mitchel* v. *Ede*, 11 A. & E. 888; *Brandt* v. *Bowlby*, 2 B. & Ad. 932; *Inglis* v. *Stock*, 10 App. Cas. at p. 270; *Ogg* v. *Shuter*, 1 C. P. D. 47; *Turner* v. *Liverpool Docks*, 6 Exch. 543. But see *Seagrave* v. *Union Mar. Ins. Co.*, L. R. 1 C. P. 305.

(*q*) This is in accordance with the better opinions: 1 Arnould, 6th ed., 71.

(*r*) *Gregory* v. *Christie*, 3 Doug. 419; *King* v. *Glover*, 2 B. & P. N. R. 256.

(*s*) *Grant* v. *Parkinson*, 3 Doug. 16; *Eyre* v. *Glover*, 16 East, 218; 3 Camp. 276; *Stockdale* v. *Dunlop*, 6 M. & W. 224; *M'Swiney* v. *Royal Exchange Ass. Co.*, 14 Q. B. 634. See, also, cases cited, note (*i*), ante, p. 400.

The subject-matter, or what may be insured.

or respondentia interest (*t*), freight and advances upon it (*u*), disbursements in the nature of general average at an intermediate port (*x*), liabilities for damages for running down or damaging another vessel (*y*),—have all been held fit subjects of Marine Insurance.

A mortgagee who insures to cover his own interest can recover only in respect of it; if the insurance was intended to cover the interest of the mortgagor also, he may recover in respect of both interests (*z*).

Under the term *freight* may be insured the benefit an owner would derive from carrying his own goods in his own vessel (*a*). But, in order to recover under a policy upon freight, the assured must prove that but for the intervention of a peril insured against some freight would have been earned, by showing, either that some goods were put on board, or that there was some contract for doing so (*b*). In *Barber* v. *Fleming* (*c*), the owner of a ship chartered for a voyage from Howland's Island to the United Kingdom, but lost while on her way from Bombay to Howland's Island, with the object of fulfilling charter, was held entitled to recover on a policy insuring freight.

"When a shipowner has got a contract with another person under which he will earn freight, and has taken steps and incurred

(*t*) *Simonds* v. *Hodgson*, 3 B. & Ad. 50.

(*u*) *Montgomery* v. *Eggington*, 3 T. R. 362; *Taylor* v. *Wilson*, 15 East, 324; *Currie* v. *Bombay Native Ins. Co.*, L. R. 3 P. C. 72; *The Karnac*, L. R. 2 P. C. 505 (advances upon freight). Even freight by a time policy: *Michael* v. *Gillespy*, 2 C. B. N. S. 627.

(*x*) *Hingston* v. *Wendt*, 1 Q. B. D. 367.

(*y*) *Xenos* v. *Fox*, L. R. 4 C. P. 665.

(*z*) *Ebsworth* v. *Alliance Mar. Ins. Co.*, L. R. 8 C. P. 596, at p. 609; *Castellain* v. *Preston*, 11 Q. B. D. 380; *Irving* v. *Richardson*, 2 B. & Ad. 193.

(*a*) *Flint* v. *Flemyng*, 1 B. & Ad. 45; *Devaux* v. *I'Anson*, 5 Bing. N. C. 519.

(*b*) *Flint* v. *Flemyng*, ubi supra; *Horncastle* v. *Suart*, 7 East, 400; *Mercantile Steamship Co.* v. *Tyser*, 7 Q. B. D. 73; *Inman S. S. Co.* v. *Bischoff*, 6 Q. B. D. 648; *Manfield* v. *Maitland*, 4 B. & Ald. 582. Lord *Ellenborough's* expressions in *Forbes* v. *Aspinall*, 13 East, at p. 331, *that in order to recover on a policy on freight, a full cargo must be ready to be shipped, and the ship must be ready to receive the cargo*, are explained by *Tindal*, C. J., in *Devaux* v. *I'Anson*, 5 Bing. N. C. at p. 538.

(*c*) L. R. 5 Q. B. 59; *Rankin* v. *Potter*, L. R. 6 H. L. 83; *Foley* v. *United Fire and Mar. Ins. Co.*, L. R. 5 C. P. 155.

expense upon the voyage towards earning it, then his interest ceases to be a contingent thing, but becomes an inchoate interest" (*d*).

The subject-matter, or what may be insured.

A defeasible or inchoate interest may be insured, as well as one absolute and perfect (*e*). In a word, any person who has an *interest* in the subject-matter of insurance may be insured to the extent of that interest (*f*); and any person may be said to have an interest who may be injured by the risks to which that subject-matter is exposed (*g*). Still, though the definition of an *interest* is thus wide, there must be some interest such as the law can take notice of. Thus, though the profits likely to be made on an expected cargo may be insured if properly described (*h*), yet no insurance can be effected on the expected profits of a cargo, to which the claim of the party insuring is founded on a contract void by the Statute of Frauds (*i*). So, if an assurer of a cargo afloat sells the cargo he cannot recover on the policy, either for himself or the purchaser, in respect of a loss subsequent to the transfer of the cargo, unless there be also a transfer of the policy to the purchaser (*j*).

The question whether the vendee has an insurable interest in goods, the property in which has not passed to him, but which are at his risk, is more difficult. The point

(*d*) Per *Blackburn*, J., in *Barber* v. *Fleming*, L. R. 5 Q. B. at p. 71.

(*e*) In *Sutherland* v. *Pratt*, 11 M. & W. 297, it was decided that a merchant's interest in the safety of goods which he had purchased as sound, but which had been damaged at a time prior to the purchase, was insurable by a policy containing the words *lost or not lost*. See *Stirling* v. *Vaughan*, 11 East, 619; 2 Camp. 225; *Stephens* v. *Australasian Ins. Co.*, L. R. 8 C. P. 18; *Joyce* v. *Swan*, 17 C. B. N. S. 84; *Le Cras* v. *Hughes*, 2 Park, Insur. 568. But it is doubtful whether *Le Cras* v. *Hughes* can be supported. In *Deraux* v. *Steele*, 6 Bing. N. C. 358, and in *Lucena* v. *Crauford*, 2 B. & P. N. R. at p. 323, strong reflections were cast on it.

(*f*) Per *Willes*, J., in *Wilson* v. *Jones*, L. R. 2 Ex. at p. 141.

(*g*) *Lucena* v. *Crawford*, 2 B. & P. N. R. 300. See *Stirling* v. *Vaughan*, ubi supra; *Hobbs* v. *Hannam*, 3 Camp. 93; *Page* v. *Fry*, 2 B. & P. 240; per *Willes*, J., in *Seagrave* v. *Union Ins. Co.*, L. R. 1 C. P. at p. 320; *Ebsworth* v. *The Alliance Mar. Ins. Co.*, L. R. 8 C. P. 596 (consignees who had made advances); and the notes to *Goram* v. *Sweeting*, 2 Wms. Saund. 200.

(*h*) See *Anderson* v. *Morice*, 1 App. Cas. 713, at p. 723; *Inglis* v. *Stock*, 10 App. Cas. 263.

(*i*) *Stockdale* v. *Dunlop*, 6 M. & W. 224; and see *Stainbank* v. *Fenning*, 11 C. B. 51; *Stainbank* v. *Shepard*, 22 L. J. Ex. 341.

(*j*) *Powles* v. *Innes*, 11 M. & W. 10.

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arose in *Anderson* v. *Morice* (*k*), *Inglis* v. *Stock* (*l*) in the House of Lords, and *Colonial Insurance Co. of New Zealand* v. *Adelaide Marine Insurance Co.* (*m*) in the Privy Council. In *Anderson* v. *Morice* (*n*) the contract was for "the cargo of new crop Rangoon rice, per *Sunbeam*, at 9*s*. 1½*d*. per cwt. cost and freight. Payment by seller's draft on purchaser." Anderson, the buyer, insured the cargo "at and from Rangoon." Before the loading of the cargo was completed the ship sank. The captain afterwards signed and delivered bills of lading, and Anderson accepted the seller's drafts, which were duly honoured. The Exchequer Chamber (*Quain*, J., dissenting) held, reversing the unanimous judgment of the Commons Pleas, that Anderson had no insurable interest in the cargo and could not recover against the underwriters for the loss. Upon appeal the House of Lords was divided in opinion, and the judgment of the Exchequer Chamber therefore stood (*o*). In *Inglis* v. *Stock* the facts were these: Drake & Co. sold to Stock and to Beloe & Co. each 200 tons of German sugar, "f. o. b. Hamburg; payment by cash in London in exchange for bill of lading"; the price to be according to the percentage of saccharine matter, which was not to exceed or fall short of a certain limit. The goods were to come to Bristol. Afterwards Beloe & Co. resold their 200 tons to Stock at an increased price, but otherwise upon similar terms. To fulfil their two contracts Drake & Co.'s agents shipped in a general ship 390 tons of sugar (being ten tons short) in 3,900 bags, no bags being set apart for one contract more than the other. The bags, however, were each marked, and ten bills of lading made out in an impersonal form, for parcels bearing marks corresponding to those on the bags, were sent to Drake & Co. in London. The goods were lost on the voyage from Hamburg to Bristol. After

(*k*) 1 App. Cas. 713.
(*l*) 10 App. Cas. 263.
(*m*) 12 App. Cas. 128.
(*n*) 1 App. Cas. 713.
(*o*) Lords *Chelmsford* and *Hatherley* were of opinion that Anderson had no insurable interest in the cargo. Lords *O'Hagan* and *Selborne* were of opinion that he had, either because the property in the rice had vested in him, or, at any rate, that according to the bargain between him and the seller, shown by the fact that he had insured the goods, and not the seller, and by other circumstances, the goods were to be at his risk.

receiving news of the loss Drake & Co. forwarded invoices of the parcels, by them then allocated by means of the marks on the bills of lading, to Stock and Beloe & Co. respectively. The House of Lords (affirming the Court of Appeal) held that Stock had an insurable interest in the 390 tons.

The subject-matter, or what may be insured.

"It is contended," says Lord *Selborne*, "that, under these circumstances, and for want of a proper division before the loss, the shipment had not the effect of divesting the prior title of Drake & Co., the vendors, or of passing any interest in these sugars to the plaintiff (Stock). This argument appears to me to confound two very different things: the appropriation necessary as between vendor and purchaser, and the division, as between purchaser and purchaser, of *specific goods, actually appropriated to the aggregate of the two contracts*. . . . In the present case I see no reason to doubt that the difficulty arising from the confusion of parcels, if not solved by consent (or by arbitration, for which each contract provided), would have been soluble by principles of law, applied to the facts and terms of the contracts. The goods were, by the act of the vendors, separated from the bulk of all other goods belonging to them; they were shipped 'free on board' in what (for that purpose) was the purchaser's ship under two contracts so to deliver them, in both which contracts the plaintiff (Stock) was then solely interested" (*p*).

The interest which an underwriter acquires in the safety of that which he had insured was declared not to be a legal subject-matter of insurance, except in certain cases; but the prohibition of re-assurance has now been repealed (*q*), and the policy need not state, nor need the assurer disclose, the fact that it is a re-insurance (*r*). The re-insurance may be limited to some only of the risks included in the original insurance. Thus, an insurer against marine risks generally may re-insure against loss by fire only (*s*).

(*p*) 10 App. Cas. at pp. 267, 268. See also per Lord *Blackburn*, at p. 274. The plaintiff in *Anderson* v. *Morice*, though held to have no insurable interest in goods, had an insurable interest in expected profits, against the loss of which he might, by a proper description, have insured himself: *Anderson* v. *Morice*, 1 App. Cas. at p. 723, per Lord *Chelmsford*.

(*q*) 30 & 31 Vict. c. 23, sched. D.; 30 & 31 Vict. c. 59.

(*r*) *MacKenzie* v. *Whitworth*, L. R. 10 Ex. 142; 1 Ex. D. 36.

(*s*) *Imperial Mar. Co.* v. *Fire Ins. Corporation*, 4 C. P. D. 166. See

The subject-matter, or what may be insured.

At common law the wages of seamen are not insurable (*t*). But now that wages no longer depend on the earning of freight (*u*), the reason for this disability appears to be gone.

The assured must, *at the time of the loss*, though not necessarily at the time of effecting the policy (*x*), have an insurable interest. If he has parted with his interest before the loss he cannot recover upon the policy, at any rate for his own benefit (*y*). If, however, the assured assigns his interest, and *at the same time* transfers his interest in the policy to the assignee, or agrees that it shall be kept alive for the benefit of the latter, the assured may sue *as trustee* for the assignee (*z*).

The policy must properly describe the interest of the assured.

"If no property which answers the description in the policy be at risk, the policy will not attach, though the assured may have other property at risk of equal or greater value; the reason being, that the assurers have not entered into a contract to indemnify the assured for any loss on that other property" (*a*).

The interest must not be too remote (*b*). In former editions of this work it was said, "upon the whole, the leaning seems to be at present towards a more confined signification of the word *interest* than has been attributed to it by some of the older authorities (*c*). But in *Stock* v. *Inglis* (*d*), *Brett*, M. R., said:—

"It is the duty of a Court always to lean in favour of an insurable interest. Of course we must not assume facts which do not exist, nor stretch the law beyond its proper limits, but we ought, I think, to consider the question with a mind, if the facts and law will allow it, to find in favour of an insurable interest."

further, as to re-insurance, *Gledstanes* v. *Royal Exchange Co.* 34 L. J. Q. B. 32; *Uzielli* v. *Boston Mar. Ins. Co.*, 15 Q. B. D. 11.

(*t*) *The Neptune*, 1 Hagg. 239.

(*u*) Merchant Shipping Act, 1854, s. 183, in Appendix.

(*x*) *Rhind* v. *Wilkinson*, 2 Taunt. 237; 1 Arnould, p. 59, 6th ed.

(*y*) *Powles* v. *Innes*, 11 M. & W. 10.

(*z*) Ibid.; *North of England Oil Cake Co.* v. *Archangel Mar. Ins. Co.*, L. R. 10 Q. B. 249.

(*a*) *Mackenzie* v. *Whitworth*, 1 Ex. D. 36 (C. A.) at p. 40, per *Blackburn*, J.

(*b*) See per Lord *Eldon* in *Lucena* v. *Crauford*, 2 B. & P. N. R. 269, at pp. 321, 323.

(*c*) Citing *Lucena* v. *Crauford*, supra; *Devaux* v. *Steele*, 6 Bing. N. C. 358; and *Seagrave* v. *Union Mar. Ins. Co.*, L. R. 1 C. P. 305.

(*d*) 12 Q. B. D. at p. 571.

The subject-matter, or what may be insured.

Every policy will be presumed to be an interest, and not a wager policy, unless the contrary appears on the face of it (*f*).

Apart from the statute 19 Geo. 2, c. 37, it is enacted by 8 & 9 Vict. c. 109, s. 18, in general terms, that "all contracts or agreements, whether by parole or in writing, *by way of gaming or wagering*, shall be null and void."

It is scarcely needful to observe that the subject-matter of the insurance will be improper, and the policy unavailable, where a voyage insured is one prohibited by law, or goods insured are intended for carrying on an illegal commerce (*g*). Trading with an enemy without the king's licence is illegal (*h*). But such trade will be legalised by a royal licence (*i*), the conditions of which must be strictly observed. Thus, if it require a bond as a preliminary to exportation, that bond must be given, or the exportation will be illegal (*k*). So, if the licence be for a limited time; though, if the adventure were *bonâ fide* prosecuted within the time, it will not become illegal, so as to avoid a policy, because accidentally protracted beyond it (*l*).

An adventure which involves any breach of the revenue laws of another country will not be deemed illegal. Neither will a voyage for the purpose of conveying contraband of war, or running a blockade. Such, however, are material facts to be disclosed to the underwriters (*m*).

An insurance on a voyage intended to be in breach of some statute passed to prohibit such voyages would be void. But *Wilson* v. *Rankin* (*n*), and *Cunard* v. *Hyde* (*o*), are authorities to show that if the statute is broken by the master, without the knowledge or authority of the owner, the policy will not be void.

(*f*) Arnould, 6th ed. p. 229.

(*g*) *Camden* v. *Anderson*, 6 T. R. 723; 1 B. & P. 272; *Johnston* v. *Sutton*, 1 Dougl. 254; *Delmada* v. *Motteaux*, Park, 357, 7th ed.; *Redmond* v. *Smith*, 7 M. & G. 457.

(*h*) *Potts* v. *Bell*, 8 T. R. 548; *Esposito* v. *Bowden*, 7 E. & B. 763.

(*i*) *Vandyck* v. *Whitmore*, 1 East, 475; *Robinson* v. *Cheesewright*, 1 M. & S. 220; *Rucker* v. *Ansley*, 5 M. & S. 25.

(*k*) *Vandyck* v. *Whitmore*, ubi sup.

(*l*) *Schroeder* v. *Vaux*, 15 East, 52.

(*m*) *Ex parte Chavasse, In re Graze brook*, 34 L. J. Bank. 17.

(*n*) L. R. 1 Q. B. 162, decided in reference to 16 & 17 Vict. c. 107, ss. 170, 172 (since repealed), as to loading timber on deck.

(*o*) 2 E. & E. 1.

The subject-matter, or what may be insured.

An infirmity in any part of an integral voyage or policy renders the whole illegal (*p*); as, for instance, if a merchant insure legal and illegal goods together in the same policy. But if a ship bring hither from a hostile country some goods licensed and others not licensed, an insurance on the licensed goods will not be thereby vitiated (*q*).

A subject of Great Britain, domiciled in a country in amity with ours, may exercise the privilege of a subject of that country, by trading with one in hostility to ours (*r*).

Section IV.—*The Policy—its Form and Construction.*

The policy—its form and construction.

The policy, which is usually printed, with a few terms superadded in writing, as the intention of the parties happens to require, is an instrument of an extremely ancient form and very inaccurate and ungrammatical in its language (*s*). The words in writing, if there be a doubt upon the meaning of the whole, have greater effect attributed to them than those in print, because they are the immediate terms selected by the parties, whereas the others are a general formula (*t*).

Sect. 7 of 30 & 31 Vict. c. 23, which regulates the stamp duty on marine insurances, provides that—

"No contract or agreement for sea insurance (other than such insurance as is referred to in the 55th section of the Merchant Shipping Act Amendment Act, 1862 (*u*)), shall be valid unless the same is expressed in a policy; and every policy shall specify the

(*p*) *Parkin* v. *Dick*, 2 Camp. 221; 11 East, 502; *Wilson* v. *Maryat*, 8 T. R. 31; *Waugh* v. *Morris*, L. R. 8 Q. B. 202; *Camelo* v. *Britten*, 4 B. & Ald. 184.

(*q*) *Pieschell* v. *Alnutt*, 4 Taunt. 792. See *Hagedorn* v. *Bell*, 1 M. & S. 450; *Camelo* v. *Britten*, supra; and 1 Duer, 390.

(*r*) *Bell* v. *Reid*, 1 M. & S. 726.

(*s*) *Brough* v. *Whitmore*, 4 T. R. 206. 30 & 31 Vict. c. 23, s. 5, provides that the Commissioners of Inland Revenue are to provide stamped blank forms of policies in the form in sched. E. to the Act.

(*t*) *Robertson* v. *French*, 4 East, at p. 136. See per *Pollock*, C. B., *Alsager* v. *St. Katherine's Dock Co.*, 14 M. & W. at p. 798; and per *Erle*, J., *Halhead* v. *Young*, 6 E. & B. at p. 320; per *Blackburn*, J., in *Joyce* v. *Realm Ins. Co.*, L. R. 7 Q. B. at p. 583.

(*u*) 25 & 26 Vict. c. 63.

The policy—its form and construction.

particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured; and in case any of the above-mentioned particulars shall be omitted in any policy, such policy shall be null and void to all intents and purposes" (*v*).

The policy must be properly stamped; and no action can be maintained upon the *slip*, or note—a memorandum of chief particulars in the contract, initialed by the underwriters—which is usually made by the broker before a formal policy is prepared. Though not binding in *law*, the slip is in practice considered the contract between the parties. It may be given in evidence. Its legal nature is thus stated by *Blackburn*, J., in *Ionides* v. *The Pacific Ins. Co.* (*x*):—

"The slip is in *practice*, and according to the understanding of those engaged in marine insurance, the complete and final contract between the parties, fixing the terms of the insurance and the premium, and neither party can, without the assent of the other, deviate from the terms thus agreed on without a breach of *faith*, for which he would suffer severely in his credit and future business. [The slip] is by virtue of [30 Vict. c. 23, ss. 7, 9,] not valid, that is, not enforceable at law or in equity; but it may be given in evidence wherever it is, though not valid, material."

Parol evidence is not admissible to *control* the meaning of a policy, or, indeed, of any other written instrument (*y*): though it is admissible, as in cases of other mercantile instruments, to *explain* the language of the policy, with reference to the usual practice of trade, *ex. gr.*, to show that the Gulf of Finland is considered by mercantile men part of the Baltic (*z*). The underwriter is supposed to contract with reference to the settled

(*v*) See *Edwards* v. *Aberayron Mutual Ship Ins. Co.*, 1 Q. B. D. 563.

(*x*) L. R. 6 Q. B. 674, at pp. 684, 685. See also *Cory* v. *Patton*, L. R. 7 Q. B. 304; *Mackenzie* v. *Coulson*, L. R. 8 Eq. 368; *Fisher* v. *Liverpool Mar. Ins. Co.*, L. R. 9 Q. B. 418; *Barrow Mut. S. Ins. Co.* v. *Ashburner*, 54 L. J. Q. B. 377; and see post, p. 483. The statute does not apply to fire insurances, *Thompson* v. *Adams*, 23 Q. B. D. at p. 365.

(*y*) *Aguilar* v. *Rodgers*, 7 T. R. 421; *Blackett* v. *R. E. A. C.*, 2 C. & J. at p. 249; *Hall* v. *Janson*, 4 E. & B. at p. 509.

(*z*) *Uhde* v. *Walters*, 3 Camp. 16. See *Lewis* v. *Marshall*, 7 M. & G. 729. Compare *Birrell* v. *Dryer*, 9 App. Cas. 345, where the policy contained the words "warranted no St. Lawrence between the 1st October and 1st April."

The policy—its form and construction.

and generally known usages of maritime trades or ports (*a*); for example, the usage for underwriters to pay the broker or to settle the loss between them in account (*b*). Being *primâ facie* only the usage of a single house, the usage of Lloyd's will not be binding on one who cannot be shown to be acquainted with it (*c*). A policy will be construed by the law of the place where the contract was made (*d*).

A policy is either *open* or *valued*. An *open policy* is where the value of the thing insured is not inserted in the policy; and, therefore, must be proved at the trial, if a loss happen. A *valued policy* is where the value of the thing insured is settled by agreement between the parties (*e*), and inserted in the policy, usually in this form:—"*The said ship, &c., goods and merchandise, &c., for so much as concerns the assureds by agreement between the assureds and assurers in this policy, are and shall be valued at £ .*" And sometimes the words, "*the policy to be deemed sufficient proof of interest in case of loss,*" are added. But having regard to 19 Geo. 2, c. 37, s. 1, and the decision in *Berridge* v. *Man On Insurance Co.* (*f*), the insertion of these latter words would vitiate the policy. Valued policies derive their origin from the difficulty the assured sometimes had in proving the value of his interest, which induced him to give the insurer a greater premium to agree to estimate it at a certain sum; from which he derives this advantage, viz., that in case of a *total loss* of what is insured, he is only bound to show *some* interest in order to satisfy the statute 19 Geo. 2, c. 37, but not *the value*, because that is admitted by, and in the absence of fraud, is conclusive upon the insurer (*g*) and the insured (*h*) for the purposes

(*a*) 1 Arnould, 277, 6th ed.; *Pearson* v. *Commercial Ass. Co.*, 1 App. Cas. 498.

(*b*) *Sweeting* v. *Pearce*, 9 C. B. N. S. 534. See *Perry* v. *Barnett*, 15 Q. B. D. 388.

(*c*) *Gabay* v. *Lloyd*, 3 B. & C. 793; *Bartlett* v. *Pentland*, 10 B. & C. 760. It is suggested in a note to former editions, p. 340, 9th ed., that in certain cases even between such persons such usages may be admissible, on the principle of *Stewart* v. *Cauty*, 8 M. & W. 160; *Bayliffe* v. *Butterworth*, 1 Ex. 425.

(*d*) *Greer* v. *Pole*, 5 Q. B. D. 272.

(*e*) See *Lidgett* v. *Secretan*, L. R. 6 C. P. 616.

(*f*) 18 Q. B. D. 346.

(*g*) *Lewis* v. *Rucker*, 2 Burr. 1171; *Irving* v. *Manning*, 1 H. L. Ca. 287; *Barker* v. *Janson*, L. R. 3 C. P. 303; *Lidgett* v. *Secretan*, L. R. 6 C. P. 616. But see *Williams* v. *North China Ins. Co.*, 1 C. P. D. 757.

(*h*) *Re North of England I. Ass.* v. *Armstrong*, L. R. 5 Q. B. 244.

The policy—its form and construction.

of the particular contract of insurance (*i*). However, *valued policies* must not be used as a cover for wagering; and, therefore, the interest of the assured must be a real *bonâ fide* interest, not a mere colourable one, otherwise the policy will be void; nay, if he fraudulently over-value his interest, in order to cheat the insurers, he will not be permitted to recover even for what he actually had on board (*k*). Exorbitant over-valuation may be evidence of fraud or wagering (*l*). If the whole of the property insured have not been at risk, the assured will recover only on the part actually at risk. In other respects the valuation, for the purposes of the contract, is conclusive (*m*).

The following is the ordinary form (*n*) of a policy of insurance on ship and goods:—

S. G.
£
Delivered the day of
No.

"Be it known that A. B. (the insured) as well in his own name, as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance, and cause himself and them, and every of them, to be insured, lost or not lost, at and from ——. Upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture, of and in the good ship or vessel called the ——, whereof is master, under God, for this present voyage, C. D., or whosoever else shall go for master in the said ship, or by whatsoever other name or names the same ship, or the master thereof, is or shall be named or called; beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship, —— upon the said ship, &c. ——, and shall so continue and endure during her abode there, upon the said ship, &c. And further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, shall be arrived at —— upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety; and upon the goods and merchandises, until the same be there discharged and safely landed. And it shall be lawful for the said ship, &c., in this voyage to proceed and sail to

(*i*) See *Burnand* v. *Rodocanachi*, 7 App. Cas. at p. 335.

(*k*) *Haigh* v. *De la Cour*, 3 Camp. 319. See *Shawe* v. *Felton*, 2 East, at p. 116.

(*l*) *Barker* v. *Janson*, L. R. 3 C. P. at pp. 306, 307; *Ionides* v. *Pender*, L. R. 9 Q. B. 531.

(*m*) *Tobin* v. *Harford*, 32 L. J. C. P. 134; 34 L. J. C. P. 37; *Denoon* v. *Home and Colonial Assurance Co.*, L. R. 7 C. P. 341.

(*n*) This is the form prescribed by 30 & 31 Viot. c. 23, sched. E.

The policy—its form and construction.

and touch and stay at any ports or places whatsoever —— without prejudice to this insurance. The said ship, &c., goods and merchandises, &c., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at ——. Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage: they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-marts, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes and people, of what nation, condition or quality soever, barratry of the master and mariners, and of all other perils, losses and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises and ship, &c., or any part thereof. And in case of any loss or misfortune, it shall be lawful to the assured, their factors, servants and assigns, to sue, labour and travel for, in and about the defence, safeguard and recovery of the said goods and merchandises, and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we the assurers will contribute, each one according to the rate and quantity of his sum herein assured. And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in *Lombard Street*, or in the *Royal Exchange*, or elsewhere, in *London*. And so we the assurers are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods, to the assured, their executors, administrators and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured —— at and after the rate of ——.

"*In witness* whereof we the assurers have subscribed our names and sums assured in ——.

"N.B.—Corn, fish, salt, fruit, flour and seed are warranted free from average, unless general, or the ship be stranded.—Sugar, tobacco, hemp, flax, hides and skins are warranted free from average, under 5*l.* per cent.—And all other goods, also the ship and freight, are warranted free from average, under 3*l.* per cent., unless general, or the ship be stranded" (*n*).

The principal parts of the policy are:—1st, the name of the insured or his agent; 2ndly, That of the ship; 3rdly,

(*n*) For a form of policy of insurance of a mutual association, see *United Kingdom Association* v. *Nevill*, 19 Q. B. D. 110; and *The Great Britain* 100 *A*1 *Ins. Association* v. *Wyllie*, 60 L. T. N. S. 916; 22 Q. B. D. 710.

The subject-matter of insurance; 4thly, The voyage insured; 5thly, The perils insured against; 6thly, The date and subscription; 7thly, The volunteer clause; 8thly, The sue and labour clause; 9thly, The memorandum; 10thly, The running down clause; 11thly, The stamp; and 12thly, Warranties. Let us consider these in order:— The policy—its form and construction.

1st, *Name of Insured.*—By statute 28 Geo. 3, c. 56, it is enacted, that it shall not be lawful for any person to make or effect any policy of insurance on any ship, goods, or other property, without first inserting the name or names, or usual style and firm, of *one or more of the persons interested* in such insurance, or of the *consignor or consignors, consignee or consignees of the property so insured*, or of the *person or persons residing in Great Britain who shall receive the order for and effect such policy*, or of the *person or persons who shall give the order to the agent* immediately employed to effect such policy. Policies are declared void if contrary to this statute (*o*). But the statute having been passed to remedy the hardships caused by the earlier Act 25 Geo. 3, c. 44, has received a liberal construction. Thus, the words "consignees (*o*), persons who shall receive the order, &c.," have been construed to include general agents (*o*).

The Policies of Marine Insurance Act, 1868, provides that the assignee of a policy which has been assigned "so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured," may sue on the policy in his own name (*p*). The assignee, whether he sues in his own name or in that of the assignor, is subject to any rights which might be set up against the latter. The underwriter will not, either under this Act or sect. 25 of the Judicature Act, 1873, be able to set off against the assignee a debt for policies effected after the assignment; such a claim is not a "defence" within the mean-

(*o*) See *Wolff* v. *Horncastle*, 1 B. & P. 316, and the remarks of Lord *Esher*, M. R., in *Great Britain* 100 *A*1 *Ins. Association* v. *Wyllie*, at p. 719. Independently of this statute in order to enable a person to sue on a policy, it must have been made with him, or on his behalf by an agent, whose act he authorised or has ratified. *Watson* v. *Swann*, 11 C. B., N. S. 756.

(*p*) 31 & 32 Vict. c. 86, s. 1. See Appendix, and *Lloyd* v. *Fleming*, L. R. 7 Q. B. 299.

The policy—its form and construction.

ing of the former statute (*q*). The assignment may be by indorsement according to the form given in the schedule to the Act.

The assignment may be made after loss (*r*).

2ndly, *The name of Ship.*—The ship ought to be truly described; for a variance from its right name might discharge the underwriter. Where the name of the ship is known it is indorsed on the policy. It is, however, usual to insert in the policy, "or by whatever other name or names the same ship shall be called;" the effect of which is to render a mistake in the name immaterial, if the identity of the ship can be proved and the underwriter be not prejudiced by it (*s*). A policy may also be effected upon *ship* or *ships* expected from any particular place, or "per ship or ships" (*t*). Declaring the name of the ship is not a condition precedent to recovering, and an innocent mistake as to the name in the declaration will not vitiate the contract (*u*). The same observations apply to the name of the master (*v*), which is generally inserted along with that of the ship, with the addition of "or whosoever else shall go for master in the said ship." The person substituted must be competent; or if made for a fraudulent purpose the change would vitiate the contract (*x*).

3rdly, *The subject-matter of Insurance.*—The subject-matter should be described with accuracy (*y*), and evidence of usage is not admissible to contradict the plain meaning of such description (*z*). A ship-owner may insure, under the name of *freight*,

(*q*) *Pellas* v. *Neptune Mar. Ins. Co.*, 5 C. P. D. 34.

(*r*) *Lloyd* v. *Fleming*, L. R. 7 Q. B. 299.

(*s*) *Le Mesurier* v. *Vaughan*, 6 East, 382. See *Ionides* v. *The Pacific F. & M. I. Co.*, L. R. 6 Q. B. 674; 7 Q. B. 517.

(*t*) *Kewley* v. *Ryan*, 2 H. Bl. 343.

(*u*) 1 Arnould, 6th ed. p. 338.

(*v*) *Morocco Land Co.* v. *Fry*, 11 L. T. N. S. 618.

(*x*) *Morocco Land and Trading Co.* v. *Fry*, 11 L. T. N. S. 618.

(*y*) *Glover* v. *Black*, 3 Burr. 1394; *Simonds* v. *Hodgson*, 6 Bing. 114, reversed upon another point in 3 B. & Ad. 50.

(*z*) *Blackett* v. *Royal Exchange Assurance Co.*, 2 C. & J. 244; *Hall* v. *Janson*, 4 E. & B. 500. See *Lewis* v. *Marshall*, 7 M. & G. 729. But see *Miller* v. *Tetherington*, 6 H. & N. 278; 7 H. & N. 954.

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the benefit he expects to derive from carrying his own goods in his own vessel (*a*), or, under the term "*average expenses*" per the ship, a lien on the cargo for salvage for which he has given security (*b*). So provisions are comprehended under the word *furniture* (*c*). It is a sufficient description to say that a policy is upon *goods* generally. But that word will be intended to mean goods of ordinary, not extraordinary, danger, not such, for instance, as goods intended to be lashed on deck (*d*), unless, indeed, they be goods which it is usual and proper to stow there (*e*): for what is usually done by such a ship with such a cargo on such a voyage is understood to be referred to by every policy, and to make a part of it, as much as if it were expressed therein (*f*). An assurance may be effected upon *profits* generally (*g*). But freight or profits must be insured *eo nomine*, and are not covered by a policy on goods (*h*). Nor will a policy on goods cover the interest of a purchaser to whom the property does not pass until delivery (*i*).

Although the *subject-matter* of insurance must be properly described, *the nature of the interest* may be, generally speaking, left at large: in other words, though a policy must state correctly *what* is insured, it is not necessary that *the reason why*

(*a*) *Flint* v. *Flemyng*, 1 B. & Ad. 45; *Devaux* v. *I'Anson*, 5 Bing. N. C. 519. As to passage money, see *Denoon* v. *Home & C. A. Co.*, L. R. 7 C. P. 341, where such money was held not covered by insurance on "freight." But the case is open to doubt. As to whether payments made in advance on account of freight will come within the term, see 1 Arnould, p. 34, 6th ed.

(*b*) *Briggs* v. *Merchant Traders S. A.*, 13 Q. B. 167.

(*c*) *Brough* v. *Whitmore*, 4 T. R. 206. As to the extent of this word, see *Blackett* v. *Royal Exchange Assurance Co.*, 2 C. & J. 244.

(*d*) Judgment of Lord *Lyndhurst* in *Blackett* v. *Royal Exchange Assurance Co.*, 2 C. & J., at p. 250; *Ross* v. *Thwaite*, Park, 26; *Backhouse* v. *Ripley*, Ibid.

(*e*) *Da Costa* v. *Edmunds*, 4 Camp. 142. As to deck cargoes of timber, see 39 & 40 Vict. c. 80, s. 24.

(*f*) *Pelly* v. *Royal Exchange Assurance Co.*, 1 Burr. 350. See *Noble* v. *Kennoway*, 2 Dougl. 510, and 2 Wms. Saund. 200, in notis.

(*g*) *Eyre* v. *Glover*, 16 East, 218; 3 Camp. 276. See *Anderson* v. *Morice*, L. R. 10 C. P. 58, 609, and ante, p. 401, note (*s*). See *Smith* v. *Reynolds*, 1 H. & N. 221. As to what it will apply to, see *M'Swiney* v. *Royal Exchange Assurance Co.*, 14 Q. B. 634; *Halhead* v. *Young*, 6 E. & B. 312.

(*h*) *Baillie* v. *Moudigliani*, Park, 90. As to what "freight" would cover, see Arnould, 6th ed., p. 34.

(*i*) *Anderson* v. *Morice*, 1 App. Cas. 713.

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the party insures should also be expressed (*j*). It sometimes happens that the insurance is upon goods, "to be thereafter declared and valued, by ship or ships;" or upon ships to be named, or in some form which leaves it to the insured to make a subsequent declaration of the goods or ships intended. This *declaration of interest*, as it is called, is the mere exercise of a power conferred on the assured; it requires no assent on the part of the underwriters, though they generally sign their initials to it, not, however, for the purpose of expressing their assent, but for that of authentication (*k*). The insured, therefore, can only fill it up so as to be consistent with the policy, and has not, in the ordinary form of policy, power to declare the matters of the risk in separate parcels, so as to make the average clause apply separately to each (*l*). It is generally put upon the policy for convenience. But this is not necessary; neither is there any necessity for its being in writing. An error in it, made without fraud, may be corrected without the assent of the underwriter, and without a new stamp (*m*). But though it does not require the underwriter's assent, it ought to be communicated to him (*n*), else it would be in the power of the insured to destroy it, and substitute another in its place.

If the words of the policy be large enough to cover an illegal adventure, and an illegal adventure was in fact intended by the insured, the policy is void, and the underwriter cannot sue for the premium (*o*). To adapt to the actual facts of commerce the policy, in the above form, which strictly applies only where the same person is interested in cargo and ship, it is customary to insert in writing on the margin or body of the policy a description of the true nature of the subject-matter of insurance.

4thly, *The Voyage or Duration of Risk.*—The voyage also must

(*j*) *Crowley* v. *Cohen*, 3 B. & Ad. 478.

(*k*) *Ionides* v. *Pacific I. Co.*, L. R. 6 Q. B. 674; 7 Q. B. 517; *Brett*, J., in *Stephens* v. *Australasian Ins. Co.*, L. R. 8 C. P. at p. 23.

(*l*) *Entwisle* v. *Ellis*, 2 H. & N. 549.

(*m*) *Robinson* v. *Touray*, 3 Camp. 160; *Stephens* v. *Australasian Ins. Co.*, L. R. 8 C. P. 18; 30 & 31 Vict. c. 23, s. 10.

(*n*) *Harman* v. *Kingston*, 3 Camp. 150.

(*o*) *Jenkins* v. *Power*, 6 M. & S. 282.

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be accurately described; the description comprehending the times and places at which the risk is to begin and end (*q*). The statute 30 & 31 Vict. c. 23, by s. 7, enacts that "every policy shall specify the particular risk or adventure, and in case [the same] be omitted in any policy, such policy shall be null and void to all intents and purposes."

It is said that an omission of the *place* where the risk is to begin would render the policy void for uncertainty (*r*), but that an omission of the *time* would cause the risk to begin from the *making* of the policy (*s*). The insertion of the words *at and from* the ship's loading port has the effect of making the insurer answerable for any misfortune which may happen after her arrival (*t*), or while the ship remains there, as if she be burnt or lost there, or detained by an embargo (*u*). The insertion of these words, moreover, implies that the ship is either there at the time, or shortly will be there (*x*); in default of which the underwriter is discharged; and, if she be not there when the policy is made, she must, in order that the risk may attach, arrive there in good physical safety. If she arrive at the outward port so shattered as to be a mere wreck, a policy on the homeward voyage never attaches (*y*). I use the words *physical* safety, because it is sufficient if she arrive safe in that sense, though from political causes she may be in great danger of condemnation (*z*). It is also implied that she shall sail thence as soon as she reasonably can; and, therefore, if the insured mean to protect his vessel during a stay *in port*, he should use those words in the policy (*a*). A policy *at and from* on freight,

(*q*) *Robertson* v. *French*, 4 East, 130; *Langhorn* v. *Hardy*, 4 Taunt. 628; *Spitta* v. *Woodman*, 2 Taunt. 416.

(*r*) Molloy, b. 2, c. 7, s. 14; Park, 28; 1 Arnould, 237 (6th ed.).

(*s*) *Ball* v. *Knight*, Fitz. 274.

(*t*) *Haughton* v. *The Empire M. I. Co.*, L. R. 1 Ex. 206.

(*u*) *Rotch* v. *Edie*, 6 T. R. 413; *Palmer* v. *Marshall*, 8 Bing. 79. See *Chitty* v. *Selwyn*, 2 Atk. 359; *Warre* v. *Miller*, 4 B. & C. 538.

(*x*) *De Wolf* v. *The Archangel M. B. & I. Co.*, L. R. 9 Q. B. 451. And see *Freeman* v. *Taylor*, 8 Bing. 124.

(*y*) *Parmeter* v. *Cousins*, 2 Camp. 235. See *Barker* v. *Janson*, L. R. 3 C. P. 303; *Haughton* v. *Empire Marine Ins. Co.*, L. R. 1 Ex. 206.

(*z*) *Bell* v. *Bell*, 2 Camp. 475.

(*a*) *Palmer* v. *Fenning*, 9 Bing. 460. See *Smith* v. *Surridge*, 4 Esp. 25; *Grant* v. *King*, 4 Esp. 175; and *Phillips* v. *Irving*, 7 M. & G. 328.

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the ship being in a foreign port, means on the *homeward* freight, and will not cover a subsequent loss of the outward (*b*); neither does such a policy at all attach until the vessel is in a condition to begin to take in her homeward cargo (*c*). When the policy is *at and from* any island or district, the words in general protect the ship in sailing from one port to another in that island or district for the purpose of loading, at least if the whole island or district be usually considered as one place (*d*); but it would be otherwise if the policy were "at and from her port of lading in such an island or district," the commencement of the voyage would then be restricted to one particular place; and, generally speaking, the words *port of lading* comprehend one place only; and it is a deviation if a ship insured *at and from her port of lading*, begin to load at one place and finish at another out of the line of her intended voyage, even though within the jurisdiction of the same custom-house (*e*). A policy on goods *at and from* G., beginning the adventure from the loading on board the ship, does not protect goods laden before the ship's arrival at G. (*f*), unless it be collected from the words of the instrument that a prior loading was contemplated (*g*); as when the words used

(*b*) *Bell* v. *Bell*, 2 Camp. 475; *Mackenzie* v. *Shedden*, Id. 431.

(*c*) *Williamson* v. *Innes*, 1 M. & Rob. 88.

(*d*) *Camden* v. *Cowley*, 1 W. Bla. 417; *Warre* v. *Miller*, 4 B. & C. 538; *Inglis* v. *Vaux*, 3 Camp. 437. See *Valente* v. *Gibbs*, 6 C. B. N. S. 270.

(*e*) *Brown* v. *Tayleur*, 4 Ad. & E. 241. See *Harrower* v. *Hutchinson*, L. R. 5 Q. B. 584; *Sailing Ship Garston Co.* v. *Hickie*, 15 Q. B. D. 580.

(*f*) *Langhorn* v. *Hardy*, 4 Taunt. 628; *Horneyer* v. *Lushington*, 15 East, 46; *Spitta* v. *Woodman*, 2 Taunt. 416; 6 East, 188; *Mellish* v. *Allnutt*, 2 M. & S. 106; *Rickman* v. *Carstairs*, 5 B. & Ad. 651. These cases have been the subject of much dispute, *Carr* v. *Montefiore*, 5 B. & S. 408. Phillips, 1, s. 939, suggests as an approximate statement of their effect the following: "This specification of the *terminus a quo*, unless it appears by the policy to be intended as a warranty of the loading at the designated place, is to be taken as mere recital, description, or intention or expectation, being at most an implied representation of the loading, and is to be construed accordingly." Parsons (2 Insurance, 50) says that if the language of the whole policy and all the circumstances of the case "make it appsrent that it was not the intention of the parties to make the attachment of the policy dependent upon the fact of loading, it would seem to us a departure, not only from natural justice, but from the true and rational principles of commercial law," to treat these words as a warranty. This seems to be the true view.

(*g*) *Bell* v. *Hobson*, 16 East, 240; *Gladstone* v. *Clay*, 1 M. & S. 418;

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were "from the loading on board the ship wheresoever" (*h*), or "outward cargo to be considered homeward interest twenty-four hours after her arrival at her first port of discharge" (*i*). A policy likewise on profits on goods, at and from M., laden or to be laden, "beginning the adventure upon the said goods from and immediately after the loading thereof aboard the said ship," will not cover a loss of profits on any goods not actually put on board (*k*). Nor will a policy on goods "at and from Hull to London," including all risk of craft, until the goods are discharged and safely landed, cover goods which are discharged into lighters, not with the intention of landing them, but of transhipping to other ships for exportation (*l*). A voyage to A., B., and C. means a voyage to all or any of them, with this reserve, if the ship go to more places than one, she must visit them in the order in which they are mentioned in the policy (*m*), and must not split the voyage into two, *e. g.*, by loading goods at A., and unloading them and loading others at B. (*n*). But she may omit visiting any of the ports named (*o*). If the voyage be described as "from A. to B., with liberty to call at any ports in any order," the vessel is authorized only to call at ports which would naturally and usually be ports of call on the voyage from A. to B. (*p*). If a voyage be from or to a district containing several ports, they must, in the absence of provisions to the contrary, be visited in their geographical order (*q*). But

Carr v. *Montefiore*, 5 B. & S. 408; *Joyce* v. *Realm Insurance Co.*, L. R. 7 Q. B. 580, p. 584.

(*h*) *Gladstone* v. *Clay*, ubi supra.

(*i*) *Joyce* v. *Realm Marine Insurance Co.*, L. R. 7 Q. B. 580.

(*k*) *M'Swiney* v. *Royal Exchange Assurance Company*, 14 Q. B. 634; *Anderson* v. *Morice*, 1 App. Cas. 713.

(*l*) *Houlder* v. *Merchants Marine Ins. Co.*, 17 Q. B. D. 354.

(*m*) *Marsden* v. *Reid*, 3 East, 572.

(*n*) *Sellar* v. *M'Vicar*, 1 B. & P. N. R. 23. See *Bottomley* v. *Bovill*, 5 B. & C. 210; *Solly* v. *Whitmore*, 5 B. & Ald. 45.

(*o*) *Marsden* v. *Reid*, 3 East, 572.

(*p*) *Ledue* v. *Ward*, 20 Q. B. D. 475 (C. A.) (bill of lading).

(*q*) *Clason* v. *Simmonds*, 6 T. R. 533, n. See *Andrews* v. *Mellish*, 5 Taunt. 496. It will be stated presently, p. 453, that in case of a voyage to, or liberty to touch at, several places, they must be taken in the order mentioned in the policy; but as this results from an implication from the order in which they are named, it probably might be controlled by a custom to visit them in a different order.

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words are generally inserted to authorize deviations from the direct track, in order to the better accomplishment of the purposes of the voyage.

If the vessel sail upon a voyage different from that described in the policy, or, having sailed on that described, afterwards deviate, the underwriters are released (*r*); their risk, in the former case, never attaching, and in the latter, being discharged upon a principle which we will explain when we come to speak of warranties. A mere intention to deviate, never carried into effect, will not discharge the underwriters (*s*); and, if the ship be hindered from completing her voyage by a mere temporary impediment, she may, it would seem, lawfully wait at a neighbouring place of safety till it is removed, and afterwards pursue her voyage at the risk of the underwriter (*t*).

In *Wingate* v. *Foster* (*u*), the policy effected on four steam pumps belonging to a salvage steamer about to proceed to a wreck, stated the risk to be at and from "Ardrossan to the *Alexandra*, steamer, ashore in the neighbourhood of Drogheda, and whilst there engaged at the wreck, and until again returned to Ardrossan." The stranded steamer was raised by means of the pumps. While she was being towed to Ardrossan, with the pumps on board, she met with bad weather. Her course was altered, and an endeavour was made to seek refuge in Belfast. The *Alexandra* foundered before she reached the port. There being no such words as "with liberty to go to a port of refuge," it was held that the loss was not covered by the policy.

We have seen that the words *at and from* an island or district will protect the ship in sailing from one port of that island or district to another. But where she is insured *to* such an island or district, the risk as to the ship determines immediately after she has been moored for twenty-four hours at the first port

(*r*) *Wooldridge* v. *Boydell*, 1 Dougl. 16; *Bottomley* v. *Bovill*, 5 B. & C. 210; *Middlewood* v. *Blakes*, 7 T. R. 162; *Parkin* v. *Tunno*, 11 East, 22.

(*s*) *Kewley* v. *Ryan*, 2 H. Bl. 343, cited *Hare* v. *Travis*, 7 B. & C. 14; *Heselton* v. *Almutt*, 1 M. & S. 46.

(*t*) See *Schroder* v. *Thompson*, 7 Taunt. 462; *Blackenhagen* v. *London A. Co.*, 1 Camp. 454; *Hadley* v. *Clarke*, 8 T. R. 259. But see *Brown* v. *Vigne*, 12 East, 283; *Doyle* v. *Powell*, 4 B. & Ad. 267.

(*u*) 3 Q. B. D. 582 (C. A.).

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there at which she stops to unload (*u*); the owner who wishes to avoid the effect of this rule should insure the vessel to *her port or ports* of discharge. These words, if used, protect the vessel till her cargo is substantially discharged—I say substantially, for if the principal part of the cargo be unladen, the risk will thereupon determine, though part be left on board to effect some object unconnected with that of the voyage insured, *e. g.*, to serve as ballast while she proceeds in search of a new cargo (*x*). As to the goods, they will in general continue to be protected till their arrival at their port of delivery (*y*).

The voyage, as far as the underwriter's risk is concerned, is generally limited to determine when the ship has been moored (*z*) "twenty-four hours (*a*) *in good safety.*" The words "*good safety*" are material. For instance, though she arrive in port, and remain there more than four-and-twenty hours, yet if she arrive a mere wreck, and afterwards founder, she cannot be said to have been moored an instant in *good safety*, and the underwriters will not be discharged (*b*). But it is otherwise, if, having continued in safety twenty-four hours, she be afterwards lost, although in consequence of an act performed during the voyage; for instance, smuggling (*c*); and if the words *good safety* be not used, the risk determines at the expiration of the limited time, whatever may be the condition of the vessel (*d*).

(*u*) *Camden* v. *Cowley*, 1 W. Bl. 417; *Leigh* v. *Mather*, 1 Esp. 412.

(*x*) *Moore* v. *Taylor*, 1 Ad. & E. 25.

(*y*) *Leigh* v. *Mather*, 1 Esp. 412. See Arnould on Insurance, p. 397, 6th ed.

(*z*) As to what is such a mooring, see *Whitwell* v. *Harrison*, 2 Exch. 127, which turns on the finding of the jury; *Samuel* v. *Royal Exchange Insurance Co.*, 8 B. & C. 119.

(*a*) These are regarded as part of the period of the voyage. See *The Mercantile Marine I. Co.* v. *Titherington*, 5 B. & S. 765. Hence "and thirty days" mean thirty days and the twenty-four hours. Sometimes these words are omitted and a certain time, *e. g.*, "fifteen days whilst there after arrival," inserted, which will cover that period, though the cargo be previously discharged, and the vessel had begun loading for a new voyage: *Gambles* v. *The Ocean Marine I. Co.*, 1 Ex. D. 8, 141.

(*b*) *Shaw* v. *Felton*, 2 East, 109; *Parmeter* v. *Cousins*, 2 Camp. 235. See *Lidgett* v. *Secretan*, L. R. 5 C. P. 190.

(*c*) *Lockyer* v. *Offley*, 1 T. R. 252; *Angerstein* v. *Bell*, Park, 55.

(*d*) *Meretony* v. *Dunlope*, cited in *Lockyer* v. *Offley*, 1 T. R. 252, at p. 260. See *Pole* v. *Fitzgerald*, Willes, 641. But this does not preclude the insured from recovering for any damage previously sustained: see *Knight* v. *Faith*, 15 Q. B. 649; *Lidgett* v. *Secretan*, L. R. 6 C. P. 616.

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But if the risk be "until the ship be discharged from her voyage," she is not considered discharged until the goods are unladen (*e*).

The risk on goods is generally limited to continue until they shall be "*discharged and safely landed*" (*f*). This landing must, however, be accomplished with reasonable expedition; delay would be in the nature of a deviation, and would discharge the underwriter (*g*). But as the policy protects the goods till landed, the underwriter is liable, though the loss happen after a transhipment into shallops, lighters, droghers, or launches for the purpose of landing the goods, such transhipment being in the usual course of the voyage (*h*), which course the underwriter is, as we have repeatedly observed, presumed to know. But it is otherwise, if the loss occur while the goods are in lighters at the port of delivery for transhipment into an export vessel (*i*), if the assured tranship them on board another vessel (*k*), or send his own lighter and take the goods into his own custody, or discharge the public lighterman who was employed (*l*).

By 30 & 31 Vict. c. 23, s. 8 (*m*), time policies for any period exceeding a year are void.

If the words "lost or not lost" be inserted in a time policy, the policy may cover past losses (*n*). Under a time policy underwriters will be liable for any losses within the period named, though the nature of the damage be not known until after its expiration (*o*).

(*e*) *Anon.*, Skinn. 243; Com. Dig. Merchant, E. 9.

(*f*) *Harrison* v. *Ellis*, 7 E. & B. 465; *Bourne* v. *Gatcliffe*, 7 M. & G. 853.

(*g*) *Parkinson* v. *Collier*, Park, 470. See *Leigh* v. *Mather*, 1 Esp. 412; *Noble* v. *Kennoway*, 2 Dougl. 510.

(*h*) *Stewart* v. *Bell*, 5 B. & Ald. 238; *Matthie* v. *Potts*, 3 B. & P. 23; *Rucker* v. *L. A. Co.*, 2 B. & P. 432, n.; *Tierney* v. *Etherington*, 1 Burr. 348.

(*i*) *Houlder* v. *Merchant Marine Ins. Co.*, 17 Q. B. D. 434.

(*k*) *Bold* v. *Rotherham*, 8 Q. B. 781. Unless liberty to tranship be expressly reserved, which will protect the goods to their ultimate destination: see *Oliverson* v. *Brightman*, 8 Q. B. 781.

(*l*) *Sparrow* v. *Caruthers*, 2 Str. 1236; *Strong* v. *Natally*, 1 B. & P. N. R. 16. See *Lane* v. *Nixon*, L. R. 1 C. P. 412.

(*m*) See Stamp Act, 1870, s. 117 (1).

(*n*) *Hucks* v. *Thornton*, Holt's N. P. 30.

(*o*) *Knight* v. *Faith*, 15 Q. B. 649.

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5thly, *Perils.*—The perils against which the insurer guarantees are described to be "of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever; barratry of the master and mariners, and all other perils, losses, and misfortunes, that have or shall come to the hurt, or detriment, or damage of the said ———, or any part thereof." The underwriters may be liable for losses prior to the date of the policy, provided there be no concealment or misrepresentation. Where the words "lost or not lost," *Gallicè sur bonnes et mauvaises nouvelles*, are inserted, as they usually are, they render the underwriter liable in respect of any of the above perils, though the ship be lost before the insurance (*p*); they render the policy, in the words of *Parke*, B., "a contract of indemnity against all *past* as well as all *future* losses sustained by the assured in respect of the interest insured" (*q*). Even in the absence of the words "lost or not lost" the policy will cover past losses, if the intention to include these appears from the description of the rest (*r*). A policy containing the words "lost or not lost" will even include cases in which the subject-matter of insurance had not vested in the assured at the time of the occurrence of the loss; for instance, if a merchant having bought goods at sea were to insure them, *lost or not lost*, the policy would cover a loss sustained by them during the voyage, but before the purchase (*s*). It is sometimes the practice to restrain these words, by warranting the ship to be well on a particular day; yet, even then, if she were well on any part of that day, though she be lost before the policy is effected, the underwriter will be liable (*t*). Indeed, if the insured, or an agent by whom the insurance is effected, or an agent who ought to have and might

(*p*) *Gledstanes* v. *Royal Exchange Ass. Corporation*, 34 L. J. Q. B. 30.

(*q*) *Sutherland* v. *Pratt*, 11 M. & W. at pp. 311, 312.

(*r*) 1 Phillips, s. 925.

(*s*) *Sutherland* v. *Pratt*, 11 M. & W. 296.

(*t*) *Blackhurst* v. *Cockell*, 3 T. R. 360.

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have disclosed the fact to the insured (*u*), knows at the time of making the insurance that the ship is lost, that fraud avoids the policy (*x*). But where the member of a mutual insurance company proposed a vessel for insurance which was accepted, and the premium paid, but afterwards and before the policy was actually executed she was lost, which was known to all parties at the time of executing the policy, the words *lost or not lost* were held to entitle the assured to recover. The Court said, that there was considerable analogy between this case and *Payne* v. *Meller* (*y*), decided by Lord *Eldon*, who held the purchaser bound to perform his contract, although the house was burnt before the time appointed for conveying it. So in the present case the insured had bought and paid for the underwriter's promise to indemnify; and equity would have compelled the latter to execute a formal policy whenever tendered to him: in voluntarily executing it he had only performed a manifest duty, and could not now retract the obligation (*z*).

Perils of the Sea.—These words mean losses occasioned strictly by sea damage (*a*), *e. g.*, by stress of weather, winds, and waves, lightning and tempest, rocks, sands, &c. Their meaning was explained in *The Xantho* by Lord *Herschell* in the passage already cited (*ante*, pp. 328, 329). It follows from that statement that a loss occasioned by collision is a peril of the sea (*b*); so is a loss by the insured vessel striking the

(*u*) *Blaekburn, Low & Co.* v. *Vigors*, 12 App. Cas. 531.

(*x*) *Jefferyes* v. *Legendra*, 1 Show. 324; *E. of March* v. *Pigot*, 5 Burr. 2803.

(*y*) 6 Ves. jun. 349; Porter on Insurance, 423.

(*z*) *Mead* v. *Davison*, 3 Ad. & E. 303.

(*a*) Ex marinæ tempestatis discrimine; Emerigon, vol. i. c. 12, in initio. See *Cullen* v. *Butler*, 5 M. & S. at p. 464; Com. Dig. Merchant, E. 9; *Shawe* v. *Felton*, 2 East, 109; and *Parfitt* v. *Thompson*, 13 M. & W. 392; *Montoya* v. *London Assurance Co.*, 6 Exch. 451; *Cator* v. *Great Western Insurance Co.*, L. R. 8 C. P. 552; *The Chasca*, L. R. 4 A. & E. 446.

(*b*) *Davidson* v. *Burnand*, L. R. 4 C. P. 117, at p. 121, per *Willes*, J.; *Dixon* v. *Sadler*, 5 M. & W. 405; *Smith* v. *Scott*, 4 Taunt. 126. But a shipowner cannot protect himself under the exception of "perils of the sea" in a charter-party against the claim of the charterer in respect of a loss occasioned by a collision brought about by the negligence of the carrying ship. See post, p. 434.

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ground under the influence of a swell on the uneven bed of a dry harbour (*c*), or a loss of animals killed by the agitation of the ship in a storm (*d*). But a loss by delay on the voyage caused by bad weather is not (*e*). If a vessel be not heard of within a reasonable time after her sailing, it is presumed that she foundered, and the assured may recover for a loss by *perils of the sea* (*f*). A loss occasioned by *sea water coming into a vessel* through a hole eaten in the vessel by rats is a loss by perils of the sea (*g*). But a loss from worms or rats eating the ship or goods is not (*h*). If the ship insured be hove down on the beach within the tideway to repair, and thereby bilged (*i*), or if damage is caused from the flow of water into a ship lying in dock through the discharge pipes, the valves of which have been left open (*j*), it would seem that these are not, strictly speaking, losses by perils of the sea, because the vessel is ashore when the damage is done. Though not losses from perils of the sea, they are certainly losses from "*perils of a like kind*" within the general words in the policy (*k*). The bursting of the air-chamber of a donkey-pump, which was being used in pumping water into the boilers of a steamer for the purpose of navigation, was held, in *Thames and Mersey Mar. Ins. Co.* v. *Hamilton, Fraser & Co.* (*l*), not to come either within the words "perils of the sea," or the words "perils of a like kind."

A loss caused immediately by perils of the sea is within the policy, though it would not have occurred but for the concurrent

(*c*) *Fletcher* v. *Inglis*, 2 B. & Ald. 315. See *Magnus* v. *Buttemer*, 11 C. B. 876; *Hahn* v. *Corbett*, 2 Bing. 205.

(*d*) *Lawrence* v. *Aberdein*, 5 B. & Ald. 107.

(*e*) *Taylor* v. *Dunbar*, L. R. 4 C. P. 207.

(*f*) Park, 105, 106; *Green* v. *Brown*, 2 Str. 1199; *Cohen* v. *Hinckley*, 2 Camp. 51; *Koster* v. *Innes*, R. & M. 333. See *Koster* v. *Reed*, 6 B. & C. 19. In such a case, if the ship reappear, the underwriters may, it seems, take possession of her: *Houstman* v. *Thornton*, 1 Holt, 212.

(*g*) *Hamilton, Fraser and Co.* v. *Pandorf and Co.*, 12 App. Cas. 518.

(*h*) Ibid.; Park, 105; *Hunter* v. *Potts*, 4 Camp. 203; *Laveroni* v. *Drury*, 22 L. J. Ex. 2; *Hazard's Administrator* v. *New England Insurance Co.*, 8 Peters, U. S. 557; *The Carlotta*, 3 Asp. M. C. 456 (Amer.). And see *Paterson* v. *Harris*, 1 B. & S. 336.

(*i*) *Thompson* v. *Whitmore*, 3 Taunt. 277. See *Magnus* v. *Buttemer*, 11 C. B. 876; *Phillips* v. *Barber*, 5 B. & Ald. 161.

(*j*) *Davidson* v. *Burnand*, L. R. 4 C. P. 117, at p. 120.

(*k*) Ibid. See post, pp. 431, 432.

(*l*) 12 App. Cas. 484.

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action of some other cause which is not within it (*m*); for contracts of marine insurance are to be construed by the maxim, *causa proxima et non remota spectatur* (*n*). But the maxim must not be applied too literally (*o*). Where sea water coming into a vessel injured hides on board her, and caused them to become putrid, and tobacco, which was a part of the cargo, contracted an ill-flavour from the odour caused by the putrid hides, it was held that the injury to the tobacco was caused by perils of the sea, although the sea water had not touched the tobacco (*p*).

Fire.—How the fire was occasioned is immaterial, whether by a common accident, or by the negligence of the crew, or lightning, or an act done in duty to the State (*q*), or to prevent capture (*r*). But if goods be put on board in a damaged condition, and are, in consequence, liable to effervesce, and generate the fire by which they are consumed, the underwriters are not liable (*s*).

Enemies.—This word is used in contradistinction to "*pirates, rovers, thieves*," afterwards mentioned, a capture by whom is an act of depredation; whereas one by enemies is an act done *jure belli* (*t*). We have already had occasion to touch upon the change of property by capture, and to state that the mere fact of capture does not of itself divest an owner's property in the thing captured, though capture is deemed a total loss so long as the vessel remains in the possession of the captors (*u*). Insurance, however, being a contract of *indemnity*, the insured must be reimbursed, if he have in point of fact suffered a loss, and the underwriter cannot protect himself by any technical rules about

(*m*) *Dudgeon* v. *Pembroke*, 2 App. Cas. at p. 297.

(*n*) *Ionides* v. *Universal Marine Insurance Co.*, 14 C. B. N. S. 259. See *Inman S.S. Co.* v. *Bischoff*, 7 App. Cas. 670, and below, pp. 433, 434.

(*o*) *Inman S.S. Co.* v. *Bischoff*, 7 App. Cas. 670, at pp. 675, 676, per Lord *Selborne*, L. C.

(*p*) *Montoya* v. *London Ass. Co.*, 6 Exch. 451.

(*q*) *Gordon* v. *Rimmington*, 1 Camp. 123; *Austin* v. *Drewe*, 6 Taunt. 436; *Busk* v. *R. E. A. Co.*, 2 B. & Ald. 73; *Shaw* v. *Robberds*, 6 Ad. & E. 75; *Hollingworth* v. *Brodrick*, 7 Ad. & E. 40.

(*r*) *Gordon* v. *Rimmington*, 1 Camp. 123.

(*s*) *Boyd* v. *Dubois*, 3 Camp. 133.

(*t*) See *Matthie* v. *Potts*, 3 B. & P. 23.

(*u*) *Dean* v. *Hornby*, 3 E. & B. 180.

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the change of property (*v*). If, indeed, the vessel be recaptured, and the owners become entitled to restitution on payment of salvage, that may, under some circumstances, change into a *partial* loss one which was *primâ facie total* (*x*). But, even when the vessel is preserved, the insured have a right to be indemnified against charges *bonâ fide* incurred in accomplishing that object; as where a neutral ship was improperly captured, an interlocutory decree pronounced against her, and the owners, dreading the expense and delay of appeal, compromised the suit, and purchased the captor's consent to a reversal (*y*). An insurance against *British capture* is illegal, as being against public policy (*z*).

Pirates, Rovers, and Thieves.—The meaning of the word pirate is explained in 4 Bl. Comm. 72 (*a*). Generally speaking, he is one who commits on the high seas those acts of robbery and depredation, which, if committed on land, would have been felonies. Thieves are persons external to the ship (*b*).

Jettison.—Jettison is a throwing of goods overboard, *ex justâ causâ; e.g.*, to prevent their capture by an enemy (*c*).

Captures, Arrests, Restraints, and Detainments of Kings, Princes, and People (*d*).—By *kings* and *princes* are here meant all potentates

(*v*) *Goss* v. *Withers*, 2 Burr. 694; *Hamilton* v. *Mendes*, Id. 1209. See *Milles* v. *Fletcher*, Dougl. 234; *Roteh* v. *Edie*, 6 T. R. 413; *M'Iver* v. *Henderson*, 4 M. & S. 576; *Cologan* v. *L. A. Co.*, 5 M. & S. 447.

(*x*) *Hamilton* v. *Mendes*, 2 Burr. 1189; *Bainbridge* v. *Neilson*, 10 East, 329; *M'Masters* v. *Shoolbred*, 1 Esp. 238; *Patterson* v. *Ritchie*, 4 M. & S. 393. Vide post.

(*y*) *Berens* v. *Rucker*, 1 W. Bla. 313. See *Wilson* v. *Forster*, 6 Taunt. 25; 1 Marsh. 425.

(*z*) *Furtado* v. *Rogers*, 3 B. & P. 191; *Kellner* v. *Le Mesurier*, 4 East, 396; *Gamba* v. *Le Mesurier*, 4 East, 407.

(*a*) See also Com. Dig. Admiralty, E. 3; Hawk. B. 1, c. 20, s. 1; *Nesbitt* v. *Lushington*, 4 T. R. 783; *Regina* v. *Serva*, 2 C. & K. 53; *Naylor* v. *Palmer*, 8 Exch. 739; 10 Exch. 382. As to what is a loss by, see *Dean* v. *Hornby*, 3 E. & B. 180; *Kleinwort* v. *Shepard*, 1 E. & E. 447, and the above cases.

(*b*) *Taylor* v. *Liverpool and G. W. Steam Co.*, L. R. 9 Q. B. 546.

(*c*) *Butler* v. *Wildman*, 3 B. & Ald. 398.

(*d*) As to the meaning of the words "capture and seizure," which are often added, see *Johnston* v. *Hogg*, 10 Q. B. D. 432.

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whether at peace or war with us (*e*). The term *people* signifies the ruling power of a country whatever it may be, and will not include a crowd of riotous individuals (*f*). One of the most usual species of detainments is an *embargo*, which is an arrest laid on ships or merchandise by public authority, or a prohibition of State (*g*), commonly issued to prevent foreign ships from putting to sea in time of war, and sometimes to exclude them from entering our ports.

As we have seen that the insured is not protected against British capture, so neither is a foreigner allowed to insure against British detention (*h*), except so far as it may be accidental and erroneous (*i*). Formerly there prevailed an idea that a foreigner could not effectually insure against the act of his own government (*j*), unless the underwriter agreed to make such insurance with full knowledge of the country of the insured (*k*); for a *foreigner*, insured against a loss of that description, might give such information to his own government as would produce a seizure, the blow of which would fall upon the British underwriter. The restraint also might be regarded as that of the insured himself, as every subject of a State was to be regarded as consenting to, and adopting every act of his own government. But this fiction has been disregarded, and a foreigner, in a time of peace, may effectually protect himself by such an insurance (*l*). It seems, too, that a British subject might insure against British embargo (*m*). If

(*e*) Per Lord *Mansfield* in *Goss* v. *Withers*, 2 Burr. 696; *Mellish* v. *Andrews*, 15 East, 13; *Sewell* v. *R. E. A. Co.*, 4 Taunt. 856; Emerig. c. 12, s. 30; *Rodocanachi* v. *Elliott*, 9 C. P. D. 518.

(*f*) *Nesbitt* v. *Lushington*, 4 T. R. 783.

(*g*) *Aubert* v. *Gray*, 32 L. J. Q. B. 50; *Rodocanachi* v. *Elliott*, L. R. 8 C. P. 649; 9 C. P. 518. Generally this would not be a total loss, but the stipulation of the parties or circumstances may make it so. As to the distinction between restraint and capture, see *Fowler* v. *E. & S. M. I. Co.*, 18 C. B. N. S. 818, where the underwriter was bound to "pay a total loss thirty days after receipt of official news of capture or embargo."

(*h*) See *Touteng* v. *Hubbard*, 3 B. & P. 291.

(*i*) *Mullett* v. *Shedden*, 13 East, 304.

(*j*) *Campbell* v. *Innes*, 4 B. & Ald. 423.

(*k*) *Simeon* v. *Bazett*, 2 M. & S. 94; 5 Taunt. 824; 5 M. & S. 147.

(*l*) *Aubert* v. *Gray*, 32 L. J. Q. B. 50; overruling *Conway* v. *Gray*, 10 East, 536.

(*m*) See Lord *Alvanley's* opinion in *Touteng* v. *Hubbard*, 3 B. & P. 291; *Green* v. *Young*, 2 Ld. Raym. 840; 1 Arnould, 6th ed. p. 767.

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the detention be occasioned by the gross negligence (*n*), or improper conduct of the assured himself, *e. g.* in carrying simulated papers without the underwriter's permission, he will not be permitted to recover; for his supineness or misconduct is a breach of his implied warranty to guard against the risks covered by the policy (*o*). But a contravention of the mere revenue laws of a foreign country, consented to by the underwriter, will not vitiate it; for our Courts do not take notice of them (*p*). If the vessel be deterred from proceeding on her voyage through fear of an embargo (*q*), or find the port of destination shut against her (*r*), or be permitted to land her goods (which are afterwards seized) in the usual manner (*s*) these losses are not within the policy; for, in the former cases, there was no seizure; in the last, none until the voyage had determined. But the underwriter cannot protect himself by saying that the seizure was unjustifiable, or that the insured had a remedy over against the aggressors (*t*).

Barratry by the Master and Mariners.—*Barratry* is derived from an Italian word, which signifies to cheat. In policies it includes every species of fraud or knavery in the master or mariners of the ship, by which the owners are injured (*u*). Phillips, s. 1062 (who collects the various judicial definitions of barratry), thus defines it:—

"An unlawful, fraudulent, or dishonest act of the master, mariners, or other carriers, or of gross misconduct, or very gross and culpable negligence, contrary, in either case, to their duty to the owner, and that might be prejudicial to him or to others interested in the voyage or adventure."

(*n*) *Pipon* v. *Cope*, 1 Camp. 434. See 2 Vern. 176; *Horneyer* v. *Lushington*, 3 Camp. 85; *Bell* v. *Carstairs*, 14 East, 374.

(*o*) 1 Camp. 436, n. See post, pp. 458 *et seq.*

(*p*) *Planché* v. *Fletcher*, Dougl. 251; *Holman* v. *Johnson*, 1 Cowp. at p. 343. See *Simeon* v. *Bazett*, 2 M. & S. 94; 5 Taunt. 824; *Emperor of Austria* v. *Day*, 3 De G. F. & J. 217.

(*q*) *Forster* v. *Christie*, 11 East, 205.

(*r*) *Hadkinson* v. *Robinson*, 3 B. & P. 388.

(*s*) *Brown* v. *Carstairs*, 3 Camp. 161. See *Carruthers* v. *Gray*, 15 East, 35; 3 Camp. 142.

(*t*) *Rotch* v. *Edie*, 6 T. R. 413; *Mullett* v. *Shedden*, 13 East, 304; *Wilson* v. *Forster*, 6 Taunt. 25.

(*u*) *Lockyer* v. *Offley*, 1 T. R. 252; *Knight* v. *Cambridge*, 1 Str. 581, the first case on the subject; *Heyman* v. *Parish*, 2 Camp. 149.

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Thus barratry may be committed by a wilful deviation in fraud of the owner (*v*), by smuggling (*x*), by sailing in breach of an embargo, and rendering ship liable to seizure (*y*), by wilfully breaking a blockade (*z*), by running away with the ship (*a*), by sinking or deserting her, or by defeating or delaying the voyage with a criminal intent (*b*). Even dropping at anchor with a fraudulent intent is barratry (*c*). If, by reason of these or other similar acts, the subject-matter of insurance is detained, lost, or forfeited, the insured will be entitled to recover for a loss by *barratry*. However, to constitute an act of barratry, there must be *fraud* or wilful misconduct—it must arise *ex maleficio;* a simple deviation through ignorance, unaccompanied with fraud or crime, will not be barratry (*d*). From the definition of barratry above given, it follows that it can be committed by no one but the master and mariners, and against no one but the *owner* of the ship (*e*), a term which, however, comprehends owners *pro hâc vice*, *e. g.*, general freighters (*f*). Of course, when the owner of the ship is also master, he cannot commit barratry against himself (*g*), nor can an act performed with his consent be barratrous against him (*h*). But a part-owner, who is also master, may be guilty of barratry (*i*). Barratry may not be committed against the freighter with the consent of the general owner (*k*), unless, perhaps, in cases where the freighter must be considered to be

(*v*) *Vallejo* v. *Wheeler*, Cowp. 143.

(*x*) See *Lockyer* v. *Offley*, ubi sup.

(*y*) *Robertson* v. *Ewer*, 1 T. R. 127.

(*z*) *Goldschmidt* v. *Whitmore*, 3 Taunt. 508.

(*a*) *Hibbert* v. *Martin*, 1 Camp. 539; *Hucks* v. *Thornton*, 1 Holt, 30; *Toulmin* v. *Inglis*, 1 Camp. 421; *Toulmin* v. *Anderson*, 1 Taunt. 227.

(*b*) *Roseow* v. *Corson*, 8 Taunt. 684. Vide *Dixon* v. *Reed*, 5 B. & Ald. 597.

(*c*) Per *Buller*, J., in *Ross* v. *Hunter*, 4 T. R. 38.

(*d*) Per *Lee*, C. J., *Stamma* v. *Brown*, cited 7 T. R. at p. 508; per Lord *Ellenborough*, *Earle* v. *Rowcroft*, 8 East, 126; *Phyn* v. *R. E. A. Co.*, 7 T. R. 505; *Grill* v. *Iron Screw Colliery Co.*, L. R. 3 C. P. 476 ("wilful default" only, within the meaning of s. 299 of Merchant Shipping Act, 1854, is not barratry).

(*e*) *Nutt* v. *Bordieu*, 1 T. R. 323.

(*f*) *Vallejo* v. *Wheeler*, Cowp. 143, 505; *Bottomley* v. *Bovill*, 5 B. & C. 210; *Soares* v. *Thornton*, 7 Taunt. 627.

(*g*) *Ross* v. *Hunter*, 4 T. R. 33.

(*h*) *Stamma* v. *Brown*, 2 Str. 1173; *Nutt* v. *Bordieu*, 1 T. R. 323.

(*i*) *Jones* v. *Nicholson*, 10 Ex. 28.

(*k*) *Nutt* v. *Bordieu*, 1 T. R. 323; *Stamma* v. *Brown*, 2 Str. 1173.

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the owner *pro hâc vice* (*l*); nor against the owners with the consent of the freighter (*m*). But though an act cannot be barratrous against the owner, if it be done with his consent, yet an act done *for his benefit*, if without his consent, may. Thus, where the master, having general instructions to make the best purchases with despatch, went to an enemy's port and traded there, for which his ship was seized, this was held barratry, although his only object was to do the best for his employer (*n*); for it is not for him to judge in cases not entrusted to his discretion, or to suppose that he is not breaking the trust reposed in him, but acting meritoriously, when he endeavours to advance the interest of his owners by means which the law forbids, and which his owners must be taken also to have forbidden, both from their sense of public duty and their dread of risk. It is not necessary that the loss should be contemporaneous with the barratry; but the barratry must happen during the voyage insured (*o*), and must be the immediate cause of the loss (*p*). Thus, when the master, during the voyage, committed barratry by smuggling, for which the ship was seized, but not till after she had been moored twenty-four hours in safety at her destined port, the underwriter was held to be discharged.

Other Perils.—These general words are inserted, as Molloy remarks, to preclude all those nice questions formerly agitated by civilians and common lawyers, and may be useful where the loss, though one against which the assured ought to be indemnified, does not fall within any of the other classes specified in the policy. The first case in which the effect of these words came directly into question was *Cullen* v. *Butler* (*q*), where the crew of a British ship, believing the ship insured to be an enemy, fired

(*l*) *Vallejo* v. *Wheeler*, Cowp. 143; *Soares* v. *Thornton*, 7 Taunt. 627; and *Hannen*, J., in *Ionides* v. *Pender*, 1 Asp. M. C. 432.

(*m*) In *Hobbs* v. *Hannam*, 3 Camp. 93, Lord *Ellenborough* held that it could not; *Boutflower* v. *Wilmer*, Sel. N. P. 903, 13th ed.

(*n*) *Earle* v. *Rowcroft*, 8 East, 126. See *Moss* v. *Byrom*, 6 T. R. 379; *Wilson* v. *Rankin*, L. R. 1 Q. B. 162.

(*o*) *Lockyer* v. *Offley*, 1 T. R. 252; *Powell* v. *Hyde*, 5 E. & B. 607.

(*p*) *Cory* v. *Burr*, 8 App. Cas. 393.

(*q*) 5 M. & S. 461. And see *Palmer* v. *Naylor*, 10 Exch. 382.

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upon and sunk her. It was held that though, perhaps, not a "peril of the seas," this loss came within the general words "all *other perils*, &c." Lord *Ellenborough*, C. J., in delivering judgment, said—

> That as these general words "must be considered as introduced into the policy in furtherance of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words, they are entitled to be considered as material and operative words, and to have the due effect assigned to them in the construction of the instrument; and which will be done by allowing them to *comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes.*"

And the House of Lords, in the recent case of *Thames and Mersey Mar. Ins. Co.* v. *Hamilton, Fraser & Co.* (*r*), in which the previous authorities are reviewed, adopts this as the true rule of construction. The question was, whether damage to a donkey engine owing to the closing of a valve by the negligence of the engineer, or accidentally, fell within the general words. The House of Lords held that it did not.

> "The damage to the donkey engine" said Lord *Bramwell*, "was not through its being in a ship, or at sea. . . . The sea, waves, and winds had nothing to do with it."

The question, said Lord *Herschell*, referring to *Cullen* v. *Butler* (*s*), is,—

> "whether the loss falls within the general words, as construed by Lord Ellenborough; that is, whether it is a case 'of marine damage of the like kind with those which are specially enumerated, and occasioned by similar causes.'"

Where the captain of a ship had thrown a quantity of dollars overboard to prevent their falling into the hands of an enemy, by whom the ship was pursued, this was held to be a loss, if not

(*r*) 12 App. Cas. 484. (*s*) Supra.

by jettison, at least *ejusdem generis* with jettison, and, therefore, within the general words (*u*). Where a ship, placed in a graving dock to be repaired, was, by the violence of the wind, thrown over on her side and bilged, this loss was held to be within the general words (*x*). The policy—its form and construction.

The perils and losses mentioned in the policy having been thus separately considered, there remain a few general observations on this part of the contract.

First, the underwriters are not liable for a loss which is necessarily incidental to the property, rather than occasioned by an adventitious cause (*y*), such as loss by decomposition, as of meat, fruit, flour (*z*), by worms (*a*), or rats (*b*), or the self-ignition of damaged hemp (*c*), or natural decay or deterioration.

Secondly, there is a class of losses which seems not to fall within the contemplation of the policy, but only to entitle the loser to be reimbursed by the owner of the ship (*d*); as, for instance, where the captain is obliged to sell part of the goods for the repair of ship (*e*).

Thirdly, in policies on freight, it has been held, that if the goods laden still exist, and the ship continue capable of carrying them, the underwriter is not liable, although the master sell or leave them behind on account of the great expense which would attend carrying them forward; for though he may in doing so have exercised a prudent discretion, yet it would be dangerous to allow him, by any exercise of his discretion, to cast the loss of freight from the shoulders of his owner on those of the underwriter (*f*). But it has been since decided, that when the goods

(*u*) *Butler* v. *Wildman*, 3 B. & Ald. 398.

(*x*) *Phillips* v. *Barber*, 5 B. & Ald. 161. Accord. *Devaux* v. *I'Anson*, 5 Bing. N. C. 519. But query as to the decision in the latter case. See *Thames and Mersey Ins. Co.* v. *Hamilton, Fraser, & Co.*, supra; *Davidson* v. *Burnand*, L. R. 4 C. P. 117; *Butler* v. *Wildman*, 3 B. & Ald. 398.

(*y*) *Fawcus* v. *Sarsfield*, 6 E. & B. 192.

(*z*) 1 Emerigon, c. xii. s. 9, pp. 388—392; *Taylor* v. *Dunbar*, L. R. 4 C. P. 206.

(*a*) *Rohl* v. *Parr*, 1 Esp. 444.

(*b*) *Hunter* v. *Potts*, 4 Camp. 203.

(*c*) *Boyd* v. *Dubois*, 3 Camp. 133.

(*d*) See judgment of *Bayley*, J., and *Abbott*, J., in *Powell* v. *Gudgeon*, 5 M. & S. 431.

(*e*) *Powell* v. *Gudgeon*, ubi supra; *Sarquy* v. *Hobson*, 2 B. & C. 7; *Atkinson* v. *Stephens*, 7 Exch. 567.

(*f*) *Mordy* v. *Jones*, 4 B. & C. 394; *Brocklebank* v. *Sugrue*, 1 M. & Rob.

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are so damaged by a peril of the sea in the course of the voyage as to render them incapable, except at a cost which would exceed their value on arrival, of being carried to their destination, and they are, therefore, left behind at an intermediate port, the assured may recover for loss of freight (*g*).

Fourthly, a loss is properly ascribed to a particular peril, if that peril be the *immediate* cause of the loss, though another cause may have contributed; as where a merchant vessel was taken in tow by a ship of war, and thus exposed to a tempestuous sea (*h*), this loss was properly ascribed to the perils of the sea; so where an enemy chases the ship and takes her, the loss is one by capture, though that enemy would not have overtaken her had not her rate of sailing been checked by sea damage (*i*). In these and many other instances (*k*) the maxim equally applies "*in jure causa proxima non remota spectatur*" (*l*). Thus, where a vessel in consequence of the barratry of the master in smuggling was seized by Spanish revenue officers, with a view to procure her condemnation and confiscation, the loss to the owner was held to be due to "capture and seizure," and not to the "barratry" of the master (*m*). A ship was chartered for time on monthly hire, with a proviso that, if at any time the ship became inefficient, the charterers might put her out of pay; the

102. See *Philpott* v. *Swann*, 11 C. B. N. S. 281; *Blasco* v. *Fletcher*, 14 C. B. N. S. 147.

(*g*) *Michael* v. *Gillespy*, 2 C. B. N. S. 627. The question would seem to be, not whether it is *physically* but *commercially* practicable to put them in a state to be carried forward; and see *Grainger* v. *Martin*, 4 B. & S. 9. The expense of carrying the goods forward is a *particular charge*, which may be recovered under the suing and labouring clause if the expenses are incurred by the insured. *Kidston* v. *The Empire M. I. Co.*, L. R. 2 C. P. 357; *Aitchison* v. *Lohre*, 4 App. Cas. 755.

(*h*) *Hagedorn* v. *Whitmore*, 1 Stark. 157.

(*i*) *Livie* v. *Janson*, 12 East, 648, per Lord *Ellenborough*; *Green* v. *Elmslie*, 1 Peake, 278.

(*k*) See *Hann* v. *Corbett*, 2 Bing. 205; *Montoya* v. *London Assurance Co.*, 6 Exch. 451; *Ionides* v. *The Universal Marine Insurance Co.*, 14 C. B. N. S. 259; *Dent* v. *Smith*, L. R. 4 Q. B. 414; *Xenos* v. *Fox*, L. R. 4 C. P. 665; *Mercantile Steamship Co.* v. *Tyser*, 7 Q. B. D. 73.

(*l*) *Greer* v. *Poole*, 5 Q. B. D. 272; *De Vaux* v. *Salvador*, 4 Ad. & E. 420.

(*m*) *Cory* v. *Burr*, 8 App. Cas. 393, where Lord *Blackburn*, at p. 398, dissents from the statement in Arnould on Insurance that barratry is an exception to the principle that the proximate cause is to be looked at.

ship having become inefficient by perils of the sea, the charterers refused to pay further freight; the loss of freight by the owner was attributed to the exercise of the option by the charterers, and not to "perils of the sea" (*n*). It is sometimes said that there is a difference as to this maxim between cases of bills of lading and policies of insurance. How far this is so, is explained in the judgment of Lord *Herschell* in *The Xantho* (*o*):

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"Now, I quite agree that in the case of a marine policy the *causa proxima* is alone considered. If that which immediately caused the loss was a peril of the sea, it matters not how it was induced, even if it were by the negligence of those navigating the vessel. It is equally clear that in the case of a bill of lading you may sometimes look behind the immediate cause, and the shipowner is not protected by the exception of perils of the sea in every case in which he will be entitled to recover on his policy, on the ground that there has been a loss by such perils. But I do not think that this difference arises from the words 'perils of the sea' having a different meaning in the two instruments, but from the context or general scope and purpose of the contract of carriage, excluding, in certain cases, the operation of the exception. It would, in my opinion, be very objectionable, unless well-settled authority compelled it, to give a different meaning to the same words occurring in two maritime instruments. The true view appears to me to be presented by *Willes*, J., in his judgment in *Grill* v. *General Iron Screw Collier Co.* (*p*). The question there arose whether, when a vessel was lost by a collision caused by the negligence of those navigating the carrying ship, the case fell within the exception of 'perils of the sea.' It was held that it did not. Reference having been made to cases on policies of insurance, and the interpretation there put upon these words, *Willes*, J., said: 'I may say that a policy of insurance is an absolute contract to indemnify for loss by perils of the sea, and it is only necessary to see whether the loss comes within the terms of the contract, and is caused by perils of the sea; the fact that the loss is partly caused by things not distinctly perils of the sea, does not prevent its coming within the contract. In the case of a bill of lading it is different, because there the contract is to carry with reasonable care, unless prevented by the excepted perils. If the goods are not carried with reasonable care, and are consequently lost by perils of the sea, it becomes necessary to reconcile the two parts of the instrument, and

(*n*) *Inman S.S. Co.* v. *Bischoff*, 7 App. Cas. 670.

(*o*) 12 App. Cas. 503, at p. 510.

(*p*) L. R. 1 C. P. 600, at p. 611.

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this is done by holding that if the loss through perils of the sea is caused by the previous default of the shipowner, he is liable for this breach of his covenant.'"

Fifthly, when two causes contribute equally to the loss it may be ascribed to either. Thus, if a ship be barratrously delivered to the enemy, the loss may be ascribed either to barratry or capture (*q*), as, in the case of *Hagedorn* v. *Whitmore* above cited, it probably might have been to seizure and detention, as well as to the perils of the sea. Where two causes, however, both contribute to the loss, but unequally, the maxim "*in jure causa proxima non remota spectatur*" applies. And if the proximate cause of the loss be not reducible to some one of the perils mentioned in the policy, the underwriters will not be chargeable with it. For instance, if the vessel insured be driven against another ship by stress of weather, this is an injury by perils of the sea, and the insurer must make it good. But, if in the collision she do some damage to the other ship, a positive rule of the Court of Admiralty prescribes that the loss sustained by both shall be added together and the aggregate equally divided. Now, in this case, if the ship insured have done more damage than she has received, and her owners are, therefore, obliged to pay the balance, this is neither a necessary nor proximate effect of the perils of the sea; it grows out of a provision of the law of nations, and cannot be charged upon the underwriters (*r*). In consequence of the decision in *De Vaux* v. *Salvador* (*r*), what is known as the running-down clause, providing for the contingency of collisions, was introduced into policies (*s*).

Date and Subscription.—The date and subscription, including a receipt for the premium, are inserted as follows: "And so we, the assurers, are contented, and do hereby promise and bind ourselves each one for his own part, our heirs, executors, and

(*q*) *Areangelo* v. *Thompson*, 2 Camp. 620; *Toulmin* v. *Anderson*, 1 Taunt. 227; *Hueks* v. *Thornton*, 1 Holt, 30; *Ionides* v. *Universal Marine Insurance Co.*, 32 L. J. C. P. 170. And see *Butler* v. *Wildman*, 3 B. & Ald. 398; *Palmer* v. *Naylor*, 10 Exch. 382.

(*r*) *De Vaux* v *Salvador*, 4 Ad. & E. 420. See 7 App. Cas. at p. 686, per Lord *Blackburn*; *Greer* v. *Poole*, 5 Q. B. D. 272.

(*s*) *Xenos* v. *Fox*, L. R. 4 C. P. 665.

goods, to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance, by the assured, at and after the rate of ———. In witness whereof we, the assurers, have subscribed our names and sums assured in ———."

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The insertion of the amount of the premium is not now (*t*) essential, but is usual, and the acknowledgment of receipt therein contained has been held conclusive between the assured and insurer in the absence of fraud (*u*). The insertion of the amount insured is required by the statute 30 & 31 Vict. c. 23, s. 7, and, in practice, the underwriter also usually annexes the date to his subscription. The same enactment requires the names of the subscribers and underwriters to be specified in or upon the policy (*x*). With this provision a subscription in the name of a firm or company is a sufficient compliance (*y*).

If the policy be executed by the underwriter as a binding instrument, there need not be a complete delivery of it to the assured (*z*).

Valuation Clause.—If the clause in the form as to value (*a*) is not filled up, it is an open policy. If it is filled up, it is a valued policy, and the valuation is, as we have seen, conclusive in the absence of fraud (*b*).

Suing and Labouring Clause.—The suing and labouring clause provides that "in case of any loss or misfortune, it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel, in, for, and about the defence, safeguard, and recovery of the said goods, and merchandizes, and

(*t*) 30 & 31 Vict. c. 23, s. 3, repealing 35 Geo. 3, c. 63.

(*u*) *Dalzell* v. *Mair*, 1 Camp. 532. See *Foy* v. *Bell*, 3 Taunt. 493; *De Gaminde* v. *Pigou*, 4 Taunt. 246; *Mavor* v. *Simeon*, 3 Taunt. 497; *Anderson* v. *Thornton*, 8 Exch. 425. In the last case the premium was proved not to have been paid.

(*x*) 30 & 31 Vict. c. 23, s. 7; *In Re Arthur Average Association*, L. R. 10 Ch. 542.

(*y*) *Reid* v. *Allan*, 4 Exch. 326; *Hallett* v. *Dowdall*, 18 Q. B. 2.

(*z*) *Xenos* v. *Wickham*, L. R. 2 H. L. 296.

(*a*) *Ante*, p. 412.

(*b*) *Ante*, pp. 394, 395.

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ship, &c., or any part thereof, without prejudice to the insurance; to the charges whereof we will contribute each one according to the rate and quantity of his sum herein assured." In *Kidston* v. *Empire Insurance Co.* (*c*), *Willes*, J., thus explains the object of this clause:

"If an occasion should occur in which, by reason of a peril insured against, unusual labour and expense are rendered necessary to prevent a loss for which the underwriters would be answerable, and such labour and expense is incurred accordingly, the underwriters will contribute, not as part of the sum insured in case of loss or damage, because it may be that a loss or damage for which they would be liable is averted by the labour bestowed, but as a contribution on their part as persons who have averted detriment by the result in proportion to what they would have had to pay if such detriment had come to a head for want of timely care. Take, for instance, the case of a policy on goods warranted free of average under 5 per cent., and the goods are wetted in a storm, which drives the ship into a port of distress, where by drying at an expense less than 5 per cent., the goods might be saved, or damaged under 5 per cent.; whilst, if not dried, they would decay and become damaged over 5 per cent., though existing in specie, so that freight would be payable. In this case there is no abandonment, and may be no prospect of one; and yet it is the duty of the master to use all reasonable means to preserve the goods, and obviously for the interest of the underwriters to encourage him in the performance of that duty by contributing to the expense incurred."

Comprehensive though the words of the suing and labouring clause are, they do not include, it has been held by the House of Lords, general average and salvage expenses (*d*). Nor will these words include expenses incurred not by the assured, but by underwriters who have re-insured (*e*).

Memorandum.—The memorandum was first introduced into policies about the year 1749 (*f*). It is inserted to protect the

(*c*) L. R. 1 C. P. 535, at p. 543 (affirmed 2 C. P. 357).

(*d*) *Aitchison* v. *Lohre*, 4 App. Cas. 755.

(*e*) *Uzielli* v. *Boston Marine Insurance Co.*, 15 Q. B. D. 11.

(*f*) So stated by Mr. *Dunning*, arguendo, in *Wilson* v. *Smith*, 3 Burr. 1551; and by Mr. *R. V. Richards*, 5 M. & W. 573.

underwriter from liability to small averages, *i.e.*, partial losses which might be claimed in respect of certain perishable commodities. It is as follows:— The policy—its form and construction.

"N.B.—Corn (*g*), fish, salt (*h*), fruit, flour, and seed are warranted free from average (*i*), unless general (*j*), or the ship be stranded (*k*). Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five pounds per cent., and all other goods, also the ship (*l*) and freight, are warranted free from average under three pounds per cent., unless general, or the ship be stranded."

This memorandum protects the underwriter from making good any partial loss whatever (*m*) upon the class of articles first specified, and any loss under five per cent. on the class secondly specified: *unless*, in either case, the loss were incurred in consequence of a general average, or the ship be stranded. The memorandum was inserted to get rid of the difficulty of discriminating between small losses by perils of the sea and those caused by tear and wear or deterioration, and to prevent disputes about trifling matters (*n*).

But the memorandum does not exclude expenses properly recoverable under the suing and labouring clause (*o*).

"The true construction of the policy, as reconciling and giving effect to all its provisions, is that the warranty against particular average does no more than limit the insurance to total loss of the

(*g*) As to the construction of this clause in a policy, see *Hart* v. *Standard Marine Ins. Co.*, 22 Q. B. D. 499. "Corn" comprehends peas and beans, *Mason* v. *Skurray*, Park, 179; and malt, *Moody* v. *Surridge*, 2 Esp. 633; but not rice, *Scott* v. *Bourdillion*, 2 B. & P. N. R. 213. The word "iron" in a memorandum has been held to include steel: *Hart* v. *Standard Marine Ins. Co.*, supra.

(*h*) This does not comprehend saltpetre, which is often now inserted: *Journu* v. *Bourdieu*, Park, 179, per *Wilson*, J.

(*i*) As to what will constitute an average loss only within this, see *Navone* v. *Haddon*, 9 C. B. 30; *Reimer* v. *Ringrose*, 6 Exch. 263; *Rosetto* v. *Gurney*, 11 C. B. 176, and post, pp. 462 et seq.

(*j*) For an account of general average, see Chap. on Contracts of Affreightment, s. 5.

(*k*) *Letchford* v. *Oldham*, 5 Q. B. D. 538.

(*l*) See, on this, *Dawson* v. *Wrench*, 3 Exch. 359.

(*m*) *The Great Indian P. R. Co.* v. *Saunders*, 1 B. & S. 41; 2 B. & S. 266; *Booth* v. *Gair*, 15 C. B. N. S. 291. But see *Kidston* v. *The Empire M. I. Co.*, ubi supra.

(*n*) Lord *Esher*, M. R., in *Stewart* v. *Merchants' Marine Ins. Co.*, 16 Q. B. D. at p. 624; and in *Price* v. *A1 Ships Association*, 22 Q. B. D. at p. 585.

(*o*) *Ante*, p. 438.

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freight by the perils insured against, without reference to extraordinary labour or expense which may be incurred by the assured in preserving the freight from loss, or rather from never becoming due, by reason of the operation of perils insured against; and that the latter expenses are specially provided for by the suing and labouring clause, and may be recovered thereunder" (*p*).

The reason of the exception where the ship has been stranded is, that, in such a case the underwriters agree to ascribe the loss to the stranding, as being the most probable occasion of the damage, though the fact cannot be ascertained; and, accordingly, it is now clearly settled, that every average or partial loss becomes a charge upon the underwriters, where a stranding has taken place, whether the loss has been in reality occasioned by the stranding or not (*q*). In consequence of this, the true sense of the word "stranding" has become a matter of importance. The rule laid down by Lord *Tenterden* in *Wells* v. *Hopwood*, and considered by him deducible from all the cases on the subject, is that—

"Where a vessel takes the ground in the ordinary and usual course of navigation and management in a tide, river or harbour, upon the ebbing of the tide, or from natural deficiency of water, so that she may float again upon the flow of tide or increase of water, such an event shall not be considered a *stranding* within the sense of the memorandum. But where the ground is taken under any extraordinary circumstances of time or place, by reason of some unusual or accidental occurrence, such an event shall be considered a stranding within the meaning of the memorandum" (*r*).

And his Lordship was further of opinion that the fact of the vessel's not receiving injury from such a grounding was of no

(*p*) *Willes*, J., in *Kidstone* v. *Empire Ins. Co.*, L. R. 1 C. P. p. 546.

(*q*) Per Lord *Tenterden*, in *Wells* v. *Hopwood*, 3 B. & Ad. 34. The case is open to doubt, *De Mattos* v. *Saunders*, L. R. 7 C. P. at p. 581.

(*r*) Cited and approved by *Willes*, J., in *Mattos* v. *Saunders*, L. R. 7 C. P. p. 581. See *Corcoran* v. *Gurney*, 1 E. & B. 456. In *Letchford* v. *Oldham*, 5 Q. B. D. 538, *Brett*, L. J., at p. 546, adopts the language of *Tindal*, C. J., in *Kingsford* v. *Marshall*, 8 Bing. 458, 463: "We think a stranding cannot be better defined than it has often been in several decided cases, namely, where the taking of the ground does not happen solely from those natural causes which are necessarily incident to the ordinary course of the navigation in which the ship is engaged, either wholly or in part, but from some accidental or extraneous cause."

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consequence. In the case just cited, the ship was moored in a tide-harbour against the quay, with her head fastened to the opposite side of the harbour by a rope. At the first ebb she took the mud, but at the second the stretching of the rope and a strong wind caused her to ground upon a bank, where she was strained, and her seams opened, and she received some water, whereby the cargo was damaged, but at high tide they closed again, and the vessel was ultimately uninjured. These circumstances were held by three judges, *Parke*, J., *dissentiente*, to constitute a stranding within the meaning of the policy. In *Kingsford* v. *Marshall* (*s*), another case upon this subject, the vessel on the ebbing of the tide took the ground *where it was intended that she should*, but, in so doing, struck against some hard substance, which made two holes in her bottom, and damaged the cargo; this was held not to constitute such a stranding as would subject the underwriters to average; and Lord Chief Justice *Tindal*, in delivering judgment, mentioned the case of *Wells* v. *Hopwood*, and said it was decided on the principle that the taking the ground was occasioned by an *extraneous and accidental cause;* but that, in the case before him, the grounding was *such as the master and crew intended*, that is, merely by the ebbing of the tide in the ordinary course of navigation. These two instances will serve to show how nice the distinction between what is, and what is not, *a stranding*, has become (*t*). To constitute *a stranding*, the ship must be stationary: the striking on a rock, while the vessel remained a minute and a half only, was thought not to be a stranding, though she thereby received an injury which eventually proved fatal (*u*). The beaching of a vessel under unusual circumstances, by reason of some unusual occurrence, may be "stranding" within the meaning of the memorandum (*v*); though it is not necessary that the injury to

(*s*) 8 Bing. 458; *Magnus* v. *Buttemer*, 11 C. B. 876.

(*t*) See further *Bishop* v. *Pentland*, 7 B. & C. 219; *Hearne* v. *Edmunds*, 1 B. & B. 388; *Carruthers* v. *Sydebotham*, 4 M. & S. 77; *Rayner* v. *Godmond*, 5 B. & Ald. 225; *De Mattos* v. *Saunders*, L. R. 7 C. P. 570; *Letchford* v. *Oldham*, 5 Q. B. D. 538.

(*u*) *MacDougle* v. *R. E. A. Co.*, 1 Stark. 130.

(*v*) *De Mattos* v. *Saunders*, L. R. 7 C. P. 570.

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the property insured, for which a compensation is claimed, should have been occasioned by the stranding, still that event must have happened before the risk upon the property insured had altogether determined. Thus, where the subject-matter of insurance consisted of hides, which were damaged by a peril of the sea so much that they were necessarily sold during the voyage, and the ship was afterwards stranded, it was held that the insured could not recover for a total loss, as he had not abandoned, and could not recover for an average loss as the hides were warranted "free of particular average, unless the ship be stranded," and the stranding had not taken place until the risk upon the hides has been determined (*w*). The stranding of a lighter, into which the goods had been transhipped for the purpose of landing them, is not such a stranding as will satisfy this condition, even although risk of craft be expressly guarded against by the policy (*x*).

The underwriter is liable, under a voyage policy, if the aggregate of average losses during the voyage, however minute each average loss may be *per se*, come up to three per cent. in the whole on property warranted free from average under three per cent.; the Court, however, said that, perhaps, usage would be admissible to show that the contrary was intended: but there was no evidence of usage in the case before them (*y*). In a time policy, also, the different losses on the same goods or article during a particular voyage, may be added together; not so different losses on different voyages (*z*). In *Price & Co.* v. *A1 Ships Small Damage Insurance Association* (*a*), the Court of Appeal lately decided that general average and particular

(*w*) *Roux* v. *Salvador*, 1 Hodg. 49; 1 Bing. N. C. 526. This case was reversed in Cam. Scacc. upon the ground that abandonment was unnecessary: but the decision of the C. P. on the second point seems to have been approved of: *Roux* v. *Salvador*, 3 Bing. N. C. 266.

(*x*) *Hoffman* v. *Marshall*, 2 Bing. N. C. 383.

(*y*) *Blackett* v. *R. E. A. Co.*, 2 C. & J. 244. As to what the three or five per cent. is to be calculated upon, see *Paterson* v. *Harris*, 1 B. & S. 336; *Oppenheim* v. *Fry*, 5 B. & S. 348; and as to particular and general average, see ante, p. 381 (*s*).

(*z*) *Stewart* v. *Merchants' Marine Insurance Co.*, 16 Q. B. D. 619.

(*a*) 22 Q. B. D. 580.

average losses, two essentially different losses, cannot be added together so as to make the underwriters liable notwithstanding the memorandum. The policy—its form and construction.

The distinction between a total loss of an integral part of the cargo, and a particular average guarded against by the memorandum, is pointed out in *Hills* v. *London Assurance Corporation* (*b*).

Stamp.—A policy of insurance made in this country ought to be duly stamped at the time when it is effected, and no policy can be pleaded or given unless duly stamped (*c*). Until recently it was unvailable unless so stamped (*d*). Now, by the Sea Insurances (Stamping of Policies) Amendment Act, 1876 (*e*), a policy, though not properly stamped, may be received in evidence upon payment of the duty and a penalty of £100, with £1 to the officer of the Court. The Commissioners may then stamp it with a denoting stamp. If, too, a policy upon distinct and separate interests of several persons bear a stamp in respect of the aggregate of such interests, it may be stamped in respect of each interest within a month after the last risk has been declared (*f*). Policies also of mutual insurance, *i. e.*, policies by which divers persons agree to insure one another, may be stamped with additional stamps, if not underwritten to an amount exceeding the sum warranted by the former stamps (*g*). A policy of insurance made abroad need not be stamped, unless it be made by or on behalf of any person carrying on the business of insurance here, or under it, according to any stipulation agreement, or understanding expressed or implied, any loss, damage, or sum be payable or recoverable in this country. In

(*b*) 5 M. & W. 569, post, p. 473; and also *Ralli* v. *Janson*, 6 E. & B. 422; *Entwistle* v. *Ellis*, 2 H. & N. 549.

(*c*) 30 & 31 Vict. c. 23, s. 9. See as to the nature of a slip, *Cory* v. *Paton*, L. R. 7 Q. B. 304; 9 Q. B. 577.

(*d*) 30 & 31 Vict. c. 23, s. 9. *Smith's Case* (contract for mutual insurance), L. R. 4 Ch. 611. See *Parry* v. *The Great Ship Co.*, 4 B. & S. 556; *Fisher* v. *The Liverpool M. In. Co.*, L. R. 8 Q. B. 469; 9 Q. B. 418. As to the penalties, see ss. 13 and 14.

(*e*) 39 & 40 Vict. c. 6, s. 2; 33 & 34 Vict. c. 97, s. 16; and 44 Vict. c. 12, s. 44.

(*f*) 39 & 40 Vict. c. 6, s. 1.

(*g*) 30 & 31 Vict. c. 23, s. 9. *Smith's Case*, ubi sup.; *Re Teignmouth Mutual Insurance Ass.*, L. R. 14 Eq. 148.

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these cases the policy may be stamped within fourteen days after its receipt here, but not afterwards (*h*).

By the 30 & 31 Vict. c. 23, s. 10, it is provided, that—

"Nothing in this Act shall extend, or be construed to extend, to prohibit the making of any alteration which may lawfully be made in the terms and conditions of any policy, after the same shall have been underwritten, provided that such alteration be made before notice of the determination of the risk originally insured, and that it shall not prolong the time covered by the insurance thereby made beyond the period of six months in the case of a policy made for a less period than six months, or beyond the period allowed by this Act in the case of a policy made for a greater period than six months, and that the articles insured shall remain the property of the same person or persons, and that no additional or further sum shall be insured by reason or means of such alteration."

A clause similar to this received a liberal interpretation (*i*). A mere extension of the time of sailing was held to be within it (*k*). So was a memorandum waiving the warranty of seaworthiness (*l*). Where a policy "on ship and outfit" was altered by inserting "ship and goods," it was held, that the insured could not recover on the policy as altered, for want of a new stamp (*m*), since the words "*thing insured*" required one identical and continued subject-matter of insurance; nor on the policy as it before stood, by reason of the alteration; but when the alteration in the subject-matter of insurance is to rectify a mere mistake, as where a broker, instructed to effect a policy on goods, effects it on ship, no new stamp is necessary (*n*). A memorandum to a policy on "hemp, marked R., and valued, with warranty to sail before August 20;" withdrawing the mark of the hemp and warranty of sailing, in consideration of four guineas, did not render an additional stamp necessary (*o*);

(*h*) 30 & 31 Vict. c. 23, s. 9; 33 & 34 Vict. c. 97, s. 117; 44 Viet. c. 12, s. 44.

(*i*) Per Lord *Tenterden* in *Brocklebank* v. *Sugrue*, 1 B. & Ad. at p. 88.

(*k*) *Kensington* v. *Inglis*, 8 East, 273; *Hubbard* v. *Jackson*, post.

(*l*) *Weir* v. *Aberdeen*, 2 B. & Ald. 320.

(*m*) *Hill* v. *Patten*, 8 East, 373, cited *Bathe* v. *Taylor*, 15 East, 415; *French* v. *Patton*, 9 East, 351, on the same policy, cited *Reed* v. *Deere*, 7 B. & C. 261.

(*n*) *Sawtell* v. *Loudon*, 5 Taunt. 359. See *Robinson* v. *Touray*, 1 M. & S. 217; *Kershaw* v. *Cox*, 3 Esp. 246; *Byrom* v. *Thompson*, 11 Ad. & E. 31; *Cariss* v. *Tattersall*, 2 M. & G. 890.

(*o*) *Hubbard* v. *Jackson*, 4 Taunt. 169.

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nor did the alteration of a voyage from "Stockholm to Swinemunde," to one "from Stockholme to Swinemunde, Konigsberg, or Memel" (*p*); nor of a risk "at and from Liverpool to Quebec," to one "from Liverpool to St. John's, New Brunswick" (*q*).

The rate of stamp duty payable on policies of marine insurance is regulated by the same statute, 30 & 31 Vict. c. 23 (*r*).

Warranties.—We now pass to the consideration of *warranties.*

"A warranty in a policy of insurance is a *condition* or a contingency, and unless that be performed there is no contract. It is perfectly immaterial for what purpose it was introduced; but, being inserted, the contract does not exist unless it be *literally* complied with" (*s*).

In this necessity for a *literal* compliance, it differs from a *representation*, which it is sufficient to perform *substantially.* Warranties are either *express—i. e.*, appearing in the body or margin (*t*), or at the bottom (*u*) of the policy, or in some writing, which is by reference incorporated with it (*x*)—or *implied*, *i. e.*, understood to exist in every policy unless expressly negatived. Anything may, of course, be *expressly* warranted; but those things which are most usually so are—

1. The time of sailing.
2. The safety of the ship at a particular time.
3. That she shall depart with convoy.
4. That the property is neutral.
5. Freedom from seizure in port.

Let us consider these in order.

(*p*) *Ramstrom* v. *Bell*, 5 M. & S. 267.

(*q*) *Brocklebank* v. *Sugrue*, 1 B. & Ad. 81.

(*r*) As to the meaning of "sea insurance" in this enactment, see 47 & 48 Vict. c. 62, s. 8.

(*s*) *De Hahn* v. *Hartley*, 1 T. R. 343, at p. 345, per Lord *Mansfield*, C. J., adopted in *Behn* v. *Burness*, 3 B. & S. 751. See *Dent* v. *Smith*, L. R. 4 Q. B. 414.

(*t*) *Bean* v. *Stupart*, Dougl. 11; *De Hahn* v. *Hartley*, 1 T. R. 343.

(*u*) *Blackhurst* v. *Cockell*, 3 T. R. 360.

(*x*) *Worsley* v. *Wood*, 6 T. R. 710; *Routledge* v. *Burrell*, 1 H. Bl. 254; *Colledge* v. *Harty*, 6 Exch. 205. Often the rules or bye-laws of associations or clubs are incorporated.

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1. *Time of Sailing.*—When a ship is warranted *to sail* on a particular day, that means that she shall be *upon her voyage* on that day, for which purpose she must be completely unmoored; it will not be sufficient that she had her cargo on board, and was only prevented from sailing by stress of weather (*y*). But if she *bonâ fide* set sail for the purpose of completing her voyage, that will be enough (*z*), although she be detained beyond that day at another part of the same river or territory; *ex. gr.*, by an embargo (*a*) or by stress of weather. It must, however, be observed, that a warranty to sail is not complied with by a vessel's raising her anchor, getting under sail and moving onwards, unless, at the time of performing these acts, she has everything ready for the performance of the voyage, and these acts are done as the commencement of it, nothing remaining to be done afterwards (*b*). For instance, if she have not her clearances, or have not taken in her entire cargo, she cannot be said to have sailed within the meaning of the warranty. Nor must her *sailing* be a merely colourable one, for the purpose of complying with the letter of the warranty, and not in real furtherance of the intended voyage (*c*). If the warranty be to *depart*, or to "sail *from* a place," which seems to bear the same sense as *depart* (*d*), it is necessary not only that the ship should *set* "*sail on the voyage*," but also that she should be out of port on or before the day (*e*). *To sail* is to set sail *on the voyage; to depart* is to depart *from some particular place.*

2. *Safety of a Ship on a particular Day.*—We have already observed (*f*) that a warranty of the safety of the ship on a par-

(*y*) *Nelson* v. *Salvador*, M. & M. 309; *Bouillon* v. *Lupton*, 15 C. B. N. S. 113.

(*z*) *Wright* v. *Shiffner*, 11 East, 515; 2 Camp. 247; *Lang* v. *Anderdon*, 3 B. & C. 495.

(*a*) *Bond* v. *Nutt*, Cowp. 601; *Thelusson* v. *Fergusson*, Doug. 361; *Cochrane* v. *Fisher*, 1 C. M. & R. 809.

(*b*) *Lang* v. *Anderdon*, 3 B. & C. 495; *Pittegrew* v. *Pringle*, 3 B. & Ad. 514; *Graham* v. *Barras*, 5 B. & Ad. 1011; *Roelandts* v. *Harrison*, 9 Exch. 444; *Thompson* v. *Gillespy*, 5 E. & B. 209; *Hudson* v. *Bilton*, 6 E. & B. 565. But see *Bouillon* v. *Lupton*, 15 C. B. N. S. 113.

(*c*) *Cochrane* v. *Fisher*, 2 C. & M. 581.

(*d*) See *Lang* v. *Anderdon*, ubi sup.

(*e*) *Moir* v. *R. E. A. Co.*, 3 M. & S. 461; 6 Taunt. 241. And see the remarks of *Abbott*, C. J., in *Lang* v. *Anderdon*, ubi supra, and of Lord *Denman*, C. J., in *Fisher* v. *Cochrane*, 1 C. M. & R. 809.

(*f*) Ante, pp. 423, 424.

ticular day is often inserted, in order to restrain the force of the expressions "*lost or not lost*," and that if the ship be safe at *any time* in that day the warranty is complied with (*g*).

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3. *To depart with Convoy.*—This is a warranty usual in time of war. A convoy is a naval force under the command of a person appointed by the government of the country to which the vessel insured belongs. The appointment by government is essential; for a ship of war *accidentally* bound on the same voyage with the vessel insured, is not a sufficient convoy (*h*). But a convoy appointed by the admiral commanding in chief on a foreign station is one appointed by government (*i*). The terms of the warranty are, sometimes, to depart *with convoy*, at other times with *convoy for the voyage*. These two forms of expression mean precisely the same, and render a departure with convoy *for the voyage* necessary (*k*). But, as it sometimes happens that government appoints a convoy to accompany the ships for part only of their voyage, and then to be succeeded by another, or to detach a portion of itself from the main body, to bring them up to a particular point; the warranty will be complied with if the vessel sail with the first convoy, and proceed with the force so appointed or detached (*l*). Indeed, as government alone can appoint convoys, the question whether a convoy be or be not sufficient must, to a great extent, depend upon its orders (*m*). It may be impossible to procure a convoy, either precisely from the port of departure or precisely to that of destination (*n*). In such cases the rule is, that if the vessel sail with convoy *from* the place of rendezvous appointed for vessels bound from her lading port, and to the nearest point to which she can be conducted by the convoy appointed for vessels going

(*g*) *Blackhurst* v. *Cockell*, 3 T. R. 360.

(*h*) *Hibbert* v. *Pigou*, Park, 498.

(*i*) Ibid. See *Audley* v. *Duff*, 2 B. & P. 111.

(*k*) *Jeffrey* v. *Legender*, 3 Lev. 320; *Lilly* v. *Ewer*, Dougl. 72.

(*l*) Abbott, 300, 12th ed.; *Smith* v. *Redshaw*, Park, 510; *De Garay* v. *Claggett*, Id. 511; *Manning* v. *Gist*, Marsh. 269; *Audley* v. *Duff*, 2 B. & P. 111.

(*m*) See remarks of *Heath*, J., *Audley* v. *Duff*, ubi sup.

(*n*) *D'Eguino* v. *Bewicke*, 2 H. Bl. 551; *Lethulier's case*, Salk. 443; *Gordon* v. *Morley*, 2 Str. 1265.

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to her place of destination, that is sufficient. A warranty to depart with convoy is not complied with unless the master, if by due diligence he can, obtain sailing instructions before the ship leaves the place of rendezvous; for the value of convoy, in a great measure, arises from its taking the ships under control as well as protection; but that control cannot commence till sailing instructions have been obtained, nor can it be enforced otherwise than by their means (*o*). Moreover, the meaning of the warranty is, that the ship shall not only *depart* with convoy, but *keep with it* during the whole voyage, except in cases of absolute impossibility, such as being driven by a tempest to some foreign port, where no convoy can be had (*p*).

4. *Neutral Property.*—In war time it is also usual to warrant the subject of insurance to be *neutral property*, which only means that it is *neutral* at the commencement of the risk, not that it shall continue so during the rest of the voyage (*q*). Indeed, if the ship forfeit her neutrality by the misconduct of those on board, the warranty will have been broken *as to her* (*r*); for when a ship is warranted *neutral*, that means, first, that she shall belong to the subject of a neutral state (*s*); and secondly, that she shall be navigated according to the law of nations, and the particular treaties subsisting between the country to which she belongs and the belligerents. Therefore, if by such a treaty it have been agreed that those ships only shall be considered neutral which are furnished with particular documents—*e. g.*, passport, sea-letter, register—whoever warrants her neutrality must take care that she have those documents on board (*t*); but it is not necessary that she should be navigated in conformity to the *ex parte* ordinance of one of the belligerents, in which her

(*o*) See *Andersen* v. *Pitcher*, 2 B. & P. 164; *Webb* v. *Thomson*, 1 B. & P. 5.

(*p*) *Jeffrey* v. *Legender*, 3 Lev. 320; *Lethulier's case*, Salk. 443.

(*q*) *Eden* v. *Parkinson*, 2 Dougl. 732; *Tyson* v. *Gurney*, 3 T. R. 477.

(*r*) *Garrels* v. *Kensington*, 8 T. R. 230. See *Carruthers* v. *Gray*, 3 Camp. 142; 15 East, 35, as to goods.

(*s*) *Tabbs* v. *Bendelack*, 3 B. & P. 207, n.; *The President*, 5 C. Rob. 277.

(*t*) *Rich* v. *Parker*, 7 T. R. 705; *Baring* v. *Christie*, 5 East, 398. As to what the principal documents are, see Arnould, Mar. Ins., vol. 2, pp. 626 et seq., 6th ed.; Phillips, 1, s. 802.

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own nation has not concurred (*x*); the belligerent has only the right of demanding proof that the property is exempt from capture (*y*). The sentence of a foreign Court of Admiralty, or other Court having competent jurisdiction over questions of prize, and adjudging the vessel to be good prize, on a ground within their jurisdiction, will, *if such ground falsify the warranty* (*z*), be conclusive evidence that it has been broken; and that, though it appear on the face of such sentence that the Court arrived at its conclusion through rules of evidence established by particular ordinances of its own country, and inadmissible on general principles (*a*). But if the ground of condemnation be stated obscurely (*b*), or the sentence adjudge the ship prize, not because she was enemy's property, but for reasons leading to a contrary conclusion (*c*); or if it appear that it was founded solely on the violation of an *ex parte* ordinance to which the neutral state had not assented (*d*); in such cases, the sentence is not conclusive evidence of a breach of the warranty (*e*).

5. *Freedom from Seizure in Port of Discharge.*—A warranty is sometimes inserted to exempt the underwriters from responsibility in case of *confiscation*, *seizure*, or *capture* in port, or the consequences of any attempt thereat (*f*). Sometimes the clause is

(*x*) *Pollard* v. *Bell*, 8 T. R. 434; *Bird* v. *Appleton*, 8 T. R. 562; *Price* v. *Bell*, 1 East, 663.

(*y*) Phillips, 1, s. 808.

(*z*) *Baring* v. *Claggett*, 3 B. & P. 201; *Lothian* v. *Henderson*, 3 B. & P. 499; *Bolton* v. *Gladstone*, 5 East, 155; *Siffken* v. *Les*, 2 B. & P. N. R. 489; *Garrels* v. *Kensington*, 8 T. R. 230.

(*a*) *Bolton* v. *Gladstone*, 2 Taunt. 85; *Baring* v. *R. E. A. Co.*, 5 East, 99; *Geyer* v. *Aguilar*, 7 T. R. 681. Note to *Duchess of Kingston's case*, 2 Smith's L. C. 9th ed. p. 885.

(*b*) *Bernardi* v. *Motteux*, Dougl. 575; *Fisher* v. *Ogle*, 1 Camp. 418; *Dalgleish* v. *Hodgson*, 7 Bing. 495, where *Tindal*, C. J., in stating the effect of the decisions, says of the ground of decision that, to be conclusive, "It must not be collected by inference only."

(*c*) *Calvert* v. *Bovil*, 7 T. R. 523; *Dalgleish* v. *Hodgson*, ubi supra; *Hobbs* v. *Henning*, 17 C. B. N. S. 791.

(*d*) *Bird* v. *Appleton*, 8 T. R. 562.

(*e*) See, as to this anomalous class of cases, the opinion of *Blackburn*, J., in *Castrique* v. *Imrie*, L. R. 4 H. L. 414.

(*f*) This is sometimes not confined to the port, but general. See *Powell* v. *Hyde*, 5 E. & B. 607. "Capture" is defined as "a taking by armed force from without, with intent to deprive the owner of the possession and property of the thing captured": Arnould,

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not confined to port. The principal difficulties which arise on this warranty are, What constitutes "capture" or "seizure"? and When is a seizure, properly speaking, *in port?* The disposition is to hold the word "port" to include any place where the vessel was intended to be discharged (*g*); but if a vessel, when seized, be neither within the *caput portûs*, nor within that part of the haven where ships usually unload, the underwriter is not discharged by this warranty (*h*). Whether the vessel was at her port of discharge or not, is a question entirely for the jury (*i*). It was ruled at nisi prius by *Gibbs*, C. J., in *O'Reilly* v. *Royal E. Assurance Co.* (*k*), that where this warranty is inserted, the underwriters are discharged, if the insured deviate from the usual course of the voyage in order to avoid the expected peril (*k*). This doctrine appears hard on the insured, who, it was ruled by the same learned judge, would be entitled to recover if there were no warranty (*l*), and cannot be considered to be law (*m*).

Besides the above usual warranties, the policy generally contains other special warranties; *e. g.*, in case of cargoes of animals "free from mortality and jettison" (*n*), "free from all average arising from jettison or leakage" (*o*).

Implied Warranties.—The implied warranties are—

1. Not to deviate.
2. Seaworthiness.
3. That the insured will use reasonable diligence to guard against the risks covered by the policy.

6th ed. 841; *Black* v. *Marine Ins. Co.*, 11 John. (N. Y.) 287. "Seizure" appears to be a more comprehensive term. It would include the case of natives taking possession of a ship to plunder, but not to keep, it: *Johnston* v. *Hogg*, 10 Q. B. D. 432.

(*g*) *Jarman* v. *Coape*, 2 Camp. 615; 13 East, 394; *Dalgleish* v. *Brooke*, 15 East, 295; *Maydhew* v. *Scott*, 3 Camp. 205; *Oom* v. *Taylor*, Id. 204.

(*h*) *Keyser* v. *Scott*, 4 Taunt. 660; *Levy* v. *Vaughan*, 4 Taunt. 387.

(*i*) *Reyner* v. *Pearson*, 4 Taunt. 662; *Levin* v. *Newnham*, 4 Taunt. 722; *Lindsay* v. *Janson*, 4 H. & N. 699.

(*k*) 4 Camp. 246.

(*l*) *O'Reilly* v. *Gonne*, 4 Camp. 249.

(*m*) See *Scott* v. *Thompson*, 1 B. & P. N. R. at p. 186, and Phillips on Insurance, s. 1025.

(*n*) *Lawrence* v. *Aberdein*, 5 B. & Ald. 107.

(*o*) *Carr* v. *Royal Exchange Insurance Co.*, 33 L. J. Q. B. 63.

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1. *Not to deviate.*—A deviation from the proper course and track of the voyage insured (*q*) discharges the underwriter, not *ab initio*, but *from the time of the deviation;* so that he is liable for any damage which had previously accrued (*r*), but is freed from subsequent responsibility. It matters not that the risk has not been enhanced by the deviation (*s*).

A deviation happens where there is a wilful and unnecessary departure from the due course of the voyage, for any, even the shortest, time. Thus, if the master touch at a port for a purpose unconnected with the voyage (*t*); or at a port not in the course of the voyage, though only a few leagues out of the way; or one at which it is not usual to touch, although the ship must pass it (*u*); or stay an unreasonable time at the place where the policy attaches (*x*), or a place where the ship has liberty to stay (*y*); or for a purpose foreign to the voyage (*z*); or if, when there are several tracks, he select one in particular for a purpose foreign to the voyage, instead of that which is safest and most eligible (*a*); or having liberty to touch at one port, touch at another (*b*); or touch at the port mentioned in this liberty, but for an unauthorized purpose (*c*): All these are deviations, and though there is no objection to a policy on part of a voyage (*d*),

(*q*) As to this, see also ante, pp. 419 *et seq.*

(*r*) *Green* v. *Young*, 2 Raym. 840. Salk. 444.

(*s*) *Hartley* v. *Buggin*, 3 Doug. 39.

(*t*) *Hammond* v. *Reid*, 4 B. & Ald. 72; *Solly* v. *Whitmore*, 5 B. & Ald. 45; and see *Pearson* v. *The Commercial U. A. Co.*, 15 C. B. N. S. 304; L. R. 8 C. P. 548.

(*u*) *Fox* v. *Black*, 2 Park, 438. *Townson* v. *Gwyon*, Ib.; *Salisbury* v. *Townson*, 2 Park, 464.

(*x*) *Palmer* v. *Marshall*, 8 Bing. 79.

(*y*) *Williams* v. *Shee*, 3 Camp. 469; *Hamilton* v. *Sheddon*, 3 M. & W. 49; *Raine* v. *Bell*, 9 East, 195; *Hammond* v. *Reid*, 4 B. & Ald. 72; *Columbian Insurance Co.* v. *Catlett*, 12 Wheal. U. S. 383. In the case of a seeking ship a reasonable time for the purposes of the adventure, to be determined by the state of things at the port where the ship happens to be, must be allowed. That state of things may render the time of the detention *unusual*, yet it will not discharge the underwriters, unless it be also *unreasonable: Phillips* v. *Irving*, 7 M. & G. 325.

(*z*) *Company of African Merchants* v. *British & Foreign M. I. Co.*, L. R. 8 Ex. 154.

(*a*) *Middlewood* v. *Blakes*, 7 T. R. 162.

(*b*) *Elliott* v. *Wilson*, 7 Bro. P. C. 459; 4 Bro. P. C. 470, Tomlins' edit.

(*c*) *Bottomley* v. *Bovill*, 5 B. & C. 210; *Langhorn* v. *Allnutt*, 4 Taunt. 511. See *Inglis* v. *Vaux*, 3 Camp. 437.

(*d*) *Taylor* v. *Wilson*, 15 East, 324; *Driscol* v. *Passmore*, 1 B. & P. 200; *Michael* v. *Gillespy*, 2 C. B. N. S. 627.

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yet if a policy be on the whole voyage, a deviation, which happened even before the making of the policy, will be fatal (*e*). In determining whether there has been a deviation, regard is always to be paid to the object of the voyage, and the usage of trade with respect to such voyages (*f*). Thus, if it be usual to stop long at a port, or to go out of the way, the underwriter is considered as understanding that usage (*g*). But, as has been frequently observed, no usage can be set up against the express language of a policy: and the policy often, in express terms, grants liberty to the insured to perform acts which, but for that liberty, would amount to deviations (*h*).

Care must be taken not to exceed the liberty (*i*); and even an express liberty is construed with reference to the main object of the voyage. Thus, under a liberty to touch and stay at any port or ports whatever, the stay must be for some purpose connected with the furtherance of the adventure (*k*). Where a ship was insured from Lisbon to England, with liberty to call at any one port in Portugal, it was held that this must mean some port in the course of the voyage to England (*l*); and, as we have seen that a voyage to A., B., and C. means a voyage to them in the order mentioned in the policy (*m*), so where liberty is given

(*e*) *Redman* v. *London*, 3 Camp. 503.

(*f*) Comyns' Dig. Merchant, E. 9; *Stewart* v. *Bell*, 5 B. & Ald. 238; *Delany* v. *Stoddart*, 1 T. R. 22; *Salvador* v. *Hopkins*, 3 Burr. 1707; *Harrower* v. *Hutchinson*, L. R. 4 Q. B. 523; 5 Q. B. 584; *Company of African Merchants* v. *The British and Foreign M. I. Co.*, L. R. 8 Ex. 154.

(*g*) *Bond* v. *Gonsales*, 2 Salk. 445, cited 1 Burr. 348; compare *Pearson* v. *Commercial Union Ass. Co.*, 1 App. Cas. 498, where on a fire policy for three weeks on a steamship "lying in the Victoria Dock," with "liberty to go into dry dock and light the boiler fires once or twice during the currency of the policy," it was held that the policy covered risk in passing from Victoria Dock to the dry dock, and repassing, but not while the steamer was moored in the river for a purpose altogether collateral.

(*h*) See *Barclay* v. *Stirling*, 5 M. & S. 6; *Leathly* v. *Hunter*, 7 Bing. 517; *Mellish* v. *Andrews*, 16 East, 312; 2 M. & S. 27; 5 Taunt. 496; *Harrower* v. *Hutchinson*, supra.

(*i*) See *Hamilton* v. *Sheddon*, 3 M. & W. 49.

(*k*) *Langhorn* v. *Allnutt*, 4 Taunt. 511. See *Williams* v. *Shee*, 3 Camp. 469, 504; *Bottomley* v. *Bovill*, 5 B. & C. 210; *Hamilton* v. *Sheddon*, 3 M. & W. 49; *Wingate* v. *Foster*, 3 Q. B. D. 582.

(*l*) *Hogg* v. *Horner*, 2 Park, 444; *Stone* v. *Marine Ins. Co.*, 1 Ex. D. 81; but for qualifications of this doctrine, see *Metcalfe* v. *Parry*, 4 Camp, 123; *Bragg* v. *Anderson*, 4 Taunt. 229.

(*m*) Ante, p. 419.

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to touch at several specified ports, they must, if more than one be visited, be taken in the order named in the policy (*n*). Nor must the stay at any specified ports be unreasonable (*p*); but when a ship has liberty to touch at a port, she has also liberty to trade there, provided that no extra delay be thereby occasioned (*q*).

If the vessel, in time of war, cruise for a prize (*r*), that is a deviation, unless she have express liberty to do so: a liberty to chase is different from one to cruise for prizes; and a liberty to chase, capture, and man, will not justify a lying-in-wait nine days for a prize (*s*), nor a delay for the purpose of bringing her, when captured, into port: in order to that, there should be a liberty to convoy prizes (*t*). A liberty to cruise for six weeks, means for six weeks successively (*u*).

An unreasonable delay in sailing to the port or place at which the risk is to commence is in the nature of a deviation, and discharges the underwriter (*x*). So is an *abandonment* or *change of voyage*, and the underwriter is discharged from the moment the purpose of so changing the voyage is definitively formed. The distinction between *deviation* and *abandonment* is, that in the former the original voyage described in the policy is not given up, and the *terminus ad quem* not altered; in the latter, it is (*y*). But the policy will not be avoided by a mere intention to deviate, never carried into effect (*z*). There are circumstances under which an actual deviation will be excused; these are, where the deviation is occasioned by necessity, or some imperative obligation, *ex. gr.*, to take in provisions to save the crew from starving, or procure repairs for the safety of the ship; for there

(*n*) *Gairdner* v. *Senhouse*, 3 Taunt. 16. But see ante, p. 452, and the cases there cited.

(*p*) *Williams* v. *Shee*, 3 Camp. 469, 504; *Phillips* v. *Irving*, 7 M. & G. 325.

(*q*) *Raine* v. *Bell*, 9 East, 195; *Laroche* v. *Oswin*, 12 East, 131.

(*r*) *Cock* v. *Townson*, Beawes, 316; Park, 448. See *Phelps* v. *Auldjo*, 2 Camp. 350; *Jolly* v. *Walker*, 2 Park, 448; *Parr* v. *Anderson*, 6 East, 202.

(*s*) *Hibbert* v. *Halliday*, 2 Taunt. 428.

(*t*) *Lawrence* v. *Sydebotham*, 6 East, 45.

(*u*) *Syers* v. *Bridge*, Dougl. 527.

(*x*) *Mount* v. *Larkins*, 8 Bing. 108.

(*y*) 1 Arnould, 452, 6th ed.

(*z*) *Thelusson* v. *Fergusson*, Dougl. 360; *Kewley* v. *Ryan*, 2 H. Bl. 343; *Foster* v. *Wilmer*, 2 Str. 1249; *Heselton* v. *Allnutt*, 1 M. & S. 46. See *Hare* v. *Travis*, 7 B. & C. 14.

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is a liberty implied in every policy to do that which is necessary for the preservation of the vessel and the lives of those on board her (*a*). But if the vessel was unseaworthy when she sailed, and went out of her course to repair original defects, this would be a deviation (*b*).

The ordinary occasions by which a deviation is justified, are,—*To join convoy*, for it may be a measure of necessary prudence; and a captain, unless expressly prohibited, may always do when insured what it would be necessary to do if uninsured (*c*); *Stress of weather* (*d*); *Want of repairs* (*e*); *The approach of an enemy* (*f*); Lastly, *Mutiny, desertion, sickness of the crew*, or any other inevitable accident (*g*); for instance, when the vessel was carried out of her course by a King's ship (*h*). But, though necessity will justify a deviation, yet it is plain, on principles of common sense as well as law, that such necessity must not have been occasioned by the insured's own fault (*i*), and that the voyage of necessity must be pursued in the shortest and most expeditious manner. The doubt which existed as to the right of vessels to deviate to succour the distressed is set at rest by the decision of the Court of Appeal in *Scaramanga* v. *Stamp* (*k*), which decides that deviation for the purpose of saving life is justifiable, but that a deviation for the mere purpose of saving property is not so; and where the former cannot be accomplished without also incidentally effecting the latter object there will be no deviation.

2. *Seaworthiness* (*l*).—"With respect to a *policy on a voyage*,"

(*a*) See *Urquhart* v. *Barnard*, 1 Taunt. 450, at p. 456; *Lavabre* v. *Wilson*, Dougl. 284.

(*b*) 1 Arnould, 503, 6th ed.

(*c*) *D'Aguilar* v. *Tobin*, 1 Holt, 185. See *Warwick* v. *Scott*, 4 Camp. 62.

(*d*) *Delany* v. *Stoddart*, 1 T. R. 22; *Smith* v. *M'Neil*, 2 Dow, 538, 544.

(*e*) *Motteaux* v. *L. A. Co.*, 1 Atk. at p. 547. See *O'Reilly* v. *Gonne*, 4 Camp. 249.

(*f*) *O'Reilly* v. *Gonne*, ubi supra; *The San Roman*, L. R. 3 Ad. 583 (charter-party).

(*g*) *Driscol* v. *Bovil*, 1 B. & P. 313; *Driscol* v. *Passmore*, Id. 200; *Elton* v. *Brogden*, 2 Str. 1264. See *Warwick* v. *Scott*, 4 Camp. 62; *Woolf* v. *Claggett*, 3 Esp. 258.

(*h*) *Scott* v. *Thompson*, 1 B. & P. N. R. 181.

(*i*) *Phelps* v. *Auldjo*, 2 Camp. 350; *Forshaw* v. *Chabert*, 3 B. & B. 158; *Woolf* v. *Claggett*, 3 Esp. 258.

(*k*) 5 C. P. D. 295 (charter-party). In case of collision, see 36 & 37 Vict. c. 85, s. 16.

(*l*) *Lavabre* v. *Wilson*, Dougl. 284.

says Baron *Parke* (*m*), "there is not the least question but that there is an implied warranty of seaworthiness at the *commencement of the risk*: that is, at the port where the assurance is '*at and from*,' at the beginning of a voyage when it is '*from*' a port." He also adds,

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"It is undoubted law, that there is an implied warranty, with respect to a policy for a voyage, that the ship should be seaworthy at the commencement of the voyage, or in port when preparing for it, or had been seaworthy when the voyage had commenced, if the insurance is on a vessel already at sea; which, being commensurate with the risk insured, is compendiously described as a warranty of seaworthiness at *the commencement of the risk*" (*n*).

If, therefore, a ship be unseaworthy at the commencement of the voyage the policy will be voided, even though the defect be remedied before loss (*o*). It matters not that the assured was ignorant of the defects, or that the loss did not occur by reason of them; a breach of this warranty will avoid the policy.

Seaworthiness is a relative term, which is to be construed according to the situation of the ship and the voyage (*p*): thus, if she was in port or river, it means that she was in a condition to render her reasonably safe in such a port or river; and therefore, if she be insured at and from it, she may be protected while in the port, though in want of repairs (*q*). Where the assured is bound to have the ship seaworthy at the commencement of the voyage, he is bound to have her properly equipped with sails (*r*) and anchors (*s*), with a sufficient crew (*t*) and a

(*m*) In giving the judgment of the Exch. Ch. in *Small* v. *Gibson*, 16 Q. B. 156. And see *S. C.*, in Ho. Lds. 4 H. of L. Ca. 353; *Cohn* v. *Davidson*, 2 Q. B. D. 455, 466; *Knill* v. *Hooper*, 2 H. & N. 277, where it was held to be implied in a policy for a voyage on "salvage," the ship having been abandoned and salved; and now, by 39 & 40 Vict. c. 80, s. 4, sending a ship to sea whereby life is endangered is a misdemeanor.

(*n*) *Small* v. *Gibson*, 16 Q. B. at p. 159. See *Lane* v. *Nixon*, L. R. 1 C. P. 412.

(*o*) *Quebec Marine Ins. Co.* v. *Commercial Bank of Canada*, L. R. 3 P. C. 234.

(*p*) *Turnbull* v. *Janson*, 36 L. T. N. S. 635.

(*q*) *Annen* v. *Woodman*, 3 Taunt. 299.

(*r*) *Wedderburn* v. *Bell*, 1 Camp. 1.

(*s*) *Wilkie* v. *Geddes*, 3 Dow, 57.

(*t*) *Shore* v. *Bentall*, 7 B. & C. 798, n.; *Forshaw* v. *Chabert*, 3 B. & B. 158. The omission in the case of English seamen to bind them by an agreement pursuant to 5 & 6 Will. 4, c. 19 (repealed), was held not to render the ship unseaworthy: *Redmond* v. *Smith*, 7 M. & G. 457.

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master of competent skill and ability to navigate her when she sails at the commencement of the voyage (*u*); and if she sail from a port where there is an establishment of pilots, and the nature of the navigation requires one, the master must take a pilot on board (*v*).

Seaworthiness is a term which always refers to the service in which the ship is engaged (*x*). Therefore a vessel may be seaworthy if designed for one service, which would not be so if designed for another (*x*). A ship may be seaworthy in a sense to satisfy the warranty implied in a policy on the ship, and yet it may not be so in a policy on the goods or cargo. Thus, in *Daniells* v. *Harris* (*y*), where there was a policy on deck cargo, it was no proof of seaworthiness that the deck cargo could be readily jettisoned in bad weather, and that thus lightened the vessel would be fit to meet bad weather. So, likewise, is the warranty to be construed relatively to the character and capacity of the vessel itself (*z*), and to the subject-matter of insurance (*a*). The general rule is, that if the ship be not seaworthy at the commencement of the voyage, the policy will be avoided. It has been suggested that an exception exists in cases where the unseaworthiness results from a mistake or accident, which is remedied as soon as it is discovered, and before any loss has been occasioned by it (*b*). The existence of this exception, how-

(*u*) *Tait* v. *Levi*, 14 East, 481.

(*v*) The provisions of the legislature respecting pilots are so minute that it is considered better to refer the reader to Abbott or Maclachlan on Shipping for a full account of them than to attempt any abridgment; and see 17 & 18 Vict. c. 104, ss. 330 et seq. in Appendix. On the question, in what cases the warranty would be broken by not having a pilot, see *Phillips* v. *Headlam*, 2 B. & Ad. 380; *Law* v. *Hollingsworth*, 7 T. R. 160. But *Law* v. *Hollingsworth* cannot now be relied on as an authority, see per *Parke*, B., *Dixon* v. *Sadler*, 5 M. & W. 405; and in error, 8 M. & W. at p. 900. The rule appears to be that, "except where required by the positive provisions of an Act of Parliament, the captain's negligence in not having a pilot on board at any intermediate stage of the voyage, or in entering the port of destination, whereby a loss accrues, will not discharge the underwriters from their liability, if such loss be proximately caused by the perils insured against, and the master and crew were originally competent": 1 Arnould, 6th ed. p. 658; Phillips, s. 717.

(*x*) *Hucks* v. *Thornton*, 1 Holt, 30.

(*y*) L. R. 10 C. P. 1.

(*z*) *Burges* v. *Wickham*, 3 B. & S. 669; *Clapham* v. *Langton*, 5 B. & S. 729; *Daniels* v. *Harris*, L. R. 10 C. P. 1.

(*a*) *Daniels* v. *Harris*, ubi sup.

(*b*) *Weir* v. *Aberdeen*, 2 B. & Ald. 320, per *Abbott*, C. J.

ever, has been questioned in *Quebec Marine Insurance Co.* v. *Commercial Bank of Canada* (*c*), and it is open to grave doubts. The policy—its form and construction.

The warranty of seaworthiness does not apply to any period except the commencement of the risk (*d*). In the case of *Sadler* v. *Dixon* (*e*), where the underwriters were held responsible for the loss of the ship, occasioned by the wilful (but not barratrous) act of the master and crew in throwing overboard the ballast, *Parke*, B., in delivering the judgment of the Court, said:—

"The great principle established by the more recent decisions, is, that if the vessel, crew, and equipments be originally sufficient, the assured has done all that he contracted to do, and is not responsible for the subsequent deficiency occasioned by any neglect or misconduct of the master or crew; and this principle prevents many nice and difficult inquiries, and causes a more complete indemnity to the assured, which is the object of the contract of insurance."

This judgment was afterwards affirmed in the Exchequer Chamber (*e*).

Where there are different stages of navigation necessitating different equipments or states of seaworthiness, the warranty of seaworthiness implies that the vessel is in all respects seaworthy at the commencement of each stage—one crew may be necessary at one part of the voyage and another at another; and there must, therefore, be a sufficient crew at the commencement of each stage. The policy in *Bouillon* v. *Lupton* (*f*) was on vessels "at and from Lyons to Galatz." The vessels were fit to navigate the Rhone from Lyons to Marseilles; but when they left Lyons they were not, and from the nature of the navigation of the river could not be, provided with masts, sails, &c., required for the voyage to Galatz. In other words, they necessarily completed the river voyage in a state unfit to make the sea voyage. *Willes*, J., points out that the warranty of seaworthiness must have different meanings as applied to

(*c*) Ante, p. 455, note (*o*).

(*d*) *Biccard* v. *Shepherd*, 14 Moore, P. C. Ca. 471.

(*e*) 5 M. & W. 405; 8 M. & W. 895 (Exch. Ch.); and see *Biccard* v. *Shepherd*, 14 Moore, P. C. Ca. 493; *Wilson* v. *Rankin*, 6 B. & S. 208; L. R. 1 Q. B. 162.

(*f*) 15 C. B. N. S. 113; *Thompson* v. *Hopper*, 6 E. & B. 172; and see *Biccard* v. *Shepherd*, supra.

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different portions of the same voyage, and states that it is sufficient if the vessel answers the warranty at and for each stage of the voyage. It is obvious that the necessity for a pilot can only be an occasional one (*f*). But, generally speaking, it is sufficient if the vessel be seaworthy at the commencement of the voyage.

If a vessel founders shortly after leaving port, or becomes unable to continue her voyage, in the absence of any external circumstances to account for the disaster, the legal presumption is shifted, and the natural inference is that it arose from defects existing at the time of sailing (*g*). But this is no presumption of law; it will be for the jury to consider the lapse of time, any relevant facts, and the whole circumstances.

This implied warranty, however, may be, and sometimes is, dispensed with by an admission of the fact of seaworthiness, or an agreement on the part of the underwriters in the policy that the ship shall be considered to be seaworthy; and in the absence of fraud they will be liable, though the vessel sink from unseaworthiness the day after the policy was effected (*h*). The exclusion of the implied warranty must be in clear terms (*i*). The fact that the perils enumerated included "rottenness, inherent defects, and other seaworthiness," is insufficient to exclude this warranty (*j*).

With respect to a *time policy*, which is usually effected when the ship is at sea, or in a position where the owner can have no means of knowing her state or complying with such a condition, no warranty of seaworthiness can be implied (*k*).

3. *The insured impliedly warrants that he will guard with reasonable diligence against the risks covered by the policy.*—He cannot claim an indemnity for a loss happening through his own wilful default and negligence (*l*).

(*f*) *Hollingworth* v. *Brodrick*, 7 Ad. & E. 40.

(*g*) *Pickup* v. *Thames Ins. Co.*, 3 Q. B. D. 594, at pp. 597, 600.

(*h*) *Parfitt* v. *Thompson*, 13 M. & W. 392; *Phillips* v. *Nairne*, 4 C. B. 343.

(*i*) *Quebec Marine Ins. Co.* v. *Commercial Bank of Canada*, L. R. 3 P. C. 234.

(*j*) *Quebec Marine Ins. Co.* v. *Commercial Bank of Canada*, supra.

(*k*) *Small* v. *Gibson*, 16 Q. B. 128; 4 H. L. Ca. 353; *Dudgeon* v. *Pembroke*, 2 App. Cas. 284.

(*l*) *Pipon* v. *Cope*, 1 Camp. 434, et

"It is a maxim of our insurance law, and of the insurance law of all commercial nations, that the assured cannot seek an indemnity for a loss produced by their own wrongful act" (*m*).

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Thus, the assurer must not, in the case of a time policy on a ship where no warranty of seaworthiness is implied, knowingly and wilfully send her to sea in an unseaworthy and dangerous state (*n*). So he must take care, in case of a policy on ship, that she be documented according to her national character, for every ship must have some national character. The underwriters will not be liable, if a loss happen from the default of the insured in either of these respects (*o*) in being unprovided with those documents, which are required by the general law of nations or by particular treaties. Thus, as the carrying of simulated papers is an offence against the law of nations, if a ship carry them *and* be condemned on that ground, the *warranty of documentation* is infringed, and the underwriters are not liable (*p*). But, as in the case of express warranty of neutral property, so in the cases now under consideration, disobedience to the mere *ex parte* ordinance of a foreign state does not vitiate the policy (*q*).

There is this difference between an *express* warranty of the ship's national character, and that which we are now considering, viz., that in the case of an *express* warranty, if the ship be not properly documented at the time of sailing, the underwriters are discharged (*r*); whereas a breach of the implied warranty does not discharge the underwriter, unless a loss actually happen in consequence (*s*).

note; *Law* v. *Hollingsworth*, 7 T. R. 160; *Bell* v. *Carstairs*, 14 East, 374. See per Lord *Campbell* in *Small* v. *Gibson*, 4 H. L. Ca. 353. In *Sadler* v *Dixon*, 8 M. & W. 895, *Tindal*, C. J., suggested that there might be an implied warranty to navigate according to the express provisions of a statute, and that *Law* v. *Hollingsworth* might be sustainable on that ground.

(*m*) *Campbell*, C. J., in *Thompson* v. *Hopper*, 6 E. & B. 172, at p. 191.

(*n*) *Thompson* v. *Hopper*, 6 E. & B. 172, 937; E. B. & E. 1038; *Dudgeon* v. *Pembroke*, 2 App. Cas. 284, at p. 297.

(*o*) *Bell* v. *Carstairs*, 14 East, 374. See *Nonnen* v. *Kettlewell*, 16 East, 176. As to what these documents are, see *Wilson* v. *Rankin*, L. R. 1 Q. B. 162.

(*p*) *Oswell* v. *Vigne*, 15 East, 70; *Flindt* v. *Scott*, 5 Taunt. 674.

(*q*) *Nonnen* v. *Reid*, 16 East, 176. See *Le Cheminant* v. *Pearson*, 4 Taunt. 367; *Sewell* v. *R. E. A. Co.*, 4 Taunt. 856.

(*r*) *Rich* v. *Parker*, 7 T. R. 705.

(*s*) Phillips (s. 751) states the distinction thus: "A non-compliance with

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The obligation to have the ship properly documented may be waived, as, for instance, by a liberty to carry simulated papers (*t*). Nor is any warranty of documentation implied in an insurance upon goods (*u*), unless they belong to the owner of the ship, for then there is (*x*).

It was supposed that the underwriter might be exempt from a loss of goods stowed on deck upon the above ground, that such loss had happened *by the merchant's own default*. But the Court of Queen's Bench decided that the mere unexplained fact of their being so stowed is not *in se* conclusive of such a default (*y*).

the implied stipulation for the evidences and insignia of the national character of the vessel does not discharge the underwriter from all subsequent liability. So far as any enhancement of the risk in this respect is imputable to the insured, he must bear the consequent loss; the insurers at the same time continuing to be liable in other respects." See *Bell* v. *Carstairs*, 14 East, 374, per Lord *Ellenborough*, and *Price* v. *Bell*, 1 East, 663. It has been sometimes said, as in *Bell* v. *Carstairs*, ubi supra, that there was *no warranty of documentation;* but that, I think, can only be understood to mean no *express* warranty; for it seems clear that the cases support the opinion in Lord *Campbell's* notes to *Pipon* v. *Cope*, 1 Camp. 434, that the insured impliedly warrants to guard the insurer with reasonable diligence against the risks insured; and that, if a loss happen in consequence of insufficient documentation, that implied warranty will be broken, and the breach a defence. Perhaps the nature of the implied warranty under which these cases fall would be more correctly expressed by saying that the insured warrants *that a loss shall not happen through his own default*. Thus, in *Hollingworth* v. *Brodrick*, 7 Ad. & E. 40, we find Lord *Denman* saying, "I own I feel a doubt whether, if it were distinctly averred that the ship had, by gross negligence, been brought during the voyage to a condition in which she would not be insurable, that might not be a defence. It is certainly a new and perhaps a dangerous one, but I think that, if it were clearly made out, the assured could not say that the loss was by perils insured against." See *Thompson* v. *Hopper*, E. B. & E. 1038, overruling *S. C.*, 6 E. & B. 937. In some cases the question may be, whether the loss arose from any peril insured against, or from the vice of the subject of insurance: see *Fawcus* v. *Sarsfield*, 6 E. & B. 192; *Dudgeon* v. *Pembroke*, 2 App. Cas. 284.

(*t*) *Bell* v. *Bromfield*, 15 East, 364; *Simeon* v. *Bazett*, 2 M. & S. 94.

(*u*) *Dawson* v. *Atty*, 7 East, 367; *Carruthers* v. *Gray*, 15 East, 35; 3 Camp. 142. See Phillips, s. 746.

(*x*) *Bell* v. *Carstairs*, 14 East, 374; *Horneyer* v. *Lushington*, 3 Camp. 85.

(*y*) *Milward* v. *Hibbert*, 3 Q. B. 120.

Section V.—*Results of Contract.*

Results of contract.

Having now finished our consideration of the form and construction of the contract, we proceed to inquire respecting its results; this will, of course, be either the safety or loss of the thing insured. In case of its safety, little matter for discussion arises. In case of *loss* by any of the perils insured against, the first consideration is, whether the loss be a *total* or a *partial* one; for, as insurance is substantially a contract of indemnity (*z*), the insured, if he have suffered only a partial loss, will be entitled only to a partial payment from the insurer. The distinction is also important in regard to goods insured "free from average," that is, goods for which the underwriter is liable only in case of total loss. We will now inquire respecting the distinction between these two classes of loss, and what is, properly speaking, a *total loss*, what only a *partial one*.

Total loss.—A total loss is of two sorts—(1) *actual*, or (2) *constructive*, that is, such as may be rendered total by *notice of abandonment*. By abandonment is meant a relinquishment to the insurer of whatever may be saved. Abandonment is not peculiar to policies of marine insurance, but is an incident of every contract of indemnity. A person claiming under such a contract must abandon all his right in respect of that for which he receives indemnity, the object being to prevent the insured from reaping an undue advantage under the contract. Accordingly, a person insured under a policy of marine insurance must, upon payment by the underwriter for a *total* loss, actual or constructive, abandon anything that remains of the subject of insurance (*a*). *Notice* of abandonment seems to be peculiar to contracts of marine insurance. In the case of *actual* total loss, no notice of abandonment is necessary; but it is necessary, in the case of a *constructive* total loss, unless it be excused (*b*).

(*z*) See *Burnand* v. *Rodocanachi*, 7 App. Cas. 333.

(*a*) *Kaltenbach* v. *Mackenzie*, 3 C. P. D. at pp. 470, 471, referring to *Rankin* v. *Potter*, L. R. 6 H. L. at p. 118.

(*b*) *Kaltenbach* v. *Mackenzie*, ubi supra, per *Brett*, L. J.

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When notice of abandonment has been given, a constructive total loss is as much a total loss as an actual total loss. Thus it will form the subject of a claim under a policy against "total loss only" (*e*).

A total loss of the former description takes place, when no part of the subject-matter of insurance exists in the hands, or for the benefit, of the insured, or in such a state as to be fit for any useful purpose (*f*). Thus, the loss will be total, *per se*, not merely if the ship insured be consumed by fire, or destroyed by perils of the sea, or by some other means cease to exist in specie; but also, in case of seizure, detention, barratry, if the dominion of the seizors continue, adverse sale by a Court of Admiralty, and so forth, the loss is total without abandonment (*g*). It appears to be settled that a partial loss only, due to a peril insured against, is not converted into a total loss by a subsequent sale, even by a Court of competent jurisdiction.

"I know of no such head in insurance law," says *Bayley*, J., in *Gardner* v. *Salvador* (*h*), "as loss by sale."

The true rule appears to be that established in *De Mattos* v. *Saunders* (*i*). A cargo of salt was shipped from Liverpool to Calcutta warranted "free from average, unless general, or the ship be stranded." The vessel was injured, and was taken in tow by salvors and stranded; the salt was landed in a damaged condition, and, if sold, it would have realized no profit. Suits were instituted in the Admiralty Court by the salvors, and the salt was sold under a decree, the entire proceeds being absorbed by the costs. It was held by the Court of Common Pleas (*Willes*, J., and *Keating*, J.), that there was not an actual total loss. *Willes*, J., in delivering judgment, said:

"The contention that the loss, partial at the time it was incurred,

(*e*) *Adams* v. *Mackenzie*, 13 C. B. N. S. 442. See *Forwood* v. *N. Wales Mut. Mar. Ins. Co.*, 5 Q. B. D. 57.

(*f*) See *Levy* v. *Merchants' Marine Ins. Co.*, 52 L. T. 263; *Farnworth* v. *Hyde*, 34 L. J. C. P. 207. A mere confusion of goods of the same kind will not be a total loss: *Spence* v. *Union Marine I. Co.*, L. R. 3 C. P. 427.

(*g*) *Mullett* v. *Shedden*, 13 East, 304; *Mellish* v. *Andrews*, 15 East, 13; *Bondrett* v. *Hentigg*, Holt, 149; *Dixon* v. *Reid*, 5 B. & Ald. 597 (g); *Stringer* v. *English, &c. Insurance Co.*, L. R. 4 Q. B. 676; 5 Q. B. 599; *Cossman* v. *West*, 13 App. Cas. 160.

(*h*) 1 Moo. & Rob. 116.

(*i*) L. R. 7 C. P. 570.

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was converted into a total loss by the acts of the salvors, and the seizure and sale under the orders of the Court of Admiralty, must fail, *because those acts and proceedings were not the natural and necessary consequences of a peril insured against.* The assured is entitled to recover from the underwriters for a loss arising from sea damage and its proximate consequences; but it is not a proximate consequence of sea damage in general that there should be proceedings in the Court of Admiralty. A link is wanting. As well might it be said that a proceeding by salvors setting up a false claim would convert a partial into a total loss; which would be absurd. There was no natural connection between the sea damage here and the seizure and sale under the decree of the Admiralty Court" (*j*).

If, however, there has been a constructive total loss owing to a peril insured against, the subsequent sale by a Court of competent jurisdiction converts the constructive total loss into an actual total loss, so as to dispense with notice of abandonment. Thus, if a ship has been seized or captured, there is a constructive total loss of the ship and cargo by a peril insured against, namely, capture or seizure (*k*); and if afterwards the ship or cargo is sold by a Court of competent jurisdiction, the loss is converted into an actual total loss of the ship or cargo.

In the recent case of *Cossman* v. *West* (*l*) the facts proved were these: a ship was deserted by her master and crew, who had previously injured her and left her in a sinking condition. Afterwards the ship was taken possession of by salvors, towed into port, and there sold, by order of the Admiralty Court, for less than the actual cost of the salvage services. The Privy Council held that after the sale there was an actual total loss.

"If it," say the Privy Council, "is lost to the owner by an adverse valid and legal transfer of his right of property and possession to a purchaser by a sale under a decree of a Court of competent jurisdiction, *in consequence of a peril insured against*, it is as much a total loss as if it had been totally annihilated" (*m*).

(*j*) *De Mattos* v. *Saunders*, L. R. 7 C. P. at p. 579.

(*k*) *Mullett* v. *Shedden*, 13 East, 304; *Stringer* v. *English and Scotch Insurance Co.*, L. R. 5 Q. B. (Ex. Ch.) 599.

(*l*) 13 App. Cas. 160.

(*m*) At pp. 169, 170, citing *Mullett* v. *Shedden*, supra.

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And the case of *De Mattos* v. *Saunders* (*n*) was thus distinguished:—

"In that case the vessel does not appear to have been abandoned by the master and crew, whereas in this case the vessel was a derelict, a term legally applied to a ship which is abandoned and deserted at sea by the master and crew without any intention on their part of returning to her. It is not like the case of a vessel which is left by her master and crew temporarily with the distinct intention of returning to it. In such a case the ship is not abandoned, and therefore is not derelict, though the master may have given up the entire management to the salvors. In the case of salvors there is a distinction between a derelict and a vessel which, though in great danger, has not been abandoned by the master and crew. In the case of a derelict, the salvors who first take possession have not only a maritime lien on the ship for salvage services, but they have the entire and absolute control of the vessel, and no one can interfere with them except in the case of manifest incompetence; but in an ordinary case of disaster, when the master remains in command he retains the possession of the ship. So, unless a vessel is derelict, the salvors have not the right as against the master to the exclusive possession of it, even though he should have left it temporarily, but they are bound, on the master's returning and claiming charge of the vessel, to give it up to him. In the present case, the vessel being a derelict, the salvors had the exclusive possession and control of it up to the time of the sale, and were not bound to give it up until they had been remunerated for the salvage services. Assuming that their possession constituted a constructive total loss, but not an absolute total loss, and that there was still a chance that the vessel might be redeemed and restored, the sale under the decree of the Court removed, as Lord *Abinger* remarked in *Roux* v. *Salvador* (*o*), all speculation upon that subject, and entitled the plaintiff to treat the case as one of total loss without abandonment. The salvage services, if not a peril insured against, were an immediate and necessary consequence of a peril insured against, whether of barratry or a peril of the sea."

Even where a total loss has occurred by the sale of the goods, a question may possibly arise, whether the assured has not, by electing to take the proceeds instead of making his claim on the underwriters, forfeited his claim to recover for a total loss, if he

(*n*) Supra. (*o*) Supra.

have thereby altered the position of the facts, so as to affect the interests of the underwriter (*p*). Results of contract.

Though it has been said that a loss by perils of the sea cannot be total if the thing exists in specie, yet that must be taken only to mean, if it exist for any useful purpose; for if a ship be so battered as to be rather a congeries of planks than a ship (*q*), or if the cargo be so damaged as to exist only in the shape of a nuisance (*r*), in such cases the loss is total without abandonment. It was indeed decided by the Court of Common Pleas, in the case of *Roux* v. *Salvador* (*s*), that where the property continues to exist and be of some value under its original denomination, but is sold on account of the *impossibility* of preserving it up to the termination of the voyage, the insured, if they desire to treat the loss as total, must abandon. That decision was, however, reversed in the Exchequer Chamber, and the rule laid down in the judgment there delivered is as follows:—

"If goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, by reason of that damage, in such a state, though the species be not utterly destroyed, that they cannot with safety be reshipped into the same or any other vessel; if it be certain that, before the termination of the original voyage, the species itself would disappear, and the goods assume a new form, losing all their original character; if, though imperishable, they are in the hands of strangers, not under the control of the assured; if, by any circumstances over which he has no control, they can never, or within no assignable period, be brought to their original destination;—in any of these cases, the circumstance of their existing in specie at *that forced termination* of the risk is of no importance. The loss is, in its nature, total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle (*t*). . . . Their destruction (*i. e.*, of the hides, the goods there in question)

(*p*) See *Mitchell* v. *Edie*, 1 T. R. 608, commented on in *Roux* v. *Salvador*, 3 Bing. N. C. 290; and *Rankin* v. *Potter*, L. R. 6 H. L. at p. 120.

(*q*) *Cambridge* v. *Anderton*, 2 B. & C. 691; *Irving* v. *Manning*, 1 H. L. 287. But see *Bell* v. *Nixon*, 1 Holt, 425; *Martin* v. *Crokatt*, 14 East, 465.

(*r*) *Dyson* v. *Rowcroft*, 3 B. & P. 474; *Cologan* v. *L. A. Co.*, 5 M. & S. 447.

(*s*) 1 Bing. N. C. 526; 3 Bing. N. C. 266. See, however, *Farnworth* v. *Hyde*, 34 L. J. C. P. 207; *Fleming* v. *Smith*, 1 H. L. 513; *Stewart* v. *Greenock Marine Insurance Co.*, 2 H. L. at p. 183; *Meyer* v. *Ralli*, 1 C. P. D. 358.

(*t*) Affirmed by the House of Lords in *Rankin* v. *Potter*, L. R. 6 H. L. 83.

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not being consummated at the time they were taken out of the vessel, they became in that state a salvage for the benefit of the party who was to sustain the loss, and were accordingly sold, and the facts of the loss and the sale were made known at the same time to the assured. Neither he nor the underwriters could at that time exercise any control over them, or by any interference alter the consequences. It appears to us, therefore, that this is not the case of what has been called a constructive loss, but of an absolute total loss of the goods. They never could arrive, and at the same moment when the intelligence of the loss arrived all speculation was at an end" (*x*).

In *Roux* v. *Salvador*, also, the Exchequer Chamber distinctly indicated the instances in which notice of abandonment must be given, in these words:—

"But there are intermediate cases,—there may be a capture, which, though *primâ facie* a total loss, may be followed by a recapture, which would re-vest the property in the assured. There may be a forcible detention, which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril, which renders the ship unnavigable without any reasonable hope of repair (*y*), or by which the goods are partly lost, or so damaged that they are not worth the expense of bringing them, or what remains of them, to their destination (*z*). In all these, or any similar cases, if a prudent man, not insured, would decline any further expense in prosecuting an adventure, the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit as well as that of the underwriter, treat the case as one of a total loss, and demand the full sum insured (*a*). But if he elects to do this, as the thing insured, or a portion of it, still exists and is vested in him, the very principle of the indemnity *requires* (*b*) *that he should make a cession of all his right to the recovery of it*, and that, too, within a reasonable time after he receives the intelligence of the accident, that the under-

(*x*) *Roux* v. *Salvador*, 3 Bing. N. C. at pp. 279, 281.

(*y*) *Knight* v. *Faith*, 15 Q. B. 649. See *King* v. *Walker*, 3 H. & C. 209.

(*z*) See *Reimer* v. *Ringrose*, 6 Exch. 263; *Rosetto* v. *Gurney*, 11 C. B. 176; *Farnworth* v. *Hyde*, 18 C. B. N. S. 835; L. R. 2 C. P. 204; and compare *Meyer* v. *Ralli*, 1 C. P. D. 358.

(*a*) *Cossman* v. *West*, 13 App. Cas. 160, at p. 169. He need not do so; he may repair, and claim for a partial loss: *Pitman* v. *Universal Insurance Co.*, 9 Q. B. D. 544.

(*b*) *Fleming* v. *Smith*, 1 H. L. Ca. 513; *Lozano* v. *Janson*, 2 E. & E. 160.

writer may be entitled to all the benefit of what may still be of any value, and that he may, if he pleases, take measures at his own cost for realising or increasing that value. In all these cases not only the thing assured, or part of it, is supposed to exist in specie, but there is a possibility, however remote, of its arriving at its destination, or at least of its value being in some way affected by the measures that may be adopted for the recovery or preservation of it. If the assured prefers the chance of any advantage that may result to him beyond the value insured, he is at liberty to do so (*c*); but then he must also abide the risk of the arrival of the thing insured in such a state as to entitle him to no more than a partial loss" (*d*). Results of contract.

Consequently, if there be nothing to cede of which the insurer can avail himself, notice of abandonment is unnecessary (*e*); but, if "the thing insured subsists in specie, and there is a chance of its recovery, there must be an abandonment (*i. e.*, notice of abandonment)" (*f*).

When the loss is not total *per se*, the right to abandon depends on its amount. The doctrine formerly held on this subject was, as succinctly stated in 2 Wms. Saund. 203 c., note 19, that, when the voyage was lost, or the expense of pursuing it exceeded the benefit arising from it, and, therefore, it was not worth pursuing, in such case the insured might abandon (*g*). But this doctrine is narrowed by later decisions (*h*), and it does not seem possible to imagine a case in which the loss of the voyage, independently of some great jeopardy affecting the subject-matter of insurance, would entitle

(*c*) See *Pitman* v. *Universal Ins. Co.*, supra.

(*d*) *Roux* v. *Salvador*, 3 Bing. N. C. at p. 286.

(*e*) *Rankin* v. *Potter*, L. R. 6 H. L. 83.

(*f*) *Roux* v. *Salvador*, 3 Bing. N. C. at p. 287, citing *Mellish* v. *Andrews*, 15 East, 13, per Lord *Ellenborough*. See, as to a sale of the ship *Cobequid, M. I. Co.* v. *Barteaux*, L. R. 6 P. C. 319, ante. As to the case of cargo being landed, owing to sea damage to carrying ship, at a place where no ship could be got to forward the cargo, see *Hunt* v. *Roy. Ex. Assurance*, 5 M. & S. at p. 56.

(*g*) *Irving* v. *Manning*, 1 H. L. Ca. 287.

(*h*) *Anderson* v. *Wallis*, 2 M. & S. 240; *Falkner* v. *Ritchie*, Id. at p. 293; *Naylor* v. *Taylor*, 9 B. & C. 718; *Thorneley* v. *Hebson*, 2 B. & Ald. 513; *Bainbridge* v. *Neilson*, 10 East, 329; *Brotherston* v. *Barber*, 5 M. & S. 419. As to whether a constructive total loss has been excluded by the bye-laws of an insurance company incorporated in a policy, see *Forwood* v. *N. Wales Ins. Co.*, 9 Q. B. D. 732.

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the assured to abandon (*f*). The insurance is not on the voyage, but on the ship for the voyage or the time specified (*g*).

The test as to constructive loss of ship laid down by Story, J., in *Peele* v. *The Merchants' Insurance Co.* (*h*), is:—

"The right of abandonment has been admitted to exist where there is a forcible dispossession or ouster of the owner of the ship, as in cases of capture; where there is a moral restraint or detention which deprives the owner of the free use of his ship, as in case of embargoes, blockades, and arrests by sovereign authority (*i*); where there is a present total loss of the physical possession and use of the ship, as in case of submersion; where there is a total loss of the ship from the voyage, as in case of shipwreck, so that the ship cannot be repaired for the voyage in the port where the disaster happens; and, lastly, where the injury is so extensive that by reason of it the ship is useless, and yet the necessary repairs would exceed her present value."

In determining what is a constructive total loss of goods, the question appears to be whether, after expending money in transhipping, drying, &c., the goods could have been sent to the port of destination at less than their selling value on arrival (*j*).

In cases in which the law requires an *abandonment*, "not only the thing assured or part of it is supposed to exist in specie, but there is a possibility, however remote, of its arriving at its destination, or at least of its value being in some way affected

(*f*) *Holdsworth* v. *Wise*, 7 B. & C. 794; *Benson* v. *Chapman*, 2 H. L. Ca. 696; *Parry* v. *Aberdein*, 9 B. & C. 411; *M'Iver* v. *Henderson*, 4 M. & S. 576; *Cologan* v. *L. A. Co.*, 5 M. & S. 447; *Dixon* v. *Reid*, 5 B. & Ald. 597; *Gernon* v. *R. E. A. Co.*, 6 Taunt. 381; *Idle* v. *R. E. A. Co.*, 8 Taunt. 755; *Read* v. *Bonham*, 3 B. & B. 147; *Meabourne* v. *Leckie*, 4 D. & R. 207; *Cambridge* v. *Anderton*, 2 B. & C. 691; *Robertson* v. *Clarke*, 1 Bing. 445; *Robertson* v. *Carruthers*, 2 Stark. 571; *Reimer* v. *Ringrose*, 6 Exch. 263; *Rosetto* v. *Gurney*, 11 C. B. 176. And see *Smith* v. *Robertson*, 2 Dow, 474; *Doyle* v. *Dallas*, 1 M. & Rob. 48; *Gardner* v. *Salvador*, Id. 116; *Robertson* v. *Clarke*, 1 Bing. 445; *Freeman* v. *E. I. Co.*, 5 B. & Ald. 617; *Morris* v. *Robinson*, 3 B. & C. 196; *Hudson* v. *Harrison*, 3 B. & B. 97; *Underwood* v. *Robertson*, 4 Camp. 138; *Rodocanachi* v. *Elliott*, L. R. 8 C. P. 649; 9 C. P. 518.

(*g*) Phillips on Insurance, s. 1522.

(*h*) 3 Mason, 27 at p. 65, cited in 2 Arnould, 6th ed. 1058.

(*i*) "If of long or uncertain duration" ought to be added: *Foster* v. *Christie*, 11 East, 205.

(*j*) *Rosetto* v. *Gurney*, 11 C. B. 188; *Farnworth* v. *Hyde*, L. R. 2 C. P. 204; 2 Arnould, 6th ed. 1064.

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by the measures that may be adopted for the recovery or preservation of it" (*k*).

In *Young* v. *Turing* (*l*), in which notice of abandonment had been given, the ship was cast away upon the Goodwin Sands, but might have been re-fitted. The Lord Chief Justice of the Common Pleas told the jury that they were to say whether, under all the circumstances attending the ship (among which was her national character), a man of prudence and discretion uninsured would have repaired her or not; that, if he would, the loss was *partial;* if he would not, *total.* And that, in determining *this* question, they were to take as the value of the ship her real value, not the sum at which she was valued in the policy (*m*). This direction was upheld by the Exchequer Chamber, and in a similar case received the sanction of the House of Lords (*n*).

This question is not to be decided by the result, but should be confined to the spot and time of the commencement of the repairs: and the jury should say whether, when the repairs were commenced, the owner, if *on the spot* and uninsured, and acting prudently, would not have repaired; for it may be that, as the repairs went on, the defects proved to be greater than was originally supposed; and that it was then worth while to incur a still greater expenditure rather than sell the ship partially repaired, and lose the benefit of the sum already laid out (*o*). And even if the owner be entitled to abandon, yet if the captain, having repaired injudiciously, prosecute the adventure, and earn the freight, though it be swallowed up by a bottomry bond, the underwriters on freight are not liable for it, inasmuch as it has not in fact been *lost* (*p*).

(*k*) Per cur. in *Roux* v. *Salvador*, 3 Bing. N. C. at pp. 286, 287; and see *Fleming* v. *Smith*, 1 H. L. Ca. 513; *Reimer* v. *Ringrose*, 6 Exch. 263; *Mellish* v. *Andrews*, 15 East, 13; and *Mullett* v. *Shedden*, 13 East, 304; 2 Arnould, 6th ed. 1058.

(*l*) 2 M. & G. 593. See also *Irving* v. *Manning*, 1 H. L. Ca. 287; *King* v. *Walker*, 3 H. & C. 209.

(*m*) See *Pitman* v. *Universal Marine Insurance Co.*, 9 Q. B. D. at p. 201.

(*n*) *Irving* v. *Manning*, 1 H. L. Ca. 287. And see *Moss* v. *Smith*, 9 C. B. 94; and as to ships of an exceptional character, *The African S. S. Co.* v. *Swanzy*, 2 K. & J. 660; *Grainger* v. *Martin*, 2 B. & S. 456; 4 B. & S. 9.

(*o*) *Benson* v. *Chapman*, 2 H. L. Cas. 696; and *Rankin* v. *Potter*, L. R. 6 H. L. 83.

(*p*) *Benson* v. *Chapman*, 2 H. L. Cas.

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When the insured are entitled to abandon, and think proper (for they are in no case obliged) to do so, they must give notice of abandonment within a reasonable time (*o*). However, it is sufficient if notice be given within a reasonable time after the insured have received intelligence of the loss, and had an opportunity of ascertaining the extent of damage (*p*).

"The law that has been laid down is, that immediately the assured has reliable information of such damage to the subject-matter of insurance as that there is imminent danger of its becoming a total loss, then he must at once, unless there is some reason to the contrary, give notice of abandonment; but if the information which he first receives is not sufficient to enable him to say whether there is that imminent danger, then he has a reasonable time to acquire full information as to the state and nature of the damage done to the ship" (*q*).

Notice of abandonment need not be given to the underwriters of a policy of re-insurance (*r*).

An abandonment cannot be partial: it must be of the whole thing insured, unless in effect there are separate insurances of particular articles or parcels (*s*). It must also be unconditional, at least, unless the underwriter think proper to accept a conditional one (*t*). It must be express, too, and positive, though the word "abandon" need not be used (*u*). A request to the underwriter to give directions for the disposition of the effects insured, and to settle for a total loss, was in one case held not sufficient (*v*).

696. Compare *Rankin* v. *Potter*, L. R. 6 H. L. 83.

(*o*) *Mitchell* v. *Edie*, 1 T. R. 608; *Hunt* v. *R. E. A. Co.*, 5 M. & S. 47; *Potter* v. *Rankin*, L. R. 3 C. P. 562; 5 C. P. 341; 6 H. L. 83; *Mellish* v. *Andrews*, 15 East, 13; *Allwood* v. *Henckell*, Park, 280; *Fleming* v. *Smith*, 1 H. L. Ca. 513; *Stringer* v. *English and Scotch Ins. Co.*, L. R. 4 Q. B. 676. 5 Q. B. 599.

(*p*) *Read* v. *Bonham*, 3 B. & B. 147; *Gernon* v. *R. E. A. Co.*, Holt, 49; 6 Taunt. 383. And see *King* v. *Walker*, 3 H. & C. 209.

(*q*) *Kaltenbach* v. *Mackenzie*, 3 C. P. D. at p. 473, per *Brett*, L. J.

(*r*) *Uzielli* v. *Boston Marine Insurance Co.*, 15 Q. B. D. 11.

(*s*) Park, 229; Marsh. 486, 4th ed.; 2 Arnould, 955.

(*t*) *M'Masters* v. *Shoolbred*, 1 Esp. 237.

(*u*) *Currie* v. *Bombay Native Insurance Co.*, L. R. 3 P. C. 72, at p. 79, dissenting from Lord *Ellenborough's* remarks in *Parmeter* v. *Todhunter*, 1 Camp. 541.

(*v*) *Parmeter* v. *Todhunter*, 1 Camp. 541 (disapproved of in *Currie* v. *Bombay Native Ins. Co.*, supra). See *Da Costa* v. *Newnham*, 2 T. R. 407; *Havelock*

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But the underwriter may waive an informality in the notice of abandonment by his acquiescence (*w*), though he will not do this merely by lying by and making no objection to it; for he is not bound to signify his acceptance of an abandonment, though if he once accept it he becomes liable for a total loss (*x*). The abandonment may be by parol (*y*); but it must be given by the assured or a person authorized by him to give it (*z*). Once given and accepted by the underwriter, a notice of abandonment is irrevocable (*a*). Such acceptance may be proved by words or conduct, and is, as a rule, a question of fact (*b*).

The effect of an abandonment is to divest the property of the thing abandoned out of the insured, and vest it in the insurer, for whom the former becomes a trustee (*c*). In *Castellain* v. *Preston* (*d*), *Brett*, L. J., thus defines the extent of the insurer's right:

"As between the underwriter and the assured, the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted upon, or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been, exercised or has accrued; and whether such right could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured can be, or has been, diminished."

Hence, freight which is actually earned, or which may be subsequently earned, passes to the insurer (*e*), though the in-

v. *Rockwood*, 8 T. R. 268; *Lockyer* v. *Offley*, 1 T. R. 252; *Thellusson* v. *Fletcher*, 1 Esp. 73.

(*w*) *Hudson* v. *Harrison*, 3 B. & B. 97. See *Da Costa* v. *Newnham*, 2 T. R. 407; *Hagedorn* v. *Whitmore*, 1 Stark. 157.

(*x*) *Smith* v. *Robertson*, 2 Dow, 474; *Provincial Insurance Co. of Canada* v. *Leduc*, L. R. 6 P. C. 224; *Shepherd* v. *Henderson*, 7 App. Cas. 49; *Fleming* v. *Smith*, 1 H. L. Ca. 513.

(*y*) *Read* v. *Bonham*, 3 B. & B. 147.

(*z*) *Jardine* v. *Leathley*, 3 B. & S. 700.

(*a*) *Provincial Insurance Co.* v. *Leduc*, L. R. 6 P. C. 224, 243.

(*b*) See *Shepherd* v. *Henderson*, 7 App. Cas. at p. 64; and *Fleming* v. *Smith*, 1 H. L. 513.

(*c*) *Randall* v. *Cockran*, 1 Ves. sen. 98; *Simpson* v. *Thompson*, 3 App. Cas. 279; *Burnand* v *Rodocanachi*, 7 App. Cas. 333. See *Scottish Marine Insurance Co.* v. *Turner*, 1 Macq. H. L. Cas. at p. 342.

(*d*) 11 Q. B. D. 380, at p. 388.

(*e*) *Steward* v. *Greenock Marine Insurance Co.*, 2 H. L. Cas. 159; *Case* v. *Davidson*, 5 M. & S. 79; 2 B. & B.

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surers, of course, receive only the balance remaining after deducting the necessary expenses incurred by the assured in the preservation of the property abandoned (*f*). Damages recovered from the owners of the wrong-doing ship for loss of freight not earned by reason of a collision (*g*), or freight earned by transhipping the cargo and conveying it in another vessel (*h*), do not pass to the insurer. The underwriters will be subrogated to no rights which the assurer had not. Thus (*i*), where two ships of the same owner came into collision, the underwriters of the vessel which was lost paid the insurance, and claimed to rank *pari passu* with the owners of cargo destroyed in the distribution of the fund lodged in Court. It was held that they had no such right under the circumstances of the case.

"The right of the underwriters," said Lord *Cairns*, L. C., "is merely to make such claim for damages as the insured himself could have made, and it is for this reason that they would have to make it in his name; and if this be so, it cannot of course be made against the insured himself" (*k*).

While the insurer is subrogated to the rights of the assured, he becomes subject to all liabilities as owner of the ship or goods; *e.g.*, the liability to pay salvage reward or freight (*l*). The better opinion seems to be that the assured cannot, by abandonment, transfer to the underwriters ownership so as to subject them to *subsequent* liabilities against their immediate disclaimer of such transfer (*m*).

It ought to be observed here, before quitting the head of *total*

379; *Thompson* v. *Rowcroft*, 4 East, 34; *Sharp* v. *Gladstone*, 7 East, 24. See *Miller* v. *Woodfall*, 8 E. & B. 493. Where the ship arrives at her destination, so that freight is earned, but owing to the abandonment is lost to the shipowner, the underwriters on freight are not liable, because the freight is lost by the abandonment, and not by a peril insured against: *Scottish Marine Insurance Co.* v. *Turner*, 1 Macq. H. L. Cas. 334. But see *Rankin* v. *Potter*, L. R. 3 C. P. at pp. 570, 571; 5 C. P. at p. 374; and 6 H. L. at p. 100.

(*f*) *Sharp* v. *Gladstone*, 7 East, 24.

(*g*) *Sea Insurance Co.* v. *Hadden*, 13 Q. B. D. 706.

(*h*) *Hickie* v. *Rodocanachi*, 28 L. J. Ex. 273.

(*i*) *Simpson* v. *Thompson*, 3 App. Cas. 279.

(*k*) Ibid. at p. 284.

(*l*) *Sharp* v. *Gladstone*, 7 East, 24; *Dakin* v. *Oxley*, 33 L. J. C. P. 115; 2 Phillips, s. 1718.

(*m*) 2 Phillips, s. 1726; 2 Arnould, 6th ed. p. 977.

loss, that there may be a *total* loss of an integral portion of the cargo. As where the insurance was on several hogsheads of sugar, and each hogshead was separately valued and insured, a loss of one of them was held to be a total loss of that hogshead (*n*); or where the insurance is general, but upon articles entirely different from each other (*o*). On the other hand, where a part of each hogshead was saved, the jury having stated their opinion that the loss was an average, the Court held them right in so doing (*p*); and where memorandum goods are shipped in distinct packages, but there is no separate valuation and insurance of each, the loss of several entire packages has been held by the Court of Exchequer Chamber to be an average one, and covered by the memorandum (*q*). The distinction between the two classes of cases is explained in that case and also in *Hills* v. *London Assurance Corporation* (*r*), where, a portion of a cargo of wheat shipped in bulk having been pumped out with water in foul weather and so lost, the loss was held only an average and not a total loss. Results of contract.

It was laid down in *Usher* v. *Noble* (*s*) that, in the case of an open policy, the invoice price of goods at the loading port, including premiums of insurance and commission, is the sum recoverable, and in the case of a ship its value at the outset of the voyage, plus outfit, stores and provisions, advance of wages, premium and charges of insurance (*t*).

Partial Loss.—The term *partial loss* needs no explanation: it is, however, proper to remark, that a loss which was once total, may by matter *ex post facto* become a partial one. Thus, if a ship be captured, the loss is total, and no

(*n*) *Lewis* v. *Rucker*, 2 Burr. 1167; *Davy* v. *Milford*, 15 East, 559. See *Navone* v. *Haddon*, 9 C. B. 30.

(*o*) *Duff* v. *Mackenzie*, 3 C. B. N. S. 16 (policy upon "master's effects valued at 100*l.*, free from all average"; assured entitled to recover, on total loss of barometer, chronometer, &c., the effects lost).

(*p*) *Hedburg* v. *Pearson*, 7 Taunt. 154.

(*q*) *Ralli* v. *Janson*, 6 E. & B. 422; *Cator* v. *G. W. Ins. Co.*, L. R. 8 C. P. 552. See also *Entwisle* v. *Ellis*, 2 H. & N. 549.

(*r*) 5 M. & W. 569. And see *Rosetto* v. *Gurney*, 11 C. B. at p. 186.

(*s*) 12 East, p. 646.

(*t*) *Shawe* v. *Felton*, 2 East, 109.

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doubt, if she continue in the power of the enemy up to the time of bringing the action, the insured may recover for a total loss. But if she escape, or be re-captured, so as to be still of value, that which was once a total loss becomes a partial one (*u*). So, when there is a policy on freight, and the ship is detained under an embargo, the loss is *primâ facie* total: yet, if the embargo be taken off, and she afterwards earn freight, it becomes partial (*x*).

With respect to the mode in which the sum to be paid by the underwriter on account of a partial loss is calculated, if the damage was suffered by *the ship*, and has been repaired by the owner, he will not be allowed the full costs of repairing, but (if the ship be not new) one-third is deducted in consideration of the benefit which he derives from new materials in lieu of old (*y*). If, however, the shipowner does not repair in case of a partial loss, and sells his ship during the continuance of the risk, the depreciation in value is the measure of the underwriter's liability (*z*).

If *the goods* are damaged, the mode adopted is, to ascertain the difference between the gross proceeds of the goods on their arrival at their destined port, and what would have been their gross proceeds had they not been injured. Then—as what would have been their gross proceeds if sound, is to their gross proceeds when damaged, so is their original value to a fourth quantity, which fourth quantity being subtracted from the original value, will give the sum to be paid by the underwriters (*a*). Thus, suppose the original value was 100*l.*; that the cargo, had it arrived safe at the end of its voyage, would have

(*u*) 2 Wms. Saund. 203 b. n. 19; *Bainbridge* v. *Neilson*, 10 East, 329; *Brotherston* v. *Barber*, 5 M. & S. 418; *Patterson* v. *Ritchie*, 4 M. & S. 393.

(*x*) *Macarthy* v. *Abel*, 5 East, 388; *Everth* v. *Smith*, 2 M. & S. 278. But see *Fowler* v. *The E. & S. M. I. Co.*, 18 C. B. N. S. 818.

(*y*) *Aitchison* v. *Lohre*, 4 App. Cas. 755; *Poingdestre* v. *R. E. A. Co.*, R. & M. 378. See *Da Costa* v. *Newnham*, 2 T. R. 407. See the qualification in *Pirie* v. *Steele*, 2 M. & Rob. 49, which excludes the new for the old deduction in cases of loss occurring during the ship's first voyage.

(*z*) This appears to be the effect of *Pitman* v. *Universal Mar. Ins. Co.*, 9 Q. B. D. 192.

(*a*) *Usher* v. *Noble*, 12 East, 639; *Johnson* v. *Sheddon*, 2 East, 581; *Lewis* v. *Rucker*, 2 Burr. 1167; *Hurry* v. *R. E. A. Co.*, 3 B. & P. 308.

fetched 200*l.*, but in its damaged state will fetch only 150*l.*; then as

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200 : 150 : : 100 : to the sum required,

which will, therefore, amount to 75*l.*; subtracting 75*l.* from 100*l.*, the original value, we obtain 25*l.* the estimated loss, which must be made good by the underwriter. The reason for adopting the original value as the basis of this calculation is, that the insurance is a contract of indemnity, and the assured ought not to be allowed to make a profit by it, which he would do, if he were to receive any more than he originally paid.

The mode of ascertaining the original value of the *goods* in the case of an *open policy* is, to take the invoice price at the loading port, and add to that all expenses till put on board, together with the premium of insurance and commission (*b*); these being both charges to which the insured has actually been put on account of the goods, in order to send them on the voyage. Whether a payment on the shipment of the goods can be added to their value, is a question as yet undecided (*c*).

When the policy is a *valued* one, the parties have themselves agreed on the original value of the goods, and the standard is therefore adopted which they have fixed in the policy (*d*).

If the policy be on freight, and open, which is uncommon, the usage is to calculate the loss upon the gross, not on the net, value (*e*). If, as is usual, the policy be valued, and there be a partial loss of freight, the underwriter pays upon the proportion of value in the policy which the part of the cargo for which freight would have been payable had the voyage terminated successfully bears to the full cargo (*f*).

Should the policy be a continuing policy "as interest may appear," the assured, in the event of a partial loss, will recover the proportion of the loss to the total amount assured; *e.g.*, if

(*b*) *Langhorn* v. *Allnutt*, 4 Taunt. 511; *Usher* v. *Noble*, 12 East, 639; *Lewis* v. *Rucker*, supra.

(*c*) *Winter* v. *Haldimand*, 2 B. & Ad. 649.

(*d*) *Lewis* v. *Rucker*, 2 Burr. 1167. See 12 East, 647; 6 C. B. 420.

(*e*) *Palmer* v. *Blackburn*, 1 Bing. 61.

(*f*) *Tobin* v. *Harford* (full cargo not landed), 17 C. B. N. S. 528; 34 L. J. C. P. 37; *Denoon* v. *Home and Colonial Assurance Co.*, L. R. 7 C. P. 341.

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the policy be for 12,000*l.* on barges, only 3,000*l.* to be covered in any one barge, and goods to the value of 1,700*l.* be lost, the assurer will recover the proportion of the loss which 12,000*l.* bears to the value of goods afloat (*g*).

Generally speaking, where property, which has been partially deteriorated, is afterwards totally lost to the insured, and the previous deterioration thus becomes a matter of perfect indifference to his interest, he cannot make it the ground of a claim upon the underwriter, for of what consequence is the intermediate condition of the thing, if he be never to receive it again? But there may be cases in which, though a prior damage be followed by a total loss, the assured may, nevertheless, have rights or claims in respect of that prior loss, which may not be extinguished by the subsequent total loss (*h*). Actual disbursements for repairs in fact made in consequence of injuries by perils of the seas, previous to the happening of the total loss, are of this description; unless, indeed, they are more properly to be considered as covered by that authority, with which the assured, "their factors, servants, and assigns" (*i*), are usually invested by the policy, of "suing, labouring, and travailing, &c., for, in, and about the defence, safeguard, and recovery of the property insured," in which case the amount of such disbursements might more properly be recovered as money paid for the underwriter, under the direction and allowance of this provision of the policy, than as a substantive average loss, to be added cumulatively to the amount of the total loss which is afterwards incurred (*k*). For such disbursements, if incurred to prevent loss insured against, the underwriter is liable over and above the amount of his subscription (*l*). Salvage expenses and

(*g*) *Crowley* v. *Cohen*, 3 B. & Ad. 478; compare *Joyce* v. *Kennard*, L. R. 7 Q. B. 78, where the policy was construed as if a fire policy.

(*h*) See *Knight* v. *Faith*, 15 Q B. 649; *Lidgett* v. *Secretan*, L. R. 6 C. P. 616.

(*i*) See *Uzielli* v. *Boston Marine Insurance Co.*, 15 Q. B. D. 11.

(*k*) See *Kidston* v. *The Empire M. I. Co.*, L. R. 1 C. P. 535; 2 C. P. 357; *Lee* v. *The Southern I. Co.*, L. R. 5 C. P. 397; *Dixon* v. *Whitworth*, 4 C. P. D. 371; *Aitchison* v. *Lohre*, 4 App. Cas. 755.

(*l*) *Livie* v. *Jansen*, 12 East, 648; *Great Indian Peninsular Ry. Co.* v. *Saunders*, 1 B. & S. 41; 2 B. & S. 266.

general average are not within the suing and labouring clause (*m*); such expenses are not incurred by the assured or their agents. Results of contract.

Section VI.—*Proceedings after a Loss.*

Adjustment.—When a loss has taken place, unless the underwriter can deny his liability to make it good, he usually proceeds to *adjustment*, which is the settling and ascertaining of the amount which the assured, after allowances and deductions are made, is entitled to receive under the policy, and fixing the proportion which each underwriter is liable to pay. Each underwriter pays only on the actual sum subscribed by him. Thus, if a policy for 1,000*l.* be subscribed by five underwriters for 200*l.* each, and the loss be one-fourth, viz., 250*l.*, each underwriter contributes 50*l.* only (*n*). When the amount to be paid by each underwriter is settled the policy is indorsed with a memorandum:—"Adjusted the loss on this policy at £ per cent." It is taken to the several underwriters, who affix their initials to the memorandum, and strike a pen through their subscriptions to the policy (*o*). The adjustment operates as an admission of all the facts necessary to constitute the underwriter responsible (*p*), but it is not conclusive upon him. Though it is incumbent on an underwriter, who has once admitted his liability by an adjustment, to make out a strong case, yet, until actual payment (*q*) of the money, he may avail himself of any defence which the law or facts will furnish (*r*). Proceedings after a loss.

If the underwriter contests his liability, he either relies upon the absence of some of the above-mentioned requisites to a contract of insurance, by alleging, for instance, that the insured

(*m*) *Aitchison* v. *Lohre*, 4 App. Cas. 755; compare *Kidston* v. *Mar. Ins. Co.*, L. R. 1 C. P. 535.

(*n*) 2 Arnould, 6th ed. p. 928, note.

(*o*) 2 Arnould, 6th ed. 1091.

(*p*) *Rogers* v. *Maylor*, Park, 194; *Christian* v. *Coombe*, 2 Esp. 489; *Shepherd* v. *Chewter*, 1 Camp. 274; *Luckie* v. *Bushby*, 13 C. B. 864.

(*q*) *Bilbie* v. *Lumley*, 2 East, 469.

(*r*) *Herbert* v. *Champion*, 1 Camp. 134; *De Garron* v. *Galbraith*, Peake, Add. Ca. 37; note to *Shepherd* v. *Chewter*, cited ante.

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is an alien enemy, or that there is no legal subject-matter of insurance, *e.g.*, that the policy is a wager policy; or he insists that the risk never began, as, for instance, that the ship cleared out and sailed on a voyage different from that insured; or that he has been discharged by a breach of warranty; *e.g.*, by a deviation; or he contends that the policy is vitiated by fraud, misrepresentation, or concealment on the part of the insured. All these grounds of defence have been already treated of; except the last, on which we will now say a few words.

It is essential that in all contracts of insurance the strictest good faith should be observed. For fraud, misrepresentation, or concealment of any material circumstance avoids the whole contract. Thus, if the underwriter assures a ship as on her voyage, which he privately knows to be arrived, the policy is void, and the assured may bring an action against him to recover back the premium (*s*). So, if the assured or his agent (*t*) misrepresent or conceal any material fact relating to the property insured, the policy is void, and the insurer not liable (*u*). When this takes place, the policy is vacated *ab initio*, and the underwriters may use it as a defence, though the loss have arisen from a cause wholly unconnected with the circumstance misrepresented or concealed (*x*).

A misrepresentation of a material fact vitiates the policy, whether the party assert a thing he knows to be false or does not know to be true (*y*) or honestly under a mistake (*z*). A material misrepresentation, though honestly made, will void the policy (*a*). Nor need the loss be in any way connected with

(*s*) *Carter* v. *Boehm*, 3 Burr. at p. 1909. And an action lies against an insurer for misrepresentation: *Pontifex* v. *Bignold*, 3 M. & G. 63.

(*t*) See *Blackburn, Low & Co.* v. *Vigors*, post, p. 485.

(*u*) *Rivaz* v. *Gerussi*, 6 Q. B. D. 222; *Carter* v. *Boehm*, 1 W. Bl. 593; 3 Burr. 1905; *Middlewood* v. *Blakes*, 7 T. R. 162; *Willes* v. *Glover*, 1 B. & P. N. R. 14; *Da Costa* v. *Scandret*, 2 P. Wms. 170.

(*x*) Per *Lee*, C. J., *Seaman* v. *Fonnereau*, Str. 1183.

(*y*) *Macdowall* v. *Fraser*, Doug. 260; *Chaurand* v. *Angerstein*, Peake, 43; *Duffell* v. *Wilson*, 1 Camp. 401; *Behn* v. *Burness*, 3 B. & S. 751.

(*z*) *Ionides* v. *The Pacific F. & M. I. Co.*, L. R. 6 Q. B. 674; 7 Q. B. 517; compare *Rivaz* v. *Gerussi*, 6 Q. B. D. 222.

(*a*) Per *Willes*, J., in *Anderson* v. *Pacific Fire Ins. Co.*, L. R. 7 C. P. at p. 68.

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the misrepresentation to have this effect (*b*). The misrepresentation will be of a material fact, if it consist of an assertion that the ship was safe on a particular day, will sail at a particular time (*c*), or will sail in company, and carry a certain force (*d*). A misrepresentation made to the first underwriter in a material point is considered as a misrepresentation to every one of the underwriters, for they are all supposed to follow the first (*e*). But a misrepresentation made to any underwriter other than the first is not to be considered as made to subsequent underwriters (*f*); and the rule concerning the effect of a misrepresentation to the first is founded, it is said, more upon precedent than reason (*g*), and must be received with great qualification (*h*).

If a representation be *substantially* true, that is sufficient, and in this respect it differs from a warranty, which must be *literally* complied with. Thus, where it was represented that the ship would carry twelve guns and twenty men, and she really carried nine guns and six swivels, and sixteen men and eleven boys, a force equal in amount to that represented, the policy was not avoided (*i*). Moreover, if the party who effects the policy do not make his assertion positively, but only as a matter of expectation and belief, it will be sufficient if he really believe it (*k*).

As to *concealment*, it is as fatal to the policy as misrepresentation; for insurance is a contract founded on speculation, and a knowledge of all the facts is necessary to enable the underwriter to calculate, and form a just estimate of the risk (*l*).

(*b*) 1 Arnould, 6th ed. p. 520.

(*c*) *Roberts* v. *Fonnereau*, Park, 285.

(*d*) *Edwards* v. *Footner*, 1 Camp. 530.

(*e*) *Pawson* v. *Watson*, Cowp. 785; *Barber* v. *Fletcher*, Dougl. 305; *Marsden* v. *Reid*, 3 East, 573.

(*f*) *Bell* v. *Carstairs*, 2 Camp. 543; *Brine* v. *Featherstone*, 4 Taunt. 869.

(*g*) Per *Heath*, J., in *Brine* v. *Featherstone*.

(*h*) Per Lord *Ellenborough* in *Forrester* v. *Pigou*, 1 M. & S. 13; 1 Arnould, 6th ed. 545.

(*i*) *Pawson* v. *Watson*, Cowp. 785; *Bize* v. *Fletcher*, Dougl. 289; *Nonnen* v. *Reid*, 16 East, 176; *Von Tungeln* v. *Dubois*, 2 Camp. 151; *Dent* v. *Smith*, L. R. 4 Q. B. 414.

(*k*) *Barber* v. *Fletcher*, Dougl. 305; *Hubbard* v. *Glover*, 3 Camp. 313; *Bowden* v. *Vaughan*, 10 East, 415; *Brine* v. *Featherstone*, 4 Taunt. 869; *Anderson* v. *The Pacific F. & M. I. Co.*, L. R. 7 C. P. 65, 69.

(*l*) *Tate* v. *Hyslop*, 15 Q. B. D. 368.

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Nor is it an excuse that the concealment was attributable to the fraud or neglect of an agent (*n*), or that the account concealed was false (*o*), or in no way referred to the subsequent cause of loss (*p*), or was not concealed with a fraudulent design (*q*), nor does it matter whether it was known as a report or as a matter of positive intelligence (*r*). But the concealment which vitiates a policy must be of a fact *material* to a just *estimate* of the risk (*s*); not necessarily a fact which would actually affect the risk, if it might reasonably influence a prudent underwriter in determining, according to the principles on which underwriters in practice act, whether he should accept the risk at all, and if so, at what price (*t*). Therefore, the main question respecting concealment almost always is, whether the fact concealed be a material one in this sense (*u*). Of this description have been held to be,—intelligence that the vessel about to be insured, or a ship like her, has been lost, or which induced the owner to fear that she may be so (*x*); information respecting the time or manner of her sailing which is material to the probability of her safety, such, for instance, as would show her to be a missing ship, or out of time, or that she had encountered bad weather, or that another ship, which sailed after her, had arrived first (*y*); intelligence that she had been met with in a leaky state (*z*), or had from some other cause sustained damage before the commencement of the risk (*a*); or

(*n*) *Fitzherbert* v. *Mather*, 1 T. R. 12; *Proudfoot* v. *Montefiore*, L. R. 2 Q. B. 511; *Blackburn, Low & Co.* v. *Vigors*, post, p. 485.

(*o*) See *Lynch* v. *Hamilton*, 3 Taunt. 37; *Lynch* v. *Dunsford*, 14 East, 494.

(*p*) *Seaman* v. *Fonnereau*, Str. 1183.

(*q*) *Morrison* v. *Universal Mar. Ins. Co.*, L. R. 8 Ex. 40, 197.

(*r*) *Durrell* v. *Bederley*, 1 Holt, 283, *Gibbs*, C. J.; *Bates* v. *Hewitt*, L. R. 2 Q. B. 595.

(*s*) *Durrell* v. *Bederley*, ubi supra.

(*t*) *Rivaz* v. *Gerussi*, 6 Q. B. D. 222 (C. A.); *Tate* v. *Hyslop*, supra.

(*u*) *Ionides* v. *Pender*, L. R. 9 Q. B. 531; *Rivaz* v. *Gerussi*, supra.

(*x*) *Da Costa* v. *Scandret*, 2 P. Wms. 170. See 1 Show. 324; *Blackburn, Low & Co.* v. *Vigors*, 12 App. Cas. 531.

(*y*) *Mackintosh* v. *Marshall*, 11 M. & W. 116; *Kirby* v. *Smith*, 1 B. & Ald. 672; *Bridges* v. *Hunter*, 1 M. & S. 15; *Sawtell* v. *Loudon*, 5 Taunt. 359; *Elton* v. *Larkins*, 8 Bing. 198; *Elkin* v. *Janson*, 13 M. & W. 655; *Anderson* v. *Thornton*, 8 Exch. 425.

(*z*) *Lynch* v. *Hamilton*, 3 Taunt. 37; *Lynch* v. *Dunsford*, 14 East, 494. See *Westbury* v. *Aberdein*, 2 M. & W. 267, where another ship arrived which had parted from the ship insured in a storm.

(*a*) *Gladstone* v. *King*, 1 M. & S. 35.

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that she is in danger of an attack, as if a man were to insure a ship, knowing that enemies were lying in wait for her (*b*); the circumstance that in the case of a policy on goods, which included risk on lighters, the lightermen were released by the assuree from liability as common carriers (*c*); the fact that the ship or goods are overvalued (*d*), or that the assured had, under a series of open policies, systematically undervalued the shipments, thereby concealing the fact that the earlier policies were more exhausted than appeared (*e*).

A merchant residing at Sydney shipped goods by the ship C. for England, and, by another ship that sailed after the ship C., wrote to an agent in England, desiring him, if he received that letter before the C. arrived, to wait for thirty days, in order to give every chance of her arrival, and then effect an insurance on the goods; the letter was received, and the agent, having waited more than thirty days, employed a broker to effect an insurance, and handed the letter to him: the broker told the underwriter when the C. sailed, and when the letter ordering the insurance was written, but he did not state when it was received, nor the order to wait thirty days after the receipt of it before effecting an insurance. The C. never arrived. In an action on the policy, no fraud was imputed to the plaintiff; but the jury, being of opinion that a material part of the letter had been concealed, found a verdict for the defendant. It was held that the uncommunicated part of the letter was material, and the policy consequently void (*f*).

The question of the materiality of the representation or concealment is, subject to the direction of the judge, exclusively for the jury (*g*). Whether the evidence of underwriters upon the question is admissible is not settled (*h*).

(*b*) *Carter* v. *Boehm*, 3 Burr. 1905; 1 W. Bl. 593; *Beckwaite* v. *Nalgrove*, cited 3 Taunt. 41; *Durrell* v. *Bederley*, 1 Holt, 283.

(*c*) *Tate* v. *Hyslop*, 15 Q. B. D. 368.

(*d*) *Ionides* v. *Pender*, L. R. 9 Q. B. 531.

(*e*) *Rivaz* v. *Gerussi*, 6 Q. B. D. 222.

(*f*) *Rickards* v. *Murdock*, 10 B. & C. 527. See *Campbell* v. *Rickards*, 5 B. & Ad. 840.

(*g*) *McDowall* v. *Fraser*, 1 Dougl. 260.

(*h*) See *Campbell* v. *Rickards*, supra; 1 Arnould, 6th ed. 592; Taylor on Evidence, 8th ed. 1211.

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The rule respecting concealment is confined to matters which lie within the private knowledge of the insured. He need not mention what the underwriter knows (*i*), or ought to know (*j*), —*scientia utrimque par pares facit contrahentes.* He need not mention general topics of speculation,—such as the difficulty of the voyage, the nature of the season, the probability of lightning, hurricanes, and earthquakes, of danger from the ruptures of states, from war, and the various operations of war. Men argue differently from natural phenomena and political appearances,—they have different capacities, different degrees of knowledge, and different modes of thinking; but the means of information are open alike to all—each professes to act from his own skill and sagacity, and therefore neither need communicate to the other the result of his individual judgment (*k*). The insured need not communicate the usage of trade, for the underwriter is supposed to know it (*l*); nor a fact which the underwriter may learn by the exercise of proper diligence (*m*). A communication in general terms not calculated to convey the full truth to the insurer will not be sufficient. An omission to communicate material facts will not be excused on the ground that the facts are known to the insurer, if his knowledge of them is not so particular and full as that of the assured, who ought to put the insurer in the same position as himself (*n*).

Though a London underwriter may *primâ facie* be taken to know matters contained in the shipping list at Lloyd's, yet if the insured makes a misrepresentation which may induce him

(*i*) *Gandy* v. *Adelaide Mar. Ins. Co.*, L. R. 6 Q. B. 746.

(*j*) It must be a matter present to his mind, not forgotten: *Bates* v. *Hewitt*, L. R. 2 Q. B. 595, 606.

(*k*) *Carter* v. *Boehm*, 3 Burr. 1905.

(*l*) *Vallance* v *Dewar*, 1 Camp. 503, custom in Newfoundland fishery; *Stewart* v. *Bell*, 5 B. & Ald. 238.

(*m*) *Gandy* v. *Adelaide Mar. Ins. Co.*, L. R. 6 Q. B. 746. But this does not extend to the paper known as Lloyd's list; *Elton* v. *Larkins*, 8 Bing. 198; and see *Bates* v. *Hewitt*, L. R. 2 Q. B. at p. 611; *Morrison* v. *Universal M. I. Co.*, L. R. 8 Ex. 40, 197, overruling *Friere* v. *Woodhouse*, 1 Holt, 572.

(*n*) Duer, 13, pt. 1, s. 13; *Sun Mutual Ins. Co.* v. *Ocean Ins. Co.*, 107 U. S. S. C. (17 Otto), 485, at p. 510, where it is suggested that "the exaction of information in some instances may be greater in a case of re-insurance than as between the parties to an original insurance," (*e.g.*, as to the character of the original insured.)

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to neglect looking at the list, the policy is avoided; at all events, unless the insured be able to show that he really did acquire a knowledge of the truth before subscribing the policy (*o*). The insured is not bound to communicate matter which forms an ingredient in a warranty, such, for instance, as that of seaworthiness: thus, where the assured received a letter mentioning that the ship had been surveyed at Trinidad on account of *her bad character*—but the survey which accompanied the letter gave the ship a good character—the concealment of this did not vacate the policy; for the insured impliedly warranted the ship to be seaworthy, and it did not appear either that she was, or that he had reason to think that she was, otherwise (*p*). If, after the broker has been instructed to effect a policy, his principal receive further intelligence, but the policy is effected before the principal can communicate it to the broker, the policy is valid, if the principal and broker appear to have acted with due diligence (*q*). And so, after the initialing of the slip, and before the execution of the policy, if the assured receive such intelligence, even although it be subject to ratification by the assured, for, according to the usage of underwriters, the initialed slip is binding in honour and good faith (*r*). "The time between the slip and the policy is not to be counted, and the latter relates back to the former" (*s*).

In every case, the question, whether the non-communication of a fact vacates the policy, depends, as has before been said, upon the further question, whether that fact was a material one (*t*). Thus, in some cases, the time of the ship's sailing has been held immaterial (*u*). Nor need the insured state to the

(*o*) *Mackintosh* v. *Marshall*, 11 M. & W. 116.

(*p*) *Haywood* v. *Rodgers*, 4 East, 590; *Shoolbred* v. *Nutt*, Park, 346.

(*q*) *Wake* v. *Atty*, 4 Taunt. 493.

(*r*) *Cory* v. *Paton*, L. R. 7 Q. B. 304; 9 Q. B. 577; *Lishman* v. *The Northern M. I. Co.*, L. R. 8 C. P. 216; 10 C. P. 179. See ante, p. 408.

(*s*) Per *Bramwell*, B., in *Lishman* v. *Northern Co.*, L. R. 10 C. P. at p. 181.

(*t*) See *Littledale* v. *Dixon*, 1 B. & P. N. R. 151; *Beckwith* v. *Sydebotham*, 1 Camp. 116; *Weir* v. *Aberdein*, 2 B. & Ald 320; *Taylor* v. *Wilson*, 15 East, 324; *Bell* v. *Bell*, 2 Camp. 479; *Carr* v. *Montefiore*, 5 B. & S. 408; *Boyd* v. *Dubois*, 3 Camp. 133. As to this last case, see *Carr* v. *Montefiore*, 5 B. & S. at p. 403.

(*u*) *Fort* v. *Lee*, 3 Taunt. 381; *Foley* v. *Moline*, 5 Taunt. 430. But see *Bridges* v. *Hunter*, 1 M. & S. 15; *Kirby* v. *Smith*, 1 B. & Ald. 672.

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underwriter general circumstances connected with the history and capabilities of the ship, *e.g.*, her age, where she was built, what was her construction, whether clinker-built or not, whether copper-bottomed, when, how, and where repaired, &c. Circumstances of this nature would no doubt have weight in guiding the judgment of the underwriter; but it is not essential to the fairness of the contract that the insured should, in the first instance, disclose them—it is sufficient if he answer truly when it is demanded of him (*w*).

The assured will be affected by the knowledge of his agent with respect to the condition of the vessel.

"If an agent, whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of a ship and cargo, omits to discharge such duty, and the owner, in the absence of information as to any fact material to be communicated to the underwriter, effects an insurance, such insurance will be void on the ground of concealment or misrepresentation. The insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, *or, in the ordinary course of business, ought to have, knowledge*" (*x*).

In that case, the plaintiff's agent, a resident at Smyrna for buying goods for the plaintiff, and shipping them to him at Liverpool, became aware, on the 24th January, that a ship on board of which he had shipped a cargo for the plaintiff had been wrecked and the cargo lost on the 23rd. The agent wrote informing the plaintiff of the loss on the 26th January, the next post day. He might have telegraphed, but he purposely refrained from doing so. It was held that it was the duty of the agent to have telegraphed, and that a policy "lost or not lost," effected by the plaintiff before receiving the letter of the 26th, and without knowledge of the loss, was void (*y*). An agent who while negotiating an insurance receives information of a

(*w*) See *Haywood* v. *Rodgers*, 4 East, 590; *Freeland* v. *Glover*, 7 East, 457; *Long* v. *Duff*, 2 B. & P. 209.

(*x*) *Cockburn*, C. J., in *Proudfoot* v. *Montefiore*, L. R. 2 Q. B. 511, at p. 521.

(*y*) *Proudfoot* v. *Montefiore*, supra.

material fact, cannot, by handing the matter over to his principals to continue the negotiations, release them from the duty of communicating the information (*z*). Proceedings after a loss.

The assured is not affected by the knowledge of every agent, but only where the agent is such that, *in respect of the particular matter in question, he represents the principal* (*a*). For example, in *Blackburn, Low & Co.* v. *Vigors* (*b*), the plaintiff had instructed a broker to effect for him a re-insurance upon an overdue ship. While acting on behalf of the plaintiff the broker received information of a material fact, tending to show that the ship was lost. He did not communicate it to the plaintiff, and did not effect the re-insurance. Afterwards, the plaintiff effected, through another broker, a policy of re-insurance "lost or not lost" upon the ship with the defendant. The ship had been lost before the plaintiff tried to re-insure her through the first broker. Neither the plaintiff nor the second broker, who actually effected the re-insurance, had any knowledge of the material fact known to the first broker. It was held in the House of Lords, that the policy was not affected by the non-disclosure of the information acquired by the first broker; for he was not the general agent of the plaintiff, but only an agent for the purpose of a particular contract, and this agency had ceased at the time the policy was entered into. "There was no material fact known to any agent which was not disclosed at the point of time at which the contract was made; there was no one possessed of knowledge whose duty it was to communicate such knowledge" (*c*).

Besides the general defences to a policy of marine insurance treated of in the preceding pages, there may, of course, be other defences arising out of the *terms of the policy; e.g.*, in the case of mutual insurance companies, it is common to stipulate that no member whose share is mortgaged, and no mortgagee or assignee, unless he shall have paid or undertaken to pay all sums due by such member to the association, shall have any

(*z*) *Blackburn, Low & Co.* v. *Haslam*, 21 Q. B. D. 144.

(*a*) Per Lord *Halsbury*, L. C., in *Blackburn, Low & Co.* v. *Vigors*, 12 App. Cas. 531, at p. 539.

(*b*) 12 App. Cas. 531, reversing the judgment of the majority of the Court in the Court of Appeal, 17 Q. B. D. 553.

(*c*) Per Lord *Halsbury*, L. C., 12 App. Cas. at p. 539.

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claim in virtue of the policy. This will be regarded as a condition precedent (*y*).

Return of Premium.—If the underwriter should succeed in establishing a defence against his liability upon the policy, a question immediately arises, whether the insured be entitled to a *return of premium;* and, if so, whether to a return of all or part. On this subject the parties sometimes enter into an agreement, and if they do, the terms of that must, of course, be observed (*z*), and will regulate the amount of the sum to be returned and the circumstances under which it is returnable (*a*).

If there be no express stipulation, the question of return or no return is regulated by two main principles: *First*, where the risk has not been run, the premium shall be returned; for the underwriter receives it for running the risk, and, if he do not run the risk, he ought not to retain it (*b*). Thus, if the policy were on goods, and no goods are put on board the ship, the premium must be returned (*c*). And on this ground rests the return of premium for *short interest*, which occurs when part only of the goods embraced by the policy is put on board, in which case a portion of the premium corresponding to the deficiency must be returned (*d*).

In *Fisk* v. *Masterman* (*e*), insurances had been effected on the 12th of April to the amount of 14,150*l.*, and on the 13th to the amount of 22,300*l.* It turned out that the whole value was 30,333*l.* 10*s.*, so that there was 6,116*l.* 10*s.* short interest. The

(*y*) *Turnbull* v. *Woolfe*, 7 L. T. N. S. 483; *Alexander* v. *Campbell*, 27 L. T. N. S. 462.

(*z*) *Audley* v. *Duff*, 2 B. & P. 111.

(*a*) See *Kellner* v. *Le Mesurier*, 4 East, 396; *Leevin* v. *Cormac*, 4 Taunt. 483; *Dalgleish* v. *Brooke*, 15 East, 295; *Aguilar* v. *Rodgers*, 7 T. R. 421; *Simond* v. *Boydell*, Dougl. 268; *Castelli* v. *Boddington*, 1 E. & B. 66, 879; *Horncastle* v. *Haworth*, Marsh. Ins. 539, 4th ed.; *Langhorn* v. *Allnutt*, 4 Taunt. 511 (which last two cases seem at variance).

(*b*) *Routh* v. *Thompson*, 11 East, 428; *Oom* v. *Bruce*, 12 East, 225; *Hentig* v. *Staniforth*, 5 M. & S. 122; *S. C.*, 4 Camp. 270. But this does not mean risk of loss. Policies are made on vessels "lost or not lost:" *Bradford* v. *Symondson*, 7 Q. B. D. 456.

(*c*) *Martin* v. *Sitwell*, 1 Show. 156.

(*d*) *Eyre* v. *Glover*, 16 East, 218; *Horneyer* v. *Lushington*, 15 East, 46; 3 Camp. 90.

(*e*) 8 M. & W. 165; *Bradford* v. *Symondson*, 7 Q. B. D. at p. 460.

Court held, that there must be a return by the underwriters on the 13th, the amount of over-insurance to be ascertained by taking all the policies into account, but no return to be made by the underwriters on the 12th. Proceedings after a loss.

So, where profits are the subject of insurance there may be a return of premium for short profits (*f*). But, if it be a valued policy, and all the goods intended were put on board, the insured will not be entitled to a return on the ground that they were not of the value specified (*g*).

The policy may attach though at the time it was entered into there could not, in fact, be a loss, and though the question of loss or no loss was then determined. Thus, in *Bradford* v. *Symondson* (*h*), the defendant, who had insured a cargo by a vessel "lost or not lost" for a certain voyage, subsequently re-insured the same cargo with the plaintiff for the same risk. Before the re-insurance was effected the vessel had arrived safely—a fact not known to the plaintiff or defendant at the time of the re-insurance. It was contended that the policy had not attached, and consequently that the plaintiff was not entitled to the premium on the re-insurance. The Court of Appeal held otherwise. "The fallacy in the defendant's argument," said *Bramwell*, L. J., "arises from the double meaning of the word 'risk.' That means both the voyage commenced with necessary conditions to make the underwriters liable, and, also, the chance of loss during its performance. In the latter sense, there was no risk at the time of re-insurance. But that is not the sense in which the word is used by the authorities. It is used in the first sense I have mentioned." *Secondly*, when the risk embraced by the policy is entire, and has once commenced, there can be no return of the premium, or of any part of it (*i*); thus, even if the insurance be for twelve months at a certain rate *per month*, and the risk ceases at the end of two months, there can be no apportionment or return of

(*f*) *Eyre* v. *Glover*, ubi supra.

(*g*) *MacNair* v. *Coulter*, 4 Bro. P. C. 450; *Stone* v. *Marine Ins. Co. of G.*, 1 Ex. D. 81.

(*h*) 7 Q. B. D. 456.

(*i*) *Tyrie* v. *Fletcher*, Cowp. 666; *Bermon* v. *Woodbridge*, Dougl. 781; *Langhorn* v. *Cologan*, 4 Taunt. 330.

Proceedings after a loss.

premium (*k*); for, as the whole risk attached, the underwriter would have been obliged to settle for a total loss had such a one taken place within the two months, and the specification of a certain sum per month is only a mode of computing the gross amount of premium. Again, if a ship insured from A. to B. sail in an unseaworthy condition, the underwriter's risk never commences (*l*): and the premium, as we have seen, must be returned. But if a vessel be insured *at and from* A. to B., and sail in an unseaworthy condition, no portion of the premium is returnable; for the risk attached, while she remained at A., before she sailed; and if she had been lost while there, a total loss would have been payable (*m*). So, again, if the ship deviate, the underwriter is discharged; yet, inasmuch as the risk once attached, and as he might have been subjected to a total loss had she perished before she reached the point of deviation, no portion of the premium is returnable (*n*).

We have seen that there can be no return of premium where the risk is entire and has once commenced. But if the insurance be, in effect, on two or more voyages, and one or more have not commenced, there shall be an apportionment and return of premium in respect of those voyages that have not commenced; for, in such a case, the risk is not entire, nor is the underwriter for a single moment liable to make good any loss incurred during the latter voyages (*o*). The usual mode of showing that the risk is to be considered as thus divided is by proving an usage of trade to that effect, of which usage the underwriter must, of course, be presumed cognizant (*p*). Thus, where the insurance was from London to Halifax, warranted to depart with convoy from Portsmouth, the ship not having departed with convoy from Portsmouth, and the jury having found a usage to return part of the premium in such a case; the Court thought that the contract was for an insurance from London to Halifax; which contract, in case of the ship's not

(*k*) *Loraine* v. *Thomlinson*, Dougl. 585.

(*l*) *Penson* v. *Lee*, 2 B. & P. 330.

(*m*) *Annen* v. *Woodman*, 3 Taunt. 299; *Meyer* v. *Gregson*, Park, 588. See ante, p. 455.

(*n*) *Tait* v. *Levi*, 14 East, 481; *Moses* v. *Pratt*, 4 Camp. 297.

(*o*) *Stevenson* v. *Snow*, 3 Burr. 1237.

(*p*) *Long* v. *Allen*, Park, 589; *Stevenson* v. *Snow*, ubi supra.

departing from Portsmouth with convoy, was to be reduced to an insurance from London to Portsmouth; that, as she had not departed from Portsmouth with convoy, the contract had been so reduced, and, consequently, that there must be a part-return of the premium for the risk never incurred, viz., that from Portsmouth to Halifax (*q*). Proceedings after a loss.

It remains to be observed, that, even where the risk never commenced, yet if the assured or his agent have been guilty of *fraud*, for instance, if he knew that the ship was lost when he insured her, there can be no return of premium (*r*). The same rule holds, if the insurance be illegal, and the voyage have been performed, unless the parties could not have known of the illegality (*s*), or believed that the risk would be legal, and took the usual effective steps to make it so (*t*), for *in pari delicto potior est conditio possidentis* (*u*). But this maxim does not apply where the return of premium is claimed before the voyage has commenced; for then, the contract being still executory, there is a *locus pœnitentiæ*, and either party has a right to rescind it, since, by doing so, he prevents the commission of that which the law forbids (*x*). However, the party seeking to rescind must formally renounce the contract, and give notice to the underwriter that he has done so, before he can bring an action to recover back the premium (*y*).

If a policy has been regularly executed (*z*), the remedy is by an action, which, as we have already seen, may be brought in the name of the assignee of the policy (*a*), or by the broker who

(*q*) *Stevenson* v. *Snow*, ubi supra.

(*r*) *Wilson* v. *Ducket*, 3 Burr. 1361; *Tyler* v. *Horne*, Park, 329; *Chapman* v. *Fraser*, Ibid. In the case of mere omission to communicate material information, the rule seems to be different: *Anderson* v. *Thornton*, 8 Exch. 425.

(*s*) *Oom* v. *Bruce*, 12 East, 225.

(*t*) *Hentig* v. *Staniforth*, 5 M. & S. 122.

(*u*) *Wilson* v. *R. E. A. Co.*, 2 Camp. 623; *Cowie* v. *Barber*, 4 M. & S. 16; *Toulmin* v. *Anderson*, 1 Taunt. 227; *Lowry* v. *Bourdieu*, Dougl. 468; *André* v. *Fletcher*, 3 T. R. 266.

(*x*) See per *Buller*, J., *Lowry* v. *Bourdieu*, supra; and *Aubert* v. *Walsh*, 3 Taunt. at p. 283. But see the remarks of *Abbott*, J., in *Palyart* v. *Leckie*, 6 M. & S. 290.

(*y*) *Palyart* v. *Leckie*, 6 M. & S. 290.

(*z*) The 30 & 31 Vict. c. 23, s. 7, presents a fatal obstacle to any proceeding on a memorandum or the slip, which is usually signed: *Parry* v. *Great Ship Co.*, 4 B. & S. 556; *Ionides* v. *Pacific I. Co.*, L. R. 6 Q. B. 674; *Cory* v. *Patton*, L. R. 7 Q. B. 304.

(*a*) Ante, p. 412.

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effected the policy (*b*). The policy may, however, be so worded as to render a reference the only mode of ascertaining the amount due (*c*), if it be disputed, and sometimes it imposes qualifications on the liability of the insurers (*d*). The policy being a contract of indemnity, a claim upon it cannot, in general, be answered by, nor form the subject of, a set-off (*e*).

When several actions are brought on a policy against several underwriters, the Court will make a rule for staying the proceedings in all the actions except one, on the defendants undertaking to be bound by the verdict in that action, and consenting to other reasonable terms (*f*). But though all the defendants are bound to abide by the verdict in that single action, the plaintiff is not so (*g*); however, if he proceeded in a second action without the leave of the Court, he will not be allowed the benefit of the terms imposed on the defendants by the consolidation rule. And if he have effected several insurances declaring the same value in each, he is bound for that sum, and cannot receive beyond that extent (*h*). The sum recovered under one policy goes in reduction of that recoverable under another. Thus, where he declares different values, viz., 8,000*l.* on one policy, and 4,000*l.* on another, and recover 6,000*l.* under the former, he cannot in a subsequent action recover under the second (*i*).

(*b*) *Provisional Ins. Co. of Canada* v. *Leduc*, L. R. 6 P. C. 224.

(*c*) *Scott* v. *Avery*, 8 Exch. 487; 5 H. of L. Ca. 811; *Tredwin* v. *Holman*, 1 H. & C. 72; *Elliott* v. *The R. E. A. Co.*, L. R. 2 Ex. 237.

(*d*) *Hallett* v. *Dowdall*, 18 Q. B. 2; *Hassell* v. *Merchant T. S. L. & I. A.*, 4 Exch. 525.

(*e*) *Castelli* v. *Boddington*, 1 E. & B. 66, 879; *Lee* v. *Bullen*, 8 E. & B. 692, n.; 1 Arnould, 6th ed. 219.

(*f*) For the history of, and practice on this subject, see Tidd, 9th ed. 614; *Doyle* v. *Anderson*, 1 Ad. & E. 635; *Hollingsworth* v. *Brodrick*, 4 Ad. & E. 646; Wilson's Judicature Acts, 7th ed. p. 371, note. The Court may grant a new trial in the first action: *Cohen* v. *Bulkeley*, 5 Taunt. 165; *Foster* v. *Steele*, 3 Bing. N. C. 892.

(*g*) *Doyle* v. *Douglas*, 4 B. & Ad. 544; *Long* v. *Douglas*, Ibid. note. As to the case of different policies on the same ship, see *M'Gregor* v. *Horsfall*, and *M'Gregor* v. *Smith*, 3 M. & W. 320.

(*h*) *Irving* v. *Richardson*, 1 M. & Rob. 153; *Morgan* v. *Price*, 4 Exch. 615.

(*i*) *Bruce* v. *Jones*, 1 H. & C. 769, overruling *Bousfield* v. *Barnes*, 4 Camp. 228; *Irving* v. *Richardson*, 1 M. & Rob. 153.

CHAPTER V.

INSURANCE UPON LIVES.

Insurance upon lives.

INSURANCE upon a life is a contract by which the insurer, in consideration of a certain premium, either in a gross sum, or by annual payments, undertakes to pay to the person for whose benefit the insurance is made, a certain sum of money or annuity on the death of the person whose life is insured (*a*). If the insurance be for the whole life, he undertakes to make the payment *whenever the death happens;* if otherwise, he undertakes to make it *in case the death should happen within a certain period*, for which period the insurance is said to be made.

As an unlimited power of effecting insurances of this description would give rise to a species of gambling, it is enacted by stat. 14 Geo. 3, c. 48, as follows:—

"Sect. 1. No insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever (*b*), wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and every assurance, made contrary to the true intent and meaning hereof, shall be null and void to all intents and purposes whatsoever.

"Sect. 2. It shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person* or persons

* *Sic.*

(*a*) *Dalby* v. *India and London Life Ass. Co.*, 15 C. B. 365. Compare the definition by *Jessel*, M. R., in *Fryer* v. *Morland*, 3 Ch. D. at p. 685.

(*b*) Perhaps it might not be very easy to say to what description of wagers, particularly if written, this statute is inapplicable. See *Paterson* v. *Powell*, 9 Bing. 320; *Roebuck* v. *Hamerton*, Cowp. 737; 8 & 9 Vict. c. 109. But see *Good* v. *Elliott*, 3 T. R. 693, and *Morgan* v. *Pebrer*, 3 Bing. N. C. 457; *Cook* v. *Field*, 15 Q. B. 460.

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name or names interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote (*c*).

"Sect. 3. In all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events" (*d*).

The Act does not void generally contracts made contrary thereto, but only as between the insurers and the insured. It is a defence to the insurers only, if they choose to avail themselves of it (*e*). A father effected, for his own benefit, an insurance in the name and on the life of his son, in which he had no insurable interest, and the insurers on the death of the son paid the father the amount insured; it was held that the father was entitled to retain the amount as against the son's estate notwithstanding the statute (*f*).

Marine insurances are exempted from the operation of this Act (*g*).

The Act does not prohibit individuals from effecting insurances upon their own lives, provided that be done *bonâ fide;* but it seems that a man would not be allowed to evade the statute by procuring another, in whose life he had no interest, to insure it with his money and for his benefit, though ostensibly for the advantage of the party insuring (*h*).

The period to which the 3rd section of the statute refers, is that of *effecting* the policy, and therefore the assured is entitled to recover, to the extent of the limit mentioned in the policy, the value of his interest at that time, notwithstanding its subsequent diminution or even extinction (*i*). The sum, too, he may recover is not restricted to the value of his interest at the

(*c*) *Hodson* v. *The Observer Life A. Co.*, 8 E. & B. 40; *Evans* v. *Bignold*, L. R. 4 Q. B. 622. See *Collett* v. *Morrison*, 9 Hare, 162.

(*d*) *Hebdon* v. *West*, 3 B. & S. 579.

(*e*) *Worthington* v. *Curtis*, 1 Ch. D. 419.

(*f*) Ibid.

(*g*) Sect. 4.

(*h*) *Wainwright* v. *Bland*, 1 M. & W. 32; 1 M. & Rob. 481; *Shilling* v. *The Accidental Death Insurance Co.*, 2 H. & N. 42.

(*i*) *Dalby* v. *India and London Life Ass. Co.*, 15 C. B. 365; and see *Law* v. *The London Indisputable L. I. Co.*, 1 K. & J. 223.

time of effecting the policy, but may include any benefit coming to the assured upon the determination of the event (*k*).

When a life policy has been assigned, it is not necessary that the assignee should have any interest or have paid any consideration for the assignment; for he stands upon the rights of the party who effected the insurance, and stat. 14 Geo. 3, c. 48, only applies to the original parties, not to assignees (*l*).

A trustee may insure in respect of the interest of which he is trustee (*m*), and a creditor has an insurable interest in the life of his debtor (*n*), provided that the debt be not an illegal one (*o*). An employer has an insurable interest in the life of a servant, and *vice versâ* (*p*). Speaking generally, any one who has a pecuniary claim against another or a legal right to support (*q*) has an insurable interest in the life of the latter.

In the well-known case of *Godsall* v. *Boldero* (*r*), the Court of Queen's Bench held, by analogy to marine and fire policies, that, insurance being a contract of indemnity, the insured could found no claim upon his policy, if the debt or other interest in respect of which he made it were satisfied *aliunde*. But in *Dalby* v. *The India and London Life Assurance Company* (*s*), the Court of Exchequer Chamber overruled this doctrine, and decided that a life policy, both in form and effect, is an absolute contract to pay a certain sum in the case of death.

(*k*) *Law* v. *The London Indisputable L. I. Co.*, ubi supra; *Hebdon* v. *West*, 3 B. & S. 579.

(*l*) *Ashley* v. *Ashley*, 3 Sim. 149. There are, indeed, some cases in which the insurers,—as the condition upon which they allow an assignee some advantage he would not otherwise have had,—impose on him the necessity of proving that he is an assignee for value; as, for instance, where they allow a policy, which would as against the insured be avoided by his suicide, to be good in favour of an assignee for value to the extent of his interest. See *Cook* v. *Black*, 1 Hare, 390.

(*m*) *Tidswell* v. *Ankerstein*, Peake, 151; *London and N. W. Rail. Co.* v. *Glyn*, 1 E. & E. 652; *Waters* v. *Monarch*, 5 E. & B. 870; and it seems one person may insure the life of another as trustee for him: *Collett* v. *Morrison*, 9 Hare, 162.

(*n*) *Anderson* v. *Edie*, Park, 640; and see *Hebdon* v. *West*, 3 B. & S. 579; *Bruce* v. *Garden*, L. R. 5 Ch. 33. See also, as to interest, *Henson* v. *Blackwell*, 4 Hare, 434. In some cases the debtor or his surety, on paying the debt, will be entitled to the benefit of the policy: see *Morland* v. *Isaac*, 20 Beav. 389; *Drysdale* v. *Piggott*, 25 L. J. Ch. 878; *Courtenay* v. *Wright*, 2 Giff. 337.

(*o*) *Dwyer* v. *Edie*, Park, 639.

(*p*) *Hebdon* v. *West*, 3 B. & S. 579.

(*q*) *Worthington* v. *Curtis*, 1 Ch. D. 419.

(*r*) 9 East, 72.

(*s*) 15 C. B. 365.

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Lord *Tenterden*, in *Halford* v. *Kymer* (*s*), expressed a strong opinion, that the word "interest," in the statute above cited, means a *pecuniary* interest; and in the same case it was held, that a father had not such an interest in his son's life as would entitle him to insure it (*t*). Lord *Kenyon* was of opinion that a wife, making an assurance on her husband's life, need not prove that she was interested therein, for that it must be presumed (*u*). It is open to doubt whether such a presumption exists; in each case the question appears to be one of fact (*x*).

By the Married Women's Property Act, 1882 (*y*), a married woman may insure her own or her husband's life for her separate use, and a policy effected by a man on his own life and expressed to be for the benefit of his wife or children, or by a woman on her life and expressed to be for the benefit of her husband or children, shall create a trust in favour of the objects therein named (*z*).

At common law the contract need not be in writing (*a*). But by the Stamp Act the contract or policy must be in writing (*b*).

Before the policy is effected, it is usual for the person whose life is insured to subscribe a declaration or answer questions concerning his age, health, and other circumstances (*c*). This

(*s*) 10 B. & C. 724; and see *Hebdon* v. *West*, 3 B. & S. 579.

(*t*) See *Worthington* v. *Curtis*, 1 Ch. D. 419.

(*u*) *Reed* v. *R. E. A. Co.*, Peake, Add. Ca. 70.

(*x*) See Porter on Insurance, 35, where it is said, "But the husband is not presumed to have such an interest in the life of his wife."

(*y*) 45 & 46 Vict. c. 75, s. 11.

(*z*) See *In re Adam's Policy Trusts*, 23 Ch. Div. 525; *Holt* v. *Everall*, 2 Ch. Div. 266; and *Re Mellor's Policy Trusts*, 7 Ch. Div. 200.

(*a*) *Kaines* v. *Knightly*, Skinner, 54.

(*b*) 33 & 34 Vict. c. 97, ss. 117, 118; 44 Vict. c. 12, s. 44 (c).

(*c*) The following is an example of the ordinary subjects of this declaration:—

1. Name of life to be assured.
2. Present residence and occupation.
3. Place and date of birth.
4. If he has had the small or cow-pox.
5. Whether parents alive.
6. Health of relatives.
7. If at any time afflicted with gout, rupture, insanity, liver complaint, fits, or convulsions.
8. If he has had symptoms of consumption, spitting of blood (see *Geach* v. *Ingall*, 14 M. & W. 95), asthma, or any disease of lungs or chest.
9. If now, and ordinarily, enjoying good health. (See *British Equitable Co.* v. *G. W. Ry. Co.*, 38 L. J. Ch. 314; *Connecticut Mutual Life Insurance Co.* v. *Moore*, 6 App. Cas. 644.)
10. If aware of any disorder or circumstance tending to shorten life, or to make an assurance more than usually hazardous. (See *Watson* v. *Mainwaring*, 4 Taunt. 763.)

declaration is recited and incorporated by reference in the policy (*d*), at the end of which a proviso is ordinarily inserted, declaring the policy to be void in case the insured should die upon the seas, or go beyond the limits of Europe without leave obtained (*e*), commit suicide (*f*), or die by the hands of justice (*g*), or if the age of the assured exceed —— years, or he be afflicted with any disease which tends to the shortening of life, or in case the declaration should contain any averment which is not true. These are the usual conditions, but they are sometimes varied to suit the objects of different insurers. In construing them the principle is that good faith is required. "I am not prepared," said *Jessel*, M. R., in *London Assurance* v. *Mansel* (*h*), "to lay down the law as making any difference in substance between one contract of assurance and another. Whether it is life, or fire, or marine assurance, I take it good faith is required in all cases." It has been held that the condition which avoids the policy in case any untrue averment be contained in the declaration is to be taken literally; and that, where it is inserted, the insurance becomes void if any statement be in fact untrue, although the party making it is not apprised of its untruth (*i*). The question for the Court is, not whether

11. If in the army or navy.

12. Name and residence of ordinary medical attendant to be referred to. (See *Huckman* v. *Fernie*, 3 M. & W. 505; *Connecticut Mutual Life Insurance Co.*, 6 App. Cas. at p. 651.)

13. Name and residence of friend for same purpose.

14. If the policy be for another person's benefit, that other person's name, residence, and occupation.

15. Whether temperate. (See *Thomson* v. *Weems*, 9 App. Cas. 671.)

16. Has a proposal ever been made on your life at any other office? (See *London Assurance* v. *Mansel*, 11 Ch. D. 363.)

As to a condition as to notice of death within a limited time, see *Stoneham* v. *Ocean, Ry., and Gen. Acc. Ins. Co.*, 19 Q. B. D. 237.

(*d*) See, as to the effect of such a recital, *Foster* v. *The Mentor L. A. Co.*, 3 E. & B. 48; *Whelton* v. *Hardisty*, 8 E. & B. 232.

(*e*) As to how this may be waived, see *Wing* v. *Harvey*, 5 De G. M. & G. 265; *Reis* v. *The Scottish E. L. A. S.*, 2 H. & N. 19.

(*f*) *Borradaile* v. *Hunter*, 5 M. & G. 639; *Horn* v. *Anglo-Australian Co.*, 30 L. J. Ch. 511.

(*g*) The provisions respecting suicide, or death by the hands of justice, are seldom or never inserted, except where a man insures his own life.

(*h*) 11 Ch. D. at p. 367. Compare remarks of Lord *Blackburn* in *Thomson* v. *Weems*, 9 App. Cas. at p. 684.

(*i*) *Duckett* v. *Williams*, 2 C. & M. 348; *Cazenove* v. *The British E. A. Co.*, 6 C. B. N. S. 437; *Macdonald* v. *Law Union F. & L. I. Co.*, L. R. 9 Q. B. 328; *Grogan* v. *London and Manchester*

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the representations are material, but whether they are true (*k*). And so the policy will be void, if the person whose life is insured have had any of the complaints which the declaration states he has not had, although the attack may have been of so mitigated a character as could not have a tendency to shorten life (*l*). Where the assured, in answer to the question "Are you temperate in your habits?" answered "Yes," and it was proved that he was intemperate, it was held that the policy was void (*m*). A condition that the person is in good health is understood to mean that he is in reasonably good health, not that he is free from the seeds of disorder. Such a condition has been held to be complied with, though the party whose life was insured was occasionally troubled with spasms, cramps, and violent fits of the gout (*n*). Nor is it to be concluded that a disease is one tending to shorten life within the meaning of the policy from the single fact that the party afterwards dies of it, if it be not a disorder necessarily having that tendency (*o*). Provisions are usually inserted in policies effected by the insured on their own lives respecting death by duelling or the sentence of the law. But they are in fact superfluous, for the policy would be unavailable to the representatives of the insured in case of such a death, even if they were not inserted; and if a man insuring his own life were to introduce a contrary provision, it would be void as being against public policy (*p*).

The condition respecting death by suicide, or, as it is sometimes expressed, "by his own hands," would likewise be superfluous, if its meaning were confined to acts of felonious self-destruction. But in the case of *Borradaile* v. *Hunter* (*q*),

Assurance Co., 53 L. T. 761; *Thomson* v. *Weems*, 9 App. Cas. 671. Contrast *Fowkes* v. *Manchester and London Assurance Association*, 3 B. & S. 917.

(*k*) *Anderson* v. *Fitzgerald*, 4 H. L. Ca. 484; *London Assurance* v. *Mansel*, 11 Ch. D. 363.

(*l*) *Geach* v. *Ingall*, 14 M. & W. 95.

(*m*) *Thomson* v. *Weems*, ubi sup.

(*n*) *Willis* v. *Pole*, Park, 650; *Ross* v. *Bradshaw*, 1 W. Bl. 312.

(*o*) *Watson* v. *Mainwaring*, 4 Taunt. 763. A warranty that the life insured had not been afflicted with nor is subject to fits, is not broken by his having accidentally had an epileptic fit in consequence of an accident: *Chattock* v. *Shawe*, 1 M. & Rob. 498.

(*p*) *Amicable Assurance Society* v. *Bolland*, 4 Bligh, N. S. 194; Selw. N. P. 13th ed. 975. See, too, the observations of Lord *Abinger*, C. B., in *Wainewright* v. *Bland*, 1 M. & Rob. at p. 486.

(*q*) 5 M. & G. 639.

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which arose on a policy containing a proviso in the latter form, the jury having found that the assured "voluntarily threw himself from the bridge into the water, with the intention of destroying life; but that, at the time of committing the act, he was not capable of judging between right and wrong," three judges of the Court of Common Pleas held the policy to have been avoided. *Tindal*, C. J., however, expressed his opinion, that, regarding the context, the condition was limited to cases of felonious suicide. He considered it quite clear that such would have been its operation, if the words used had been "shall die by suicide;" and, in this construction, *Erskine*, J., seems to have concurred. In the case of *Schwabe* v. *Clift* (*s*), which arose upon a policy containing the words "commit suicide," *Cresswell*, J., at Nisi Prius, told the jury that, in his opinion, "it must appear that the deceased was a responsible moral agent at the time of his death, in order to make the act committed by him amount to suicide;" and, if they thought he could not "at the time distinguish and understand the nature and quality of the act he was doing," they should find a verdict for the plaintiff, which they did. Upon a bill of exceptions to this ruling, the majority of the judges in the Exchequer Chamber held (*t*), that these words included all cases of voluntary self-destruction: and that if the deceased voluntarily killed himself, it was immaterial whether he was at the time sane or not. In the absence of an express provision in the policy, that in the event of the insured dying by his own hands the policy shall become void, the policy is not avoided, if the insured while in a state of temporary insanity takes his own life (*u*).

An exception is generally engrafted upon this condition, that the policy shall remain in force to the extent of any *bonâ fide* interest a third person may acquire in it. This is valid, and in general it is not necessary that the policy should have been assigned, but a deposit or lien will suffice (*x*).

(*s*) 2 Car. & K. 134.

(*t*) *Clift* v. *Schwabe*, 3 C. B. 437. And see *White* v. *British Empire M. L. I. A. Co.*, L. R. 7 Eq. 394.

(*u*) *Horn* v. *Anglo-Australian Life Ass. Co.*, 30 L. J. Ch. 511.

(*x*) *Moore* v. *Woolsey*, 4 E. & B. 243; *Jackson* v. *Forster*, 1 E. & E. 463;

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Some policies contain a provision that the company shall be answerable only for death or injuries caused by "external" causes; and questions similar to those discussed with reference to marine insurance arise as to whether a death or an accident is covered by the policy. The tendency is, as in construing contracts of marine insurance, to look to the proximate cause. In *Reynolds* v. *Accidental Insurance Co.* (*y*), the deceased had been drowned in a pool a foot deep, owing to a fit or some other cause; the executors of the insured were held entitled to recover under a policy containing a proviso, that "no claim should be payable in respect of death by accident, unless the same should be occasioned by some external or material cause operating on the insured person."

The payment of the agreed premium in the stipulated manner is almost an invariable condition (*z*), though such a provision will not be implied (*a*). If this provision be broken, a subsequent receipt of the premium by the insurance company's agent will not set up the policy, the agent not being authorized to bind the company by a fresh agreement to insure (*b*); though a payment to an agent having such authority will be evidence of such an agreement. Nor will receipt of premium by the company after the death of the assured, unless the company was aware of the fact, be construed as a waiver (*c*). Once the risk

Jones v. *Consolidation I. A. Co.*, 26 Beav. 256; *Dufaur* v. *Professional Life A. Co.*, 25 Beav. 599; *White* v. *British Empire M. L. I. A. Co.*, L. R. 7 Eq. 394.

(*y*) 22 L. T. 820; *Smith* v. *Accidental Ins. Co.*, L. R. 5 Ex. 302; *Winspear* v. *Accidental Ins. Co.*, 6 Q. B. D. 42; *Lawrence* v. *Accidental Ins. Co.*, 7 Q. B. D. 216; *Isitt* v. *Railway Passengers Ass. Co.*, 60 L. T. N. S. 297.

(*z*) A certain number of days (usually fifteen) after the premium becomes due, called days of grace, are frequently allowed for the payment by the conditions. These should never be depended upon, as generally they only provide for payment by the *assured*, and render it optional with the company whether they will receive the premium, so that if the life drops in the interval, the policy will be void: *Tarleton* v. *Staniforth*, 5 T. R. 695; *Simpson* v. *The Accidental Death I. Co.*, 2 C. B. N. S. 257. And see *The Phœnix L. A. Co.* v. *Sheridan*, 8 H. L. Ca. 745; and Porter on Insurance, 90.

(*a*) *Kelly* v. *London and Staffordshire Ins. Co.*, 1 Cab. & E. 47.

(*b*) *Acey* v. *Fernie*, 7 M. & W. 151. But see *Wing* v. *Harvey*, 5 De G., M. & G. 265.

(*c*) *Pritchard* v. *Merchants' and Tradesmen's Life Ins. Co.*, 3 C. B. N. S. 622.

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has attached, no matter for how short a period, there shall be no return of the premium (*d*).

If there be no warranty or condition on the part of the insured, the insurer is subject to all risks, unless he (*e*) can show a fraudulent concealment or misrepresentation (*f*), or a non-communication of material facts known to the assured (*g*), either of which will avoid the policy. It is the duty of the insured to disclose all material facts within his knowledge; and, if the fact suppressed be material, it signifies not whether the party did or did not believe it to be so, its materiality being a question of fact (*h*). An insurance company had agreed to insure a life at a specified premium, on the terms that no insurance should take place till the premium was paid; before the tender of the premium there was a material alteration in the risk; in these circumstances it was held that there was no contract binding the company to grant a policy (*i*). A *verbal* misrepresentation vitiates the policy, although it be expressly stipulated by its terms that it shall be void on untrue answers being given to certain *written* inquiries (*k*). It has been held, that an action will lie to have a fraudulent policy delivered up, but that the equity is better, if it be brought during the continuance of the life assured (*l*). But, it seems, that no such action would lie on the ground of there being no insurable interest (*m*).

Where one person insures the life of another, the party whose life is insured, if applied to for information, is not, in giving it,

(*d*) *Bermon* v. *Woodbridge*, 2 Doug. 781, at p. 788.

(*e*) See *Elkin* v. *Janson*, 13 M. & W. 655; *Geach* v. *Ingall*, 14 M. & W. 95.

(*f*) *Stackpole* v. *Simon*, Park, 648. In some cases policies are declared, either by their terms or by prospectuses issued by the company, to be indisputable. As to their effect, see *Wood* v. *Dwarris*, 11 Ex. 493; *Wheelton* v. *Hardisty*, 8 E. & B. 232.

(*g*) Cited with approval by *Campbell*, C. J., in *Wheelton* v. *Hardisty*, 8 E. & B. at p. 273; *Williams* v. *Duckett*, cited 6 C. & P. at p. 4, per Lord *Lyndhurst*, C. B.; *Morrison* v. *Muspratt*, 4 Bing. 60; *Huguenin* v. *Rayley*, 6 Taunt. 186; *Geach* v. *Ingall*, 14 M. & W. 95.

(*h*) *London Ass.* v. *Mansel*, 11 Ch. D. at p. 368; *Lindenau* v. *Desborough*, 8 B. & C. 586; *Geach* v. *Ingall*, ubi supra.

(*i*) *Canning* v. *Farquhar*, 16 Q. B. D. 727.

(*k*) *Wainwright* v. *Bland*, 1 M. & W. 32. As to the question, *Who is your usual medical attendant?* and the answer proper to be given to it, see *Huckman* v. *Fernie*, 3 M. & W. 505.

(*l*) *Fenn* v. *Craig*, 3 Y. & C. 216; *Brooking* v. *Maudslay*, 38 Ch. D. 636.

(*m*) *Desborough* v. *Curlewis*, 3 Y. & C. 175.

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impliedly the agent of the party insuring: the latter, therefore, is not bound by his statements, and, *in the absence of any condition to that effect* (*m*), or fraud on his own part, will not suffer should they be false (*n*). "We quite agree with the rule that the fraud *of the agent who makes the contract* is the fraud of the principal; but we cannot regard the fraudulent parties in the present case as the parties intrusted to make the contract or to represent the plaintiffs in so doing" (*o*).

"Fraud," says *Bramwell*, B., in delivering judgment in *Wheelton* v. *Hardisty* (*p*), in the Exchequer Chamber, "on the part of the person effecting the insurance, or of his agent, of course, avoids the policy; but I cannot see how the mere fraud of some third party can have that effect, unless there be an express condition between the contracting parties to that effect" (*q*).

Concealment, therefore, by the person whose life is insured, of a mortal disease known to himself will not avoid the policy, if the existence of such disease were unknown to the assured (*r*).

It seems, too, that though the person assuring his own life may have been afflicted with a disease tending to shorten life, still if that disease were of such a nature, that he himself could not be conscious of what happened to him while suffering under it (as in some cases of mental derangement) (*s*), his non-communication thereof would not vitiate the policy. So, if he declare that he is not aware of his having any disorder tending to shorten his life, in order to defeat the policy it must be shown, not only that he had such a disorder, but that he was aware of its tendency (*t*).

(*m*) *Everett* v. *Desborough*, 5 Bing. 503. See *Aveson* v. *Lord Kinnaird*, 6 East, 188; *Swete* v. *Fairlie*, 6 C. & P. 1; *Williams* v. *Duckett*, cited Id. at p. 3; *Von Lindenau* v. *Desborough*, 3 C. & P. 353; *Maynard* v. *Rhodes*, 5 D. & R. 266; 1 C. & P. 360.

(*n*) *Wheelton* v. *Hardisty*, 8 E. & B. 232.

(*o*) *Erle*, C. J., in *Wheelton* v. *Hardisty*, 8 E. & B. at p. 260.

(*p*) 8 E. & B. 232, at p. 301.

(*q*) Generally there is such a condition.

(*r*) *Huckman* v. *Fernie*, 3 M. & W. 505; *Rawlins* v. *Desborough*, 2 M. & Rob. 328. In the former, a distinction is drawn between the case of reference to a person to answer particular questions, and reference to the general agent of the assured.

(*s*) *Swete* v. *Fairlie*, ubi supra; *Fowkes* v. *Manchester & London Ins. Co.*, 3 B. & S. 917.

(*t*) *Jones* v. *The Provincial Ins. Co.*, 3 C. B. N. S. 65.

Non-fulfilment of the conditions on which a policy is granted may, however, be waived by the insurers if they do any act amounting to an affirmance of the contract, *e.g.*, if they receive premiums, after knowledge of the breach of the condition (*u*).

A policy upon a life could not, until recently, have been assigned at law, but now this may be done, either by indorsement or by a separate instrument (*x*); and any person entitled by assignment (*y*) or derivative title who has acquired a right to receive and give a discharge for the sum assured, may sue upon it in his own name (*z*). No assignment, however, will confer on the assignee this right of suit, until a written notice of the date and purport of it has been given to the assurance company; and priority in giving this notice will regulate the priority of the claim of the person giving it under his assignment (*a*). The statute does not alter the rights of parties. It only enables the insured to sue in his own name.

The assignee of a policy takes it subject to all defects in the title or interest of the assignor (*b*). On the other hand, he succeeds to all his rights. The assignee need not have any interest in the life insured or have paid any consideration (*c*). It seems, however, that the provisions of 14 Geo. 3, c. 48, cannot be evaded by effecting a policy in the name of the person whose life is insured, but in reality for the benefit and with the money of another, who has no interest in the life (*d*).

(*u*) *Wing* v. *Harvey*, 5 De G., M. & G. 265. And see *Scottish Equitable Ass. Co.* v. *Buist*, 4 Court of Sess. Cas., 4th Series, 1076; 5 Ib., H. L. 64; *Reis* v. *Scottish Equitable Life Assurance*, 2 H. & N. 19.

(*x*) 30 & 31 Vict. c. 144, s. 5. The assignment abroad between parties domiciled there of a policy, granted by an English company, is governed by the law of the domicil: *Lee* v. *Abdy*, 17 Q. B. D. 309.

(*y*) *Spencer* v. *Clarke*, 9 Ch. D. 137.

(*z*) 30 & 31 Vict. c. 144, s. 1.

(*a*) Ib. sect. 3, and see 36 & 37 Vict. c. 66, s. 25. As to what is an assignment, see *Crossley* v. *City of Glasgow L. Ass. Co.*, 4 Ch. D. 421. As to how a lien on a policy can be acquired, see *Leslie* v. *French*, 23 Ch. D. 552; *Falcke* v. *Scottish Imp. Ins. Co.*, 34 Ch. D. 234.

(*b*) *Anderson* v. *Fitzgerald*, 4 H. L. C. 484.

(*c*) *Ashley* v. *Ashley*, 3 Sim. 149.

(*d*) See *Wainwright* v. *Bland*, 1 M. & Rob. 481; 1 M. & W. 32.

CHAPTER VI.

INSURANCE AGAINST FIRE.

Insurance against fire.

By this contract, the insurer, in consideration of a certain premium paid, either in gross or at stated intervals, undertakes to indemnify the assured against damage to his property by fire, during a limited period of time, usually a year (*a*). The contract is usually in the form of a policy; though it may be, and often is, a slip, initialled by the underwriters (*b*).

It is necessary that the assured should have an interest in the property protected, and, in case of loss, he will only be able to recover to the extent of that interest; for fire insurance, like marine insurance, is a contract of indemnity (*c*). "Only those can recover who have an insurable interest, and they can recover only to the extent to which that insurable interest is damaged by the loss" (*d*).

The insurer, upon payment of the amount insured, is entitled to be subrogated to all the rights of the assured (*e*). "As between the underwriter and the assured, the underwriter is

(*a*) A great variety of forms are adopted by the different insurance offices in framing their fire policies. Some are, indeed, so worded, that it is very difficult to determine who are the parties to be sued by the insured in case of loss, or even whether any action whatever be maintainable upon the policy. See *Andrews* v. *Ellison*, 6 Moore (C. P.) 199; *Alchorne* v. *Saville*, Id. 202, note; *Gurney* v. *Rawlins*, 2 M. & W. 87; *Hallett* v. *Dowdall*, 18 Q. B. 2; *Elliott* v. *The R. E. A. Co.*, L. R. 2 Ex. 237.

(*b*) See *Thompson* v. *Adams*, 23 Q. B. D. 361.

(*c*) Stat. 14 Geo. 3, c. 48, cited in last chapter. As to what is sufficient, see *Marks* v. *Hamilton*, 7 Exch. 323; *Waters* v. *The Monarch F. & L. A. Co.*, 5 E. & B. 870 (wharfinger and warehouseman); *London & N. W. R. Co.* v. *Glyn*, 1 E. & B. 652 (carriers); *North British Ins. Co.* v. *Moffatt*, L. R. 7 C. P. 25; *Collingridge* v. *Royal Exchange Ass. Co.*, 3 Q. B. D. 173; *Castellain* v. *Preston*, 11 Q. B. D. at p. 385 (vendor of property contracted to be sold).

(*d*) *Castellain* v. *Preston*, 11 Q. B. D. 380, at p. 397, per *Bowen*, L. J.

(*e*) *Collingridge* v. *Royal Ass. Co.*, 3 Q. B. D. 173; *Darrell* v. *Tibbitts*, 5 Q. B. D. 560; and see *Midland Ins. Co.* v. *Smith and Wife*, 6 Q. B. D. 561.

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entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on, or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be or has been exercised, or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be or has been diminished" (*f*). If, for instance, the assurer brings an action and recovers judgment against those who have caused the injury, he will be a trustee for the insurer for the amount so recovered; and he may not compromise the action otherwise than *bonâ fide* (*g*).

Where a vendor had contracted with a purchaser for the sale for a specified price of a house insured by the vendor, the contract containing no reference to the insurance, and afterwards, before completion of the purchase, the house was burned, and the amount of the insurance paid to the vendor, the insurers were, after the completion of the purchase, and payment of the price to the vendor, held entitled to recover from him a sum equal to the insurance money previously paid (*h*).

If, after the insurer has paid the amount of the loss, the assured receives otherwise compensation for the loss, the insurer is entitled to recover from the assured any sum received in excess of the loss actually sustained (*i*).

It has, indeed, been said that the doctrine of abandonment, which, we have seen, applies to marine insurances, does not apply to insurances of houses, &c. against fire. This, it was pointed out in *Castellain* v. *Preston* (*k*), arises not from any difference in principle, but from the difference in the subject-matter of the two contracts, there being no such thing as a constructive total loss of a house, buildings, &c.

(*f*) *Brett*, L. J., in *Castellain* v. *Preston*, 11 Q. B. D. 380, at p. 388, distinguishing *Burnand* v. *Rodocanachi*, 7 App. Cas. 333.

(*g*) *Commercial Union Ass. Co.* v. *Lister*, L. R. 9 Ch. 483.

(*h*) *Castellain* v. *Preston*, 11 Q. B. D. 380.

(*i*) *Darrell* v. *Tibbitts*, 5 Q. B. D. 560 (C. A.). And see *Rayner* v. *Preston*, 18 Ch. D. 1.

(*k*) *Castellain* v. *Preston*, supra.

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The interest of each of different persons having different and distinct interests in the same house may be insured. Thus, a mortgagor and mortgagee of property may both insure the same property, or a warehouseman and the owner of the goods warehoused may both insure the goods (*e*).

Insurance being a contract of indemnity, an insurer who has only a limited interest, *e.g.*, a tenant of the property insured, cannot, in case of loss, obtain more than the full value of his interest; if, however, he has insured for the full value of the property, as he may do in certain cases, he holds the balance for the parties interested. The law upon this point is thus stated by *Bowen*, L. J., in *Castellain* v. *Preston* (*f*):—

"A person with a limited interest may insure either for himself and to cover his own interest only, or he may insure so as to cover not merely his own limited interest, but the interest of all others who are interested in the property. It is a question of fact what is his intention when he obtains the policy. But he can only hold for so much as he has intended to insure. Let us take a few of the cases which are most commonly known in commerce of the persons who insure. There are persons who have a limited interest, who insure for the total value of the subject-matter. There is the case, which is, I suppose, the most common, of carriers and wharfingers and commercial agents, who have an interest in the adventure (*g*). It is well known what their rights are. Then let us turn to the case of a mortgagee. If he has the legal ownership, he is entitled to insure for the whole value; but even supposing he is not entitled to the legal ownership, he is entitled to insure *primâ facie* for all. If he intends to cover only his mortgage, and is only insuring his own interest, he can only, in the event of a loss, hold the amount to which he has been damnified. If he has intended to cover other persons beside himself, he can hold the surplus for those whom he has intended to cover. But one thing he cannot do, that is, having intended only to cover himself, and being a person whose interest is only limited, he cannot hold anything beyond the amount of the loss caused to his own particular interest."

(*e*) See infra, per *Bowen*, L. J. See *North British Ins. Co.* v. *London, &c. Ins. Co.*, 5 Ch. D. at p. 583.

(*f*) 11 Q. B. D. 380, at p. 398.

(*g*) *Waters* v. *Monarch Ass. Co.*, 5 E. & B. 870; *Martineau* v. *Kitching*, L. R. 7 Q. B. 436; *Ebsworth* v. *Alliance Mar. Ins. Co.*, L. R. 8 C. P. 596; *N. British Ins. Co.* v. *Moffatt*, L. R. 7 C. P. 25. But see *L. & N. W. R. Co.* v. *Glyn*, 1 E. & E. 652.

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A misrepresentation or concealment of material facts is as fatal to this as to other contracts of insurance. To use the words of *Bayley*, J. (*h*),

"In all cases of insurance, whether on ships, *houses*, or lives, the underwriter should be informed of every material circumstance within the knowledge of the assured, and the proper question is, whether any particular circumstance was in fact material, and not whether the party believed it to be so" (*i*).

It is necessary to be extremely accurate in describing the nature of the property intended to be insured, in order that it may not fall without the scope of the policy. For where a policy was effected on "Stock in trade, household furniture, *linen*, wearing apparel and plate," the person insured not being a linen-draper, this was held not to protect linen subsequently purchased on speculation, the word *linen* in the policy being taken to mean household linen, or linen used by way of apparel (*k*). The insurance of an innkeeper's "*interest in the inn and offices*" does not cover the loss of profits sustained between the destruction of the inn by fire and its restoration. Such profits are, indeed, insurable, but they must be insured *quâ* profits (*l*). If a building be described as of one class instead of another, when a larger premium would have been required for that other, the policy becomes completely void (*m*).

But, though the most appropriate phrase be not employed, yet, if the description of the property be substantially correct, and a more accurate statement would not have varied the premium, the error is not material (*n*). And where goods were

(*h*) In *Lindenau* v. *Desborough*, 8 B. & C. 586; *London Ass.* v. *Mansel*, 11 Ch. D. 363.

(*i*) Accord. *Bufe* v. *Turner*, 6 Taunt. 338.

(*k*) *Watchorn* v. *Langford*, 3 Camp. 422; and see *Gorman* v. *Hand-in-Hand Ins. Co.*, 11 Ir. L. R. C. L. 224.

(*l*) *In re Wright*, 1 Ad. & E. 621.

(*m*) *Newcastle Fire Insurance Company* v. *M'Morran*, 3 Dow. H. L. 255. See *Stokes* v. *Cox*, 1 H. & N. 320; *Sillem* v. *Thornton*, 3 E. & B. 868. Risks are commonly divided by the insurance offices into three classes; 1st, *Common Insurances;* 2ndly, *Hazardous;* 3rdly, *Doubly Hazardous*. There are, besides, a few cases of what is called *Extraordinary Risks, e. g.*, those of sugar refineries; these are generally excluded from the table of premiums, and made subjects of special agreement. Cash, and securities for cash, are, it is believed, seldom insurable on any terms.

(*n*) *Dobson* v. *Sotheby*, M. & M. 90;

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described as *in the dwelling-house* of the insured, and it turned out that the insured had but one room *as a lodger*, in which the goods were, it was held, that they were correctly described within a condition, that "the houses, buildings and other places where goods are deposited and kept, shall be truly and accurately described"; such a condition relating to the construction of the house, not to the interest of the parties in it (*o*). And when the policy was effected on premises "*where no fire is kept and no hazardous goods deposited*," these words were held to mean *habitually kept* and *habitually deposited*, so that the policy was not vitiated by bringing a tar-barrel and lighting a fire in order to effect repairs, in consequence of which the loss occurred (*p*). In *Pearson* v. *Commercial Union Assurance Co.* (*q*), it was held that a fire policy on a ship in wet dock, with liberty to go into dry dock, did not cover loss sustained while the vessel was outside these limits for a collateral purpose. The risk being essentially local, the policy will not cover goods during transit unless it be expressly so provided (*r*).

Every warranty or condition inserted in the policy, or incorporated into it by reference from the printed proposals (which are considered parcel of the contract), must be strictly and literally observed. For example, where it was stipulated in the proposals, that loss money should not be payable till the insured should have produced a certificate of character from the minister of the parish, it was held, that he could not recover, even though the minister should have *wrongfully* refused to grant such certificate; for that, if a man undertakes for the act of a stranger, he must see it done (*s*). Again, where a policy contained a condition requiring that, in case any steam-engine, stove, &c., or any other description of fire-heat should be introduced, notice

In re Universal N. T. Fire Insurance Co., L. R. 19 Eq. 485. See *Doe* d. *Pitt* v. *Laming*, 4 Camp. 76.

(*o*) *Friedlander* v. *London Ass. Co.*, 1 M. & Rob. 171.

(*p*) *Dobson* v. *Sotheby*, M. & M. 90.

(*q*) 1 App. Cas. 498.

(*r*) *Maclure* v. *Lancashire Ins. Co.*, 6 Ir. Jur. N. S. 63; Porter on Insurance, 123.

(*s*) *Worsley* v. *Wood*, 6 T. R. 710. See also *Salvin* v. *James*, 6 East, 571; *Routledge* v. *Burrell*, 1 H. Bl. 254; *Oldman* v. *Bewicke*, 2 H. Bl. 577, n.; *Tarleton* v. *Staniforth*, 5 T. R. 695; 1 B. & P. 471; *Levy* v. *Baillie*, 7 Bing. 349; *Elliott* v. *The Royal Exchange A. Co.*, L. R. 2 Ex. 237.

thereof should be given, and that every such alteration should be allowed by indorsement, and any further premium paid, otherwise no benefit to arise in case of loss; it was held that the introduction and mere temporary use of a steam-engine as an experiment, without notice, avoided the policy (*t*). A condition that notice should be given of any change in the *business* carried on upon the premises, was held not to render it necessary to give notice of a *temporary* and *gratuitous* permission given to a friend to dry some bark there (*u*). A description of the premises insured may amount to a warranty that the assured will not, during the term insured, voluntarily do anything to make the condition of the premises vary from the description (*x*). Unless contrary to some condition in the policy or warranty and in the absence of fraud, the circumstance that subsequently to effecting the policy a more hazardous trade has without notice to the insurers been carried on upon the premises will not avoid the policy (*y*).

The conditions generally require, that, in the event of a loss, an account of the particulars of it is to be rendered by the

(*t*) *Glen* v. *Lewis*, 8 Exch. 607. And see generally as to changes in the property or its user, *Sillem* v. *Thornton*, 3 E. & B. 868; *Stokes* v. *Cox*, 1 H. & N. 320.

(*u*) *Shaw* v. *Robberds*, 6 Ad. & E. 75; as to which see *Sillem* v. *Thornton*, 3 E. & B. at pp. 884, 885, per Lord *Campbell*, C. J.; and *Glen* v. *Lewis*, 8 Exch. 607, per *Parke*, B. And see *Barrett* v. *Jermy*, 3 Exch. 535; and *Mayall* v. *Mitford*, 6 Ad. & E. 670; and *Whitehead* v. *Price*, 2 C. M. & R. 447.

(*x*) *Sillem* v. *Thornton*, 3 E. & B. 868; *Stokes* v. *Cox*, 1 H. & N. 320.

(*y*) *Pim* v. *Reid*, 6 M. & G. 1; May on Insurance, s. 230. "There is a material distinction," said *Tindal*, C. J., in *Pim* v. *Reid* (6 M. & G. at p. 20), "between matters to vitiate the policy, arising subsequently to the execution thereof and such matters existing at the time the policy is effected." "It has been argued," said *Maule*, J., "that independently of the express provisions of the policy, if hazardous articles or a hazardous trade were introduced upon the premises with the knowledge or assent of the assured, after the policy was effected, it would be thereby avoided. But I conceive the law to be otherwise; and that, in the absence of fraud, such an alteration would not vitiate the policy; and that the insurers must pay for any loss, notwithstanding such alteration, unless by some condition in the policy they have provided against it." See *Shaw* v. *Robberds*, supra. *Mayall* v. *Mitford*, 6 Ad. & E. 670; and *Whitehead* v. *Price*, 2 C. M. & R. 447, if rightly decided, appear to turn on the words of the particular policy. Both were cases in which motion was made after judgment.

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assured. No action can be maintained (z) until this has been complied with.

The insurance being against fire, a loss by fire must of course happen, in order to give the insured a claim upon the policy. The word *fire* must be taken in its ordinary sense, and fire must be the proximate, not merely the remote, cause of the loss. Where the register of a sugar-house was kept shut by mistake, so that the sugar was overheated and spoiled, this was held not to be a loss *by fire*, but by mismanagement (a).

In *Stanley* v. *Western Insurance Co.* (b), where a policy against loss by fire exempted the insurers from liability for loss occasioned by explosion, it was held that the exemption was not limited to cases where the fire was originated by explosion, but included cases where the explosion occurred in the course of a fire, and exempted the insurers in respect both of the damage caused by the explosion itself, and of the damage done by the further fire caused by the explosion. Explosion by *gas* means ordinary coal gas (c). The policy usually narrows the liability of the insurer still further, by declaring that "no loss or damage by fire, happening by any invasion, foreign enemy, or any military and usurped power, will be made good by the insurers." The words *usurped power* are understood to refer to the power of rebels or invaders, not of a common mob. And, therefore, when a mob at Norwich burnt down the insured's malting-house, he was held entitled to recover (d); nor, formerly, would the fact that the insured had previously recovered from the insurer bar his action against the hundred, or against the party who had committed the injury, for he might sue as a trustee for the insurer (e).

(z) *Mason* v. *Harvey*, 8 Exch. 819. In some instances its delivery within a specified time is a condition precedent to the right to recover: *Roper* v. *Lendon*, 1 E. & E. 825; and generally there is a provision, that any fraud in it shall disentitle the assured to recover anything: *Weir* v. *Northern Ins. Co.*, 4 L. R. (Ir.) 689.

(a) *Austin* v. *Drewe*, 6 Taunt. 436; 4 Camp. 360; Holt, 126; *Everett* v. *The London Ass.*, 19 C. B. N. S. 126; *Marsden* v. *City of London City and County Ass. Co.*, L. R. 1 C. P. 232.

(b) L. R. 3 Ex. 71.

(c) *Stanley* v. *Western Ins. Co.*, L. R. 3 Ex. 71.

(d) *Drinkwater* v. *London Ins. Co.*, 2 Wils. 363.

(e) *Clark* v. *Blything*, 2 B. & C. 254; *Mason* v. *Sainsbury*, Marsh. Ins. 796; *Yates* v. *Whyte*, 4 Bing. N. C. 272;

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Now, however, by the existing enactment with reference to compensation in case of loss by riot (*f*), it is provided that a person sustaining loss in case of riot shall, so far as he has been recouped by way of insurance, &c., receive no compensation, but the person paying the insurance, &c., shall be compensated as if he had sustained the loss. The introduction of the words *civil commotion* into the above exception will exempt the insurer from liability for the tumultuous act of rioters (*g*).

A loss by mere negligence, so that there be no fraud, is covered by the policy (*h*); though such negligence, if gross, may be evidence of fraud; and if the assured fraudulently prevents the employment of means to stop the fire, he may lose his remedy under the contract (*i*). Whether, in the absence of special provisions, the principle of general average applies to fire policies, does not seem to have been decided in this country.

Apparently the assured is bound to use reasonable efforts to save his goods; and he may recover, it is alleged, even in the absence of a provision to that effect, for the costs of such efforts (*l*).

Fire policies usually contain a proviso that the company may if they think fit, reinstate, replace or repair the property damaged or destroyed instead of paying the amount of the loss. If the company once elect to reinstate they cannot afterwards compel the assured to accept payment in lieu (*m*).

In order to deter evil-disposed persons from wilfully setting their own premises on fire for the purpose of obtaining the insurance money, the old Metropolitan Building Act, 14 Geo. 3, c. 78, s. 83 (*n*), enables the offices, at the request of any person interested in a building burnt down or damaged, or upon any

White v. *Dobinson*, 14 Sim. 273. But see *Henson* v. *Blackwell*, 4 Hare, 434.

(*f*) The Riot (Damages) Act, 1886, 49 & 50 Vict. c. 38, s. 2, sub-s. (2).

(*g*) *Langdale* v. *Mason*, Park, 657; Marsh. 793.

(*h*) *Shaw* v. *Robberds*, 6 Ad. & E. 75; *Hollingworth* v. *Brodrick*, 7 Ad. & E. 40. *Semble*, loss by a felonious act committed without the privity of the assured is within an ordinary fire policy. See *Midland Ins. Co.* v. *Smith*, 6 Q. B. D. 561, at p. 568.

(*i*) Porter on Insurance, 10, 12.

(*l*) Porter on Insurance, 119.

(*m*) *Brown* v. *Royal Ins. Co.*, 1 E. & E. 853.

(*n*) The whole of this Act, except ss. 83 and 86, is now repealed.

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suspicion of fraud, to cause the insurance money to be laid out in repairs, unless the party insured, within sixty days after his claim has been adjusted, give security that the money shall be so expended; or unless the money be at that time disposed of to the satisfaction of all parties. This section is not, as has been supposed, confined to the metropolis, but is of general and universal application to insurance moneys on "houses and buildings" (*o*). In consequence of this provision it has been held that a covenant to insure such premises runs with the land, and that an assignee of the reversion can maintain an action for breach of the covenant against a tenant, who had entered into the covenant with his assignor. As the landlord may, in consequence of the statute, insist on the insurance money being laid out upon the premises, the covenant is "a covenant to do a matter which concerns the land, and falls within the rule laid down in *Spencer's Case*" (*p*).

The contract of insurance does not pass to a purchaser of the land, unless it is expressly included in the contract of sale. "The contract," says Lord Justice *Cotton*, in *Rayner* v. *Preston* (*q*), "passes all things belonging to the vendors appurtenant to or necessarily connected with the use and enjoyment of the property mentioned in the contract, but not, in my opinion, collateral contracts; and such, in my opinion, at least, independently of the Act 14 Geo. 3, c. 78, the policy of insurance is." Nor does the statute give the purchaser a right to the money; at most it entitles him to require that the money shall be applied in rebuilding (*r*). The Conveyancing and Law of Property Act, 1881 (*s*), enacts that, in the absence of agreement, the mortgagee may require the mortgagor to apply money paid to the mortgagor under an insurance to making good the loss or damage in respect of which the money is paid.

The principle of contribution applies to fire as to marine insurances. If the same person in respect of the same right insures with several different insurers, they, in case of loss, con-

(*o*) *Ex parte Gorely*, 1 D. J. & S. 477.
(*p*) *Vernon* v. *Smith*, 5 B. & Ald. 1, at p. 7, per *Holroyd*, J.
(*q*) 18 Ch. D. 1, at p. 6.
(*r*) *Rayner* v. *Preston*, 18 Ch. D. at p. 7.
(*s*) 44 & 45 Vict. c. 41, s. 23.

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tribute equally towards the loss (*t*). The principle does not apply where different persons insure in respect of different rights. B. & Co., wharfingers, effected wharfingers' policies on grain in their warehouses for which they were responsible; and R. & Co., the owners of the grain, effected merchants' policies upon the same grain; the grain having been destroyed by fire, and B. & Co. having been paid in full by the insurers, it was held that the insurers on the merchants' policies were not liable to contribute to the loss (*u*).

Now, since the Judicature Act, 1873 (*x*), if there has been an absolute assignment in writing of a policy of fire insurance, of which express notice in writing has been given to the insurer, the assignee, to the extent of his interest, may in his own name recover from the insurer in case of loss.

An insurer may, as in the case of marine insurance, protect himself, in whole or in part, by a re-insurance (*y*).

(*t*) *N. British & Mercantile Ins. Co.* v. *London, Liverpool, and Globe Ins. Co.*, 5 Ch. D. 569, at p. 583, per *Mellish*, L. J.

(*u*) *N. British & Mercantile Ins. Co.* v. *London, Liverpool, and Globe Ins. Co.*, supra.

(*x*) 36 & 37 Vict. c. 66, s. 25 (6).

(*y*) Ante, p. 404. *N. Y. Bowery Fire Ins. Co.* v. *N. Y. Fire Ins. Co.*, 17 Wend. 359, 362.

CHAPTER VII.

BOTTOMRY AND RESPONDENTIA.

Bottomry and Respondentia.

BOTTOMRY is an agreement entered into by the owner of a ship, or his agent, whereby, in consideration of a sum of money advanced for the use of the ship, the borrower undertakes to repay the same, with interest, if the ship terminate her voyage successfully, and binds or hypothecates the ship for the performance of his contract. The contract, which must be in writing (*a*), by which this hypothecation is effected is sometimes in the shape of a deed poll, and is then called a bottomry bill; sometimes in that of a bond (*b*). Whatever be its form, the contract should be clearly set out in it (*a*). The essence of the contract is that there should be a maritime risk to be ascertained from the writing (*c*). Therefore, bills of exchange drawn by the master on the owner, though accompanied with a verbal engagement that the ship should be liable, cannot be considered instruments of hypothecation (*d*).

The contract ought to state the amount of the loan, the interest to be paid, and the property hypothecated for repayment of the loan (*e*). The name of the ship hypothecated, the voyage for which the loan is made, and the fact that repayment depends upon the safe arrival of the ship or cargo at its destination,

(*a*) *Ex parte Halkett*, 3 Ves. & B. 135; 19 Ves. 474; 2 Rose, 194, 229.

(*b*) See the forms of both, Appendix to Abbott on Shipping.

(*c*) *The Mary Ann*, L. R. 1 A. & E. at p. 14.

(*d*) *Ex parte Halkett*, 3 Ves. & B. 135; 19 Ves. 474; 2 Rose, 194, 229; *Stainbank* v. *Fenning*, 11 C. B. 51; *Stainbank* v. *Shepard*, 22 L. J. Exch. 341.

(*e*) See *The Heinrich Bjorn*, 10 P. D. 44.

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should be stated. A bottomry bond may be given at the same time with, and as collateral security for, bills of exchange drawn upon the owner of the ship, so as to be valid in the event of the bills being refused acceptance or dishonoured (*f*).

If ship, freight, and cargo are hypothecated, the contract is *bottomry;* where cargo only is hypothecated, the contract is *respondentia.*

Hypothecation in bottomry or respondentia differs both from a mortgage and from a pawn or pledge. It does not, as a mortgage does, transfer the property in the thing hypothecated to the person making the advance, nor, as in the case of a pawn or pledge, is it necessary to its validity that there should be a transfer of the possession. Hypothecation gives only a right against the subject-matter hypothecated through the medium of process in the Admiralty Division of the High Court (*g*). There is this further main difference between those contracts and a common loan: the money advanced is at hazard during the voyage (*h*); so that if the ship or cargo does not arrive safely at its destination nothing is repayable. The lender of the money has, therefore, always been, as we shall immediately see, entitled to receive a recompense far beyond the ordinary rate of interest. This recompense is very properly called in the civil law *periculi pretium*, and no person can be entitled to it who does not take upon himself the perils of the voyage. But it is not necessary that his doing so should be declared expressly, and in terms, though this is often done: it is sufficient that the fact can be collected from the language of the instrument considered in all its parts. Hence, where the words were, "I bind myself, my ship, and tackle to pay the sum borrowed, with twelve per cent. bottomry premium, in eight days after my arrival at the port of London," the Court were of opinion that the words "my arrival" must be understood to mean my arrival with the ship, or the ship's arrival (*i*).

(*f*) *Stainbank* v. *Shepard*, supra. See *The Staffordshire*, L. R. 4 P. C. 194.

(*g*) *Stainbank* v. *Shepard*, 22 L. J. Ex. at p. 346.

(*h*) *Stainbank* v. *Fenning*, 11 C. B. 51; *Stainbank* v. *Shepard*, 22 L. J. Exch. 341; *The Indomitable*, 5 Jur. N. S. 632.

(*i*) *Simonds* v. *Hodgson*, 3 B. & Ad. 50, reversing decision in 6 Bing. 114: and see *The Emancipation*, 1 W. Rob. 124; *The Cecilie*, 4 P. D. 210.

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A total loss of the ship, within the meaning of the bottomry bond, cannot happen if it exist in specie, although ever so much injured (*k*); the doctrine of constructive total loss does not apply. Though arrival of the vessel or cargo is the condition upon which bottomry advances are made, the lender would, it seems, be entitled to recover, if the owner fraudulently refused to proceed with the voyage (*l*).

Inasmuch as the lender receives nothing unless the subject-matter of hypothecation arrives at its destination, it was always, notwithstanding the Usury Laws, competent to the lender upon a *bottomry* or *respondentia* contract to receive any interest whatever (*m*). If the interest be exorbitant, the Court will have power to reduce it; a power which it is slow to exercise (*n*). Where no interest is agreed upon, the Court will allow four per cent. (*o*).

The terms *bottomry* and *respondentia* are sometimes incorrectly applied to contracts for the repayment of money borrowed, not on the ship and goods only, but on the mere hazard of the voyage itself; as, where a man lends a merchant 1000*l.* to be employed in a beneficial trade, on condition to be repaid with extraordinary interest in case such a voyage be safely performed, which kind of agreement is called by some writers *fœnus nauticum*, and by others *usura maritima*. In these cases the loan is not upon the ship or cargo. The lender has only the personal security of the borrower.

The contracts of bottomry or respondentia are generally entered into by the master acting under an implied authority as the agent of the owner. A bottomry bond may be given by the owner, if both he and the ship be abroad at the time; but against an owner of a British ship in England who raised money upon a bottomry bond for any voyage, the lender could not enforce the bond as a bottomry bond (*p*). And if the contract refer to a British ship, of which it purports to be an

(*k*) *Thomson* v. *R. E. Ass. Co.*, 1 M. & S. 30; *The Great Pacific*, L. R. 2 A. & E. 381; 2 P. C. 516; *Broomfield* v. *Southern Insurance Co.*, L. R. 5 Ex. 192.

(*l*) *The Armadillo*, 1 W. Rob. 251.

(*m*) 2 Bl. Com. 457.

(*n*) *The Huntley*, Lush. 24.

(*o*) *The Cecilie*, 4 P. D. 210.

(*p*) *The Duke of Bedford*, 2 Hagg. Adm. Rep. 294; *The Helgoland*, Swab. at p. 495.

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assignment, compliance with the provisions of the Registry Act seems necessary to its validity (*q*). Neither does there seem to be any mode by which a person who advances money at respondentia, on goods laden and to be laden on board a ship on an outward and homeward voyage, can entitle himself to resort for payment of his debt to the specific goods that may be brought back (*r*). Only freight to be earned on the voyage for which the advance is made (*s*), including freight earned from sub-shippers of goods (*t*), can be hypothecated.

The authority of the master to hypothecate the ship and freight, *in case of necessity*, and in furtherance of the voyage in which he is engaged (*u*), at a foreign port, is indisputable (*v*), and his hypothecation of the freight (*x*) or cargo is also justifiable, *if necessary* (*y*). *Neeessity*, to use the expression of Lord *Stowell*, is "the vital principle" of hypothecation, and the Court of Admiralty will consider every circumstance, will go into the whole history of the voyage, in order to determine whether there be that necessity, without which an instrument of hypothecation is void (*z*). It has been defined by *Erle*, C. J., as "a high degree of need—a need which arises when choice is to be made of one of several alternatives under the peril of severe loss if a wrong choice should be made" (*a*). A bond given to free a ship from arrest for salvage would be valid (*b*); not so one given for paying insurance premiums (*c*). The advantage of allowing the master to take up money on bottomry consists in its enabling him to procure assistance when no other resource is

(*q*) Abbott, 106, 12th edit.; *Johnson* v. *Shippen*, 2 Ld. Raym. 983. The jurisdiction conferred by 24 & 25 Vict. c. 10, s. 11, is confined to registered mortgages.

(*r*) Abbott, 106, 12th edit.; 2 Bl. Com. 458; *Busk* v. *Fearon*, 4 East, 319; *Glover* v. *Black*, 3 Burr. 1394; *The Sultan*, Swabey, 504.

(*s*) *The Staffordshire*, L. R. 4 P. C. 194.

(*t*) *The Eliza*, 3 Hagg. Adm. Rep. 87.

(*u*) *The Osmanli*, 3 W. Rob. 198.

(*v*) Moore, 918; Hob. 11; Abb. 156, 8th edit.; *Duncan* v. *Benson*, 1 Ex. 537; 3 Ex. 644.

(*x*) See *Place* v. *Potts*, 8 Exch. 705; 10 Exch. 370; *The Karnak*, L. R. 2 P. C. 505.

(*y*) *The Gratitudine*, 3 C. Rob. Adm. Rep. 240; *The Jacob*, 4 Ibid. 245; *The Lord Cochrane*, 2 W. Rob. Adm. Rep. 320; *The Bonaparte*, 3 Ibid. 298; *The Olivier*, 31 L. J. Adm. 137.

(*z*) *The Hersey*, 3 Hagg. Adm. Rep. 404, at p. 408; *S. C.*, 3 Moore, P. C. Ca. 79; *The Karnak*, L. R. 2 A. & E. 289; 2 P. C. 505.

(*a*) *The Karnak*, L. R. 2 P. C. 505, at p. 512.

(*b*) *The Sultan*, Swabey, 504.

(*c*) *The Serafina*, B. & L. 277.

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at hand, and the adventure would be frustrated if assistance were not afforded. Such being the reason for permitting him to borrow money on those terms, it follows that he has no right to do so where he can obtain the money on better terms, *ex. gr.*, on the personal credit of the owner (*d*); or when he is at the owner's place of residence, and the means of communication with him are open, without his consent (*e*), for then he has the owner to resort to (*f*); or where there is a recognized agent of the owner (*g*). And, with us, all England would, at least before the commencement of the voyage, be considered the owner's residence for this purpose; and so, perhaps, would Ireland since the Union (*h*), though before that period it was otherwise (*i*).

It follows, also, that the master ought not to take up money on bottomry, even for a necessary purpose, if it can be procured on more moderate terms.

When the master, finding it absolutely necessary for the purposes of the voyage to obtain money, and being unable to obtain it in any other manner, executes an instrument of hypothecation, the effect of his contract is to give the creditor, not indeed a property in the ship hypothecated, but a privilege or claim upon it, to be carried into effect by legal process (*j*). And where the interest reserved exceeded, as it almost always did, the then legal rate of five per cent., the owner could not before the recent Acts, however it may now be, have been made personally

(*d*) *Heathorn* v. *Darling*, 1 Moore, P. C. Ca. 5; *Soares* v. *Rahn*, 3 Moore, P. C. Ca. 1.

(*e*) *The Bonaparte*, 3 W. Rob. Adm. Rep. 298; 8 Moore, P. C. Ca. 459.

(*f*) *The Oriental*, 7 Moore, P. C. Ca. 398; *The Trident*, 1 W. Rob. Adm. Rep. 29, where the master was allowed to borrow on bottomry at Plymouth, the owner, who lived in Scotland, being dead, insolvent; *The Olivier*, 31 L. J. Adm. 137; *The Hamburg*, 32 L. J. Adm. 161; *The Bonaparte*, 8 Moore, P. C. Ca. 459. It is the duty of the master or bondholder, wherever it is reasonably practicable, to communicate with the owners both of ship and cargo, before he hypothecates them, and, if they desire information, not to act until he has supplied it. See *The Lizzie*, L. R. 2 A. & E. 254; *The Karnak*, L. R. 2 A. & E. 289; 2 P. C. 505; *The Hamburg*, supra; *The Panama*, L. R. 3 P. C. 199; *The Onward*, L. R. 4 A. & E. 38; *The Staffordshire*, L. R. 4 P. C. 194; *Kleinwort* v. *Cassa Maritima of Genoa*, 2 App. Cas. 156.

(*g*) *Gunn* v. *Roberts*, L. R. 9 C. P. 331.

(*h*) Abbott, 107, n., 12th ed.; *The Rhadamanthe*, 1 Dods. Adm. Rep. 201. See 19 & 20 Viot. c. 97, s. 8.

(*i*) *Menetone* v. *Gibbons*, 3 T. R. 267.

(*j*) Abbott, 106, 12th ed.

responsible, and the lender's remedy was against the master of ship (*k*).

No person is entitled to make advances on bottomry, who at the time of making them is a debtor in a larger or equal amount to the vessel (*l*).

But it is no objection to the validity of a bottomry bond, that it is given to the consignee of the cargo; the necessity for borrowing, and the fairness of the transaction, being established (*m*). The money, however, must have been originally advanced upon the credit of the ship. If it be originally advanced on that of the owner, and such a bond be afterwards given in consequence of doubt arising as to his responsibility, even before the ship leaves the place of advance, the bond will be invalid (*n*). But if a portion only of the money secured have been thus previously advanced, and the rest of the sum be subsequently lent on the security of the ship, the bond is not void *in toto*, but only to the extent of the previous advance (*o*). The person making the advance to the master must ascertain that the ship is in distress, that the master cannot obtain credit, and that the advances are required for necessary purposes (*p*). He ought also to make inquiries as to communications between the master and the owners where communication is practicable (*q*). It is clear that the master cannot hypothecate the ship for any debt of his own; though, if she really were in a state of want, and the money *bonâ fide* advanced to relieve her, his subsequent misapplication of it would not prejudice the lender's remedy (*r*).

(*k*) Abbott, 111, 112, 12th ed.

(*l*) *The Hebe*, 2 W. Rob. Adm. Rep. 146, 412.

(*m*) *The Alexander*, 1 Dods. Adm. Rep. 278; and see *The Lord Cochrane*, 2 W. Rob. Adm. Rep. 320, in which a bottomry bond on the ship, freight and cargo, given for advances made by persons acting in the capacity of the *ship's agents*, was upheld against the *consignees* of the cargo. And see *The Oriental*, 7 Moore, P. C. Ca. 398; *The Staffordshire*, L. R. 4 P. C. 194.

(*n*) *The Augusta*, 1 Dods. Adm. Rep. 283. See *Weston* v. *Foster*, 2 Bing. N. C. 693; *The Tartar*, 1 Hagg. 1. See also *The Vibilia*, 1 W. Rob. Adm. Rep. 1; *The Lochiel*, 2 W. Rob. Adm. Rep. 35; *The Hersey*, 3 Moore, P. C. Ca. 79; *The Gauntlet*, 3 W. Rob. Adm. Rep. 82; *The Ida*, L. R. 3 A. & E. 542; but see *The Karnak*, L. R. 2 A. & E. 289; 2 P. C. 505.

(*o*) *Smith* v. *Gould*, *Re The Prince George*, 4 Moore, P. C. Ca. 21.

(*p*) *The Mary Ann*, L. R. 1 A. & E. 13.

(*q*) *The Hamburg*, 32 L. J. Ad. 161; *The Nelson*, 1 Hagg. 169, 176.

(*r*) Abbott, 113, 12th ed.

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A bottomry bond may be good in part and bad in part (*s*); for instance, a bond given for past and present advances may be void only as to the present advances (*t*); or a bond which hypothecates freight may be good as to the freight to be earned on the voyage for which the advance is made, though invalid as to freight to be earned on other voyages (*u*).

Where the ship has been hypothecated by the master in a foreign country, the lender has, as we have seen, a privilege or claim against the ship itself, of which he may avail himself as follows:—Upon the arrival of the ship in this country, if the loan be not repaid within the time prescribed, the agent of the lender applies to the Admiralty Division of the High Court, with the instrument of contract, and a proper affidavit of the facts, and obtains a warrant to arrest the ship, and a monition to the persons liable to the freight, if that be charged, to pay it at the registry (*x*), and cite all persons interested to appear before the Court if they think proper to do so. If, in the course of the proceedings, it becomes necessary to sell the ship, the Court decrees a sale to be made under the direction of its own commissioners, and afterwards distributes the proceeds among the different claimants, as justice requires; and this may be done if the owners or persons interested in the ship do not appear at the time appointed by the Court, otherwise their absence or default would occasion a failure of justice. The claim will, if necessary, be referred to the registrar and merchants to examine the items in respect of which the bond was given.

As to the mode of distributing the proceeds among the several claimants, it is worthy of observation that if securities of this sort are given at different periods of a voyage, and the value of the ship is insufficient to discharge them all, the last in point of date is entitled to priority of payment; because the last loan furnishes the means of preserving the ship, and, without it, the former lenders would have entirely lost their security (*y*). But

(*s*) Abbott, 113, 12th edit.; *The Staffordshire*, L. R. 4 P. C. 194.

(*t*) *Smith* v. *Gould*, supra.

(*u*) See *The Staffordshire*, ante, p. 517.

(*x*) 3 & 4 Vict. c. 65; *The Dowthorpe*, 2 W. Rob. 73; *Place* v. *Potts*, 8 Exch. 705; 10 Exch. 370.

(*y*) *The Eliza*, 3 Hagg. Adm. Rep. 87; *The Rhadamanthe*, 1 Dods. Adm. Rep. 201.

this priority may be lost by want of diligence in enforcing a bond; and a voluntary postponement of payment will deprive the Admiralty Court of jurisdiction over it (*z*).

The validity of a bottomry bond will be determined by the law of the flag of the vessel. "Upon principle, it seems to me," said *Brett*, L. J., in *The Gaetano and Maria* (*a*), "that he who ships goods on board a foreign ship, ships them to be dealt with by the master of that ship according to the law of the country of that ship, unless there is a stipulation to the contrary."

Bottomry bonds have always been assignable in equity and by Admiralty law (*b*).

A person who has supplied necessaries to a ship has not, under 3 & 4 Vict. c. 65, or 26 & 27 Vict. c. 24, or otherwise, any maritime lien (*c*).

(*z*) *The Royal Arch*, Swabey, 269, at p. 285.

(*a*) 7 P. D. at p. 146.

(*b*) Maclachlan on Merchant Shipping, 60.

(*c*) *The Rio Tinto*, 9 App. Cas. 356; *The Heinrich Bjorn*, 11 App. Cas. 270.

CHAPTER VIII.

CONTRACTS OF HIRING AND SERVICE.

Contracts of hiring and service.

THE greater part of the law respecting the relation of master and servant has been treated of in the First Book, under the head of *Principal and Agent;* for every servant is, in executing the duties required from him by his contract of service, his master's agent. The present chapter will, therefore, only contain a few remarks on the contract by which this relation is created.

Where the hiring is under a special agreement the terms of that agreement must of course be observed (*a*). If there be no special agreement or no usage or custom, but the hiring is a general one without mention of time, it is considered to be for a year certain. If the servant continue in employment beyond that year, a contract for a second year is implied, and so on (*b*). Indeed, in case of menial (*c*) or domestic servants, the contract is, by general custom, dissoluble by a month's warning, or payment of a month's wages (*d*), and in many trades or professions there are customs as to the length of notice.

Though a hiring in general words is *primâ facie* presumed to be for a year even though the master and servant may have

(*a*) As to the mutuality and validity of such agreement, see *Whittle* v. *Frankland*, 2 B. & S. 49; Macdonell on Master and Servant, 127, 139.

(*b*) *Beeston* v. *Collyer*, 4 Bing. 309; *Williams* v. *Byrne*, 7 Ad. & E. 177, case of a newspaper reporter; *Huttman* v. *Boulnois*, 2 C. & P. 510; *Rex* v. *Hensingham*, Cald. 206; *Rex* v. *Croscombe*, Burr. S. C. 256; *Turner* v. *Robinson*, 5 B. & Ad. 789; *Fawcett* v. *Cash*, 5 B. & Ad. 904; *Langton* v. *Carleton*, L. R. 9 Ex. 57. But see *Fairman* v. *Oakford*, 5 H. & N. 635. As to clerks, commercial travellers, and other like persons, see *Creen* v. *Wright*, 1 C. P. D. 591, and *Nayler* v. *Yearsley*, 2 F. & F. 41.

(*c*) *Todd* v. *Kerrich*, 8 Ex. 151; *Nicoll* v. *Greaves*, 17 C. B. N. S. 27.

(*d*) See *Beeston* v. *Collyer*, ubi sup.; *Robinson* v. *Hindman*, 3 Esp. 235; 6 T. R. 326; *Nowlan* v. *Ablett*, 2 C. M. & R. 54. As to clerks, &c., see cases at end of note (*b*).

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thought that they could separate within the year (*e*); and, though the circumstances of the servant's leaving in the middle of a year (*f*), or having previously served for a shorter time than a year (*g*), will not prevent the usual interpretation from taking place, yet this presumption, arising from the use of general words, is capable of being rebutted (*h*). Thus, a general hiring *at weekly wages* is but a weekly hiring, if there be no other circumstance whence the intended duration of the contract can be collected (*i*), *e. g.*, a hiring *at so much per week* "for so long a time as the master shall want a servant," or "for so long a time as the master and servant shall agree," are weekly hirings (*k*). But if there be any circumstance to show that a yearly hiring was intended, a reservation of wages payable at shorter intervals will not control it (*l*); as, where the contract was to serve "for four shillings and ninepence a week," or "at the rate of four shillings a week," the parties having liberty of parting at a month's notice from either, this was held to be a hiring for a year, for the mention of a month showed that the stipulation for a weekly payment of wages was not intended to limit the duration of the contract (*m*). But an indefinite hiring by piecework, or a hiring to do a certain quantity of work, cannot be considered a yearly hiring (*n*). If the hiring be for a year, to commence at a future day, it must be in writing to satisfy the Statute of Frauds (*o*).

(*e*) *Rex* v. *Stoekbridge*, Burr. S. C. 759; *Lilley* v. *Elwin*, 11 Q. B. 742.

(*f*) *Rex* v. *Worfield*, 5 T. R. 506.

(*g*) *Rex* v. *Long Whatton*, 5 T. R. 447; *Rex* v. *Hales*, 5 T. R. 668. But see *Fairman* v. *Oakford*, ubi sup.

(*h*) *Rex* v. *Christ's Parish*, 3 B. & C. 459; *Rex* v. *St. Matthew*, 3 T. R. 449; *Rex* v. *Great Bowden*, 7 B. & C. 249; *Rex* v. *Stokesley*, 6 T. R. 757; *Baxter* v. *Nurse*, 6 M. & G. 935.

(*i*) Per *Buller*, J., *Rex* v. *Newton Toney*, 2 T. R. 455; *Rex* v. *Pucklechurch*, 5 East, 382; *Rex* v. *Clare*, Burr. S. C. 819; *Rex* v. *Dodderhill*, 3 M. & S. 243.

(*k*) *Rex* v. *Elstaek*, Cald. 489; *Rex* v. *Mitcham*, 12 East, 351. See *Rex* v. *Odiham*, 2 T. R. 622; *Rex* v. *Dodderhill*, 3 M. & S. 243; *Rex* v. *Lambeth*, 4 M. & S. 315; *Rex* v. *Hanbury*, 2 East, 423; *Evans* v. *Roe*, L. R. 7 C. P. 138.

(*l*) See *Rex* v. *Seaton*, Cald. 440.

(*m*) *Rex* v. *Hampreston*, 5 T. R. 205. See *Rex* v. *Great Yarmouth*, 5 M. & S. 114; *Rex* v. *Birdbrooke*, 4 T. R. 245; *Rex* v. *Brandninch*, Burr. S. C. 662; *Rex* v. *Sandhurst*, 7 B. & C. 557; *Rex* v. *Pershore*, 8 B. & C. 679; *Reg.* v. *Pilkington*, 5 Q. B. 662.

(*n*) *Rex* v. *St. Peter's*, Burr. S. C. 513; *Rex* v. *Woodhurst*, 1 B. & Ald. 325; *Rex* v. *Wrington*, Burr. S. C. 280.

(*o*) *Banks* v. *Crossland*, L. R. 10 Q. B. 97.

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It was thought to follow, from what is above stated, that, if the master dismissed his servant (hired generally) without cause, the latter would have a right of wages up to the expiration of the year. This notion, however, seems to be erroneous (*p*). On the other hand, if the servant quit his master causelessly, he will be entitled to no *accruing* wages (*q*); nor will he be so, if dismissed before the expiration of his term of service for misconduct (*r*).

The master will be justified in taking this step by any exhibition of moral turpitude on the part of the servant: *e. g.*, an assault on a maid servant, or the persuasion of an apprentice to elope (*s*); by a refusal to obey his lawful orders (*t*), or the servant's unwarrantable absence from his duty (*u*), even though involuntary, as if he subject himself to imprisonment (*v*). Though it is otherwise where the absence is warrantable, as, if it be for the purpose of having a severe hurt remedied (*x*); going to a statute fair to be hired for the ensuing year (*y*), or looking for another service (*z*). And a mere temporary absence without leave,

(*p*) See *Gandell* v. *Pontigny*, 4 Camp. 375; 1 Stark. 198; *Eardley* v. *Priee*, 2 N. R. 333. But see contra, *Archard* v. *Hornor*, 3 C. & P. 349; *Fewings* v. *Tisdal*, 1 Exch. 295; *Goodman* v. *Pocock*, 15 Q. B. 576. It is certainly otherwise in the case of a special agreement providing a certain notice: see *Hartley* v. *Harman*, 11 Ad. & E. 798.

(*q*) *Lamburn* v. *Cruden*, 2 M. & G. 253; *Huttman* v. *Boulnois*, 2 C. & P. 510; Com. Dig. Justices, B. 63; *Ridgway* v. *Hungerford Market Co.*, 3 Ad. & E. 171; *Giraud* v. *Richmond*, 2 C. B. 835; *Walsh* v. *Walley*, L. R. 9 Q. B. 367; *Stubbs* v. *Holywell R. Co.*, L. R. 2 Ex. 311. In *Lamburn* v. *Cruden*, supra, the Court held that it should be left to the jury to say, whether there was a new contract to pay for the portion of time which the servant stayed over the year.

(*r*) *Turner* v. *Robinson*, 6 C. & P. 15; 5 B. & Ad. 789; 2 N. & M. 829; *Atkin* v. *Acton*, 4 C. & P. 208; *Callo* v. *Brouncker*, Id. 518. See *Boston Deep Sea Fishing Co.* v. *Ansell*, 39 Ch. D. at p. 364, per *Bowen*, L. J.

(*s*) *Atkin* v. *Acton*, 4 C. & P. 208; *Turner* v. *Robinson*, 6 C. & P. 15; 5 B. & Ad. 789; 2 N. & M. 829; *Rex* v. *Brampton*, Cald. 11; *Rex* v. *Welford*, Cald. 57; *Trotman* v. *Dunn*, 4 Camp. 211.

(*t*) *Spain* v. *Arnott*, 2 Stark. 256.

(*u*) *Robinson* v. *Hindman*, 3 Esp. 235; *Lilley* v. *Elwin*, 11 Q. B. 742; *Turner* v. *Mason*, 14 M. & W. 112. In the last case, the fact of a domestic servant absenting herself for a night, to visit a dying parent, *in defiance* of the master's prohibition, was held to justify dismissal.

(*v*) *Rex* v. *Barton*, 2 M. & S. 329.

(*x*) *Rex* v. *Sharrington*, 2 Bott's Poor Laws, by Const. 322, 5th ed.; *Rex* v. *Wintersett*, Cald. 298; *Chandler* v. *Grieves*, 2 H. Bl. 606, n.

(*y*) *Rex* v. *Islip*, 1 Str. 423; *Rex* v. *Polesworth*, 2 B. & Ald. 483.

(*z*) *Rex* v. *Potter Heigham*, Burr. S. C. 690.

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involving no immoral purpose, appears not to be a sufficient ground for his dismissal; especially if the master's business be not seriously impeded (*a*). But if the servant does anything incompatible with the due or faithful discharge of his duty to his master—if a servant is guilty of such a crime outside his service as to make it unsafe for a master to keep him in his employ—he may be dismissed (*b*). Thus, a clerk having claimed to be a partner, and to transact business as such, his master was held justified in immediately dismissing him from his service (*c*). And even an isolated case of the receipt of commission by the managing director of a company from persons making contracts with the company, and without the knowledge of the company, will justify them in dismissing him (*d*). So, where a clerk, employed to make entries in the minute-book of a company, entered a protest against a summons for the appointment of a successor to himself, it was held that a jury were justified in finding this to be a sufficient cause for his dismissal (*e*). It was further held in that case, and the doctrine has been since confirmed, that a master who has discharged his servant for an insufficient cause, is not precluded from afterwards justifying that dismissal by alleging any sufficient cause that may have been in existence (*f*).

(*a*) *Fillieul* v. *Armstrong*, 7 Ad. & E. 557. But see *Turner* v. *Mason*, 14 M. & W. 112, supra; *Lilley* v. *Elwin*, 11 Q. B. 742.

(*b*) Lord *Esher*, M. R., in *Pearce* v. *Foster*, 17 Q. B. D. 536, at p. 539 (plaintiff, a clerk to stockbrokers, had been dismissed by them for speculating upon the Stock Exchange to the extent of many hundreds of thousands of pounds; a good ground of dismissal).

(*c*) *Amor* v. *Fearon*, 9 Ad. & E. 548.

(*d*) *Boston Deep Sea Fishing Co.* v. *Ansell*, 32 Ch. D. 339. "There can be no question that an agent, employed by a principal or master to do business with another, who, unknown to that principal or master, takes from that other person a profit arising out of the business, which he is employed to transact, is doing a wrongful act inconsistent with his duty towards his master, and the continuance of confidence between them. He does the wrongful act whether such profit be given to him in return for services which he actually performs for the third party, or whether it be given to him for his supposed influence, or whether it be given to him on any other ground at all; if it is a profit which arises out of the transaction it belongs to his master, and the agent or servant has no right to take it, or keep it, or bargain for it, or to receive it without bargain, unless his master knows it." Per *Bowen*, L. J., at pp. 363, 364.

(*e*) *Ridgway* v. *Hungerford Market Co.*, 3 Ad. & E. 171.

(*f*) *Baillie* v. *Kell*, 4 Bing. N. C. 638; *Spotswood* v. *Barrow*, 5 Exch.

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Incompetency of a person hired as a skilled artizan or labourer will justify his dismissal (*g*). But illness, unless habitual, or incapacitating him from performing his work, is not a ground for dismissal.

At common law the master was not responsible for an injury sustained by the servant in the execution of his orders (*h*), unless there were personal negligence on his part (*i*), though it might have been occasioned by the negligence of any of his fellow-servants (*k*), even if of superior authority (*l*), if the master had taken care to select competent persons and furnished them with proper materials. He had not, it was said, undertaken to do more, and the servant was content to bear this risk (*m*). This has been modified by the Employers' Liability Act (43 & 44 Vict. c. 42) in the case of railway servants and workmen to whom the Employers and Workmen Act, 1875, applies; that is, the Act does not include a domestic or menial servant, but, save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under twenty-one years or not, has entered into, or works under, a contract with an employer, whether such contract be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour (*n*).

110. See *Boston Deep Sea Fishing Co.* v. *Ansell*, 39 Ch. D. 339 (C. A.)

(*g*) *Harmer* v. *Cornelius*, 5 C. B. N. S. 236.

(*h*) *Seymour* v. *Maddox*, 16 Q. B. 326; *Assop* v. *Yates*, 2 H. & N. 768; *Ormond* v. *Holland*, E. B. & E. 102.

(*i*) *Roberts* v. *Smith*, 2 H. & N. 213; *Vose* v. *The Lancashire and Yorkshire R. Co.*, 2 H. & N. 728; *Tarrant* v. *Webb*, 18 C. B. 797; *Ormond* v. *Holland*, E. B. & E. 102; *Riley* v. *Baxendale*, 6 H. & N. 445; *Holmes* v. *Clarke*, 6 H. & N. 349.

(*k*) *Priestley* v. *Fowler*, 3 M. & W. 1; *Senior* v. *Ward*, 1 E. & E. 385; *Waller* v. *S. E. R. Co.*, 2 H. & C. 102; *Searle* v. *Lindsay*, 11 C. B. N. S. 429; *Hutchinson* v. *The York, N. and B. R. Co.*, 5 Exch. 343; *Wigmore* v. *Jay*, 5 Exch. 354; *Skipp* v. *The Eastern Counties R. Co.*, 9 Exch. 223; *Tarrant* v. *Webb*, 18 C. B. 797; *Degg* v. *The Midland R. Co.*, 1 H. & N. 773; *Morgan* v. *The Vale of Neath R. Co.*, L. R. 1 Q. B. 149; 5 B. & S. 570, 736; *Lovell* v. *Howell*, 1 C. P. D. 161. See *Warburton* v. *The G. W. R. Co.*, L. R. 2 Ex. 30.

(*l*) *Feltham* v. *England*, L. R. 2 Q. B. 33.

(*m*) *Riley* v. *Baxendale*, 6 H. & N. 445; *Mellors* v. *Shaw*, 30 L. J. Q. B. 333; *Wilson* v. *Merry*, L. R. 1 H. L. Sc. 326.

(*n*) 43 & 44 Vict. c. 42, s. 8, and 38 & 39 Vict. c. 90, s. 10; *Cook* v. *Metropolitan Tramways Co.* (driver of a tramcar not within the Act), 18 Q. B. D. 683.

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Sect. 1 provides that—

"(1) Where personal injury is caused to a workman by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer (*o*); or

"(2) By reason of the negligence of any person in the service of the employer who has any superintendence (*p*) entrusted to him whilst in the exercise of such superintendence; or

"(3) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform (*q*), where such injury resulted from his having so conformed; or

"(4) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or bye-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer, in that behalf; or

"(5) By reason of the negligence of any person in the service of the employer who has the charge or control of any signals, points, locomotive engine, or train upon a railway" (*r*).

In these cases the workman is entitled to the same rights and remedies as if he had not been a workman (*s*). "The Act has placed the workman, with certain exceptions (*t*), in a position as advantageous as, but no better than, that of the rest of the world who use the master's premises at his invitation on business" (*u*). Accordingly, to an action under the statute, the master may plead contributory negligence by the servant, or *volenti non fit injuria* (*v*).

By the Truck Act, 1831 (1 & 2 Will. 4, c. 37), in contracts of hiring made with artificers, workmen, labourers, or other persons employed in the trades specified in sect. 19 of that Act, the wages

(*o*) *Howe* v. *Finch*, 17 Q. B. D. 187; *Walsh* v. *Whiteley*, 21 Q. B. D. 371; *Corcoran* v. *East Surrey Ironworks Co.*, 58 L. J. Q. B. 145.

(*p*) *Shaffers* v. *General Steam Navigation Co.*, 10 Q. B. D. 356; *Osborne* v. *Jackson*, 11 Q. B. D. 619; *Millward* v. *Midland R. Co.*, 14 Q. B. D. 68; *Kellard* v. *Rooke*, 21 Q. B. D. 367.

(*q*) *Howard* v. *Bennett*, 58 L. J. Q. B. 129.

(*r*) *Cox* v. *G. W. R. Co.*, 9 Q. B. D. 106; *Doughty* v. *Firbank*, 10 Q. B. D. 358.

(*s*) *Thomas* v. *Quartermain*, 18 Q. B. D. at p. 692.

(*t*) See sects. 2, 3, 4, in Appendix, post.

(*u*) *Bowen*, L. J., in *Thomas* v. *Quartermain*, 18 Q. B. D. at p. 693.

(*v*) See *Yarmouth* v. *France*, 19 Q. B. D. 647; and *Membery* v. *Great Western Rail. Co.*, 14 App. Cas. 179.

Contracts of hiring and service.

must be made payable *in the current coin of this realm, and not otherwise.* The payment of such wages in any other mode is declared invalid. Nor is the employer allowed to set off goods supplied to the artificer against the wages due to him. Obedience to this Act is enforced by penalties. A payment in bank-notes, with the artificer's consent, is legalised by a proviso in sect. 8. But deductions previously agreed upon, not being in the nature of payment, as for the use of frames supplied by the master and employed in the work, standing room, &c., were held to be legal in *Chawner* v. *Cummings* (*u*). To prevent this was passed 37 & 38 Vict. c. 48, which enacted, as to hosiery manufactures, that all contracts to stop wages, and for frame rents and charges, shall be null and void. The Truck Act, 1831, has been further amended by the 50 & 51 Vict. c. 46, which partly repeals the first Act, and enacts that in actions for wages, a set-off or counter-claim in respect of goods supplied to workmen by their employer or his agent, may not be set up, and that conditions as to spending wages at any shop are invalid (sects. 5 and 6). The Act does not apply to servants in agriculture (*x*).

46 & 47 Vict. c. 31, prohibits under penalties the payment of wages of workmen in public-houses.

By stat. 33 & 34 Vict. c. 97, an agreement or memorandum for the hire of any labourer, artificer, manufacturer, or menial servant is exempt from stamp duty (*y*).

By 30 & 31 Vict. c. 130, the employment of young persons and women by gangmasters for agricultural purposes is prohibited. There are other statutes regulating the employment in factories and mines (*z*).

A great number of statutes have at various times been passed,

(*u*) 8 Q. B. 311. But see *Archer* v. *James*, 2 B. & S. 61, 67 (Ex. Ch.); *Willis* v. *Thorp*, L. R. 10 Q. B. 383. By the first Act (ss. 23, 24) the agreement for such deductions must in most cases be in writing signed by the workman: *Pillar* v. *Llynvi Coal Co.*, L. R. 4 C. P. 752.

(*x*) See as to the persons within the Truck Act, *Riley* v. *Warden*, 2 Exch. 59; *Sharman* v. *Sanders*, 13 C. B. 166; *Weaver* v. *Floyd*, 21 L. J. Q. B. 151; *Ingram* v. *Barnes*, 7 E. & B. 115. But see aliter, where they bind themselves to work: *Bowers* v. *Lovekin*, 6 E. & B. 584; *Lawrence* v. *Todd*, 14 C. B. N. S. 554; 50 & 51 Vict. c. 46.

(*y*) *Wilson* v. *Zulueta*, 14 Q. B. 405.

(*z*) See as to coal mines, 50 & 51 Vict. c. 58; as to cotton cloth factories, 52 & 53 Vict. c. 62.

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pointing out modes for the enforcement of their rights, and for the arrangement of disputes occurring between masters in particular trades and their servants or workmen (*z*). But these have now been superseded by the statute 38 & 39 Vict. c. 90, which provides remedies of a civil nature before a county court judge, or, where the sum in dispute does not exceed £10, by summary proceedings before magistrates, and enables those tribunals to administer full justice between both parties. There are also statutes (*a*) which afford the means of adjusting disputes between masters and workmen by arbitration. These statutes embrace almost all causes of dispute between such parties, and give ample powers for their redress up to a limited amount. The 3rd section of the 5 Geo. 4, c. 96, points out the mode of decision, which is either by the summary award of a justice, if the parties can agree to it; or, if not, by two arbitrators, one chosen by each party out of a number of not less than four, nor more than six, to be named by the justice upon application to him by one of the parties. The other sections provide for the appointment of new arbitrators in case of the neglect or refusal of those first named, the mode of investigation, the powers with which the arbitrators are to be invested for the purpose of procuring evidence, the course to be adopted where they disagree, and the enforcement of the award when made.

A contract of hiring and service, being a purely personal contract, is determined by the death of either party (*b*); and the inability of the servant from illness will excuse his performance of it (*c*). If permanent, his illness is a ground for dismissal (*d*).

(*z*) By the Master and Servant Act, 1889 (52 & 53 Vict. c. 24), a number of statutes "relating to master and servants in particular manufactures" have been repealed.

(*a*) 5 Geo. 4, c. 96; 7 Will. 4 & 1 Vict. c. 67; 30 & 31 Vict. c. 105; 35 & 36 Vict. c. 46.

(*b*) *Farrow* v. *Wilson*, L. R. 4 C. P. 744; *Stubbs* v. *Holywell Railway Co.*, L. R. 2 Ex. 311.

(*c*) *Robinson* v. *Davison*, L. R. 6 Ex. 269; *Boast* v. *Firth*, L. R. 4 C. P. 1.

(*d*) *Cuckson* v. *Stones*, 1 E. & E. 248.

CHAPTER IX.

CONTRACTS WITH SEAMEN.

SECT. 1. *Form of Contract.*
2. *Duties and Rights of Seamen.*
3. *Wages, how lost or forfeited.*
4. *Remedies of Seamen for their Wages.*

Contracts with seamen.

THIS subject is regulated by the Merchant Shipping Act, 1854 (*a*), which consolidated and amended the provisions of the General Merchant Seamen's Act (*b*), and the Mercantile Marine Act, 1850 (*c*), and the Merchant Shipping Acts, 1862 (*d*), 1873 (*e*), 1876 (*f*), and 1880 (*g*).

Special provisions with regard to fishing vessels and apprentices to the sea fishing service are made by the Merchant Shipping (Fishing Boats) Act, 1883 (*h*).

The subject of the present chapter may be most aptly considered under the following heads:—

1. Form of contract.
2. Duties and rights of seamen under it.
3. Wages, how lost or forfeited.
4. Remedies for the recovery of wages.

(*a*) 17 & 18 Vict. c. 104.
(*b*) 7 & 8 Vict. c. 112.
(*c*) 13 & 14 Vict. c. 93.
(*d*) 25 & 26 Vict. c. 63.
(*e*) 36 & 37 Vict. c. 85.
(*f*) 39 & 40 Vict. c. 80.
(*g*) 43 & 44 Vict. c. 16.
(*h*) 46 & 47 Vict. c. 4.

Section I.—*Form of Contract.*

Form of contract.

With regard to the form of the contract, the 149th section of 17 & 18 Vict. c. 104, enacts that—

"The master of every ship (*i*), except ships of less than eighty tons registered tonnage exclusively employed in trading between different ports on the coasts of the United Kingdom (*k*), shall enter into an agreement with every seaman whom he carries to sea from any port in the United Kingdom as one of his crew in the manner hereinafter mentioned; and every such agreement shall be in a form sanctioned by the Board of Trade, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars as terms thereof; (that is to say,)

(1.) The nature, and, as far as practicable, the duration (*l*) of the intended voyage or engagement: [*or*, instead, may state the maximum period of the voyage or engagement, and the places or parts of the world (if any) to which the voyage or engagement is not to extend (*m*).]

(2.) The number and description of the crew, specifying how many are engaged as sailors:

(3.) The time at which each seaman is to be on board or to begin work:

(4.) The capacity in which each seaman is to serve:

(5.) The amount of wages which each seaman is to receive (*mm*):

(6.) A scale of the provisions which are to be furnished to each seaman:

(7.) Any regulations as to conduct on board, and as to fines (*n*), short allowance of provisions, or other lawful punish-

(*i*) This applies to all *British* ships, wherever registered, s. 109; also to sea-going yachts and registered fishing vessels on the coasts and light-house ships: see 25 & 26 Vict. c. 63, s. 13. As to contracts with fishermen, see 36 & 37 Vict. c. 85, s. 8, and s. 55.

(*k*) See *Shepherd* v. *Hills*, 11 Exch. 55.

(*l*) In *Frazer* v. *Hatton*, 2 C. B. N. S. 512, a voyage from Liverpool to the West Coast of Africa and back, *or* for a term not to exceed three years, though in the alternative, was held a sufficient compliance with this ordinance, and a provision that the crew might be transferred to any other ship in the same employ upheld.

(*m*) The alternative statement within brackets is provided by 36 & 37 Vict. c. 85, s. 7.

(*mm*) See 52 & 53 Vict. c. 46, s. 2.

(*n*) Unless this provision be inserted, fines cannot be deducted without an adjudication. See post, pp. 545, 546.

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ments for misconduct, which have been sanctioned by the Board of Trade as regulations proper to be adopted, and which the parties agree to adopt:

And every such agreement shall be so framed as to admit of stipulations to be adopted at the will of the master and seamen in each case, as to advance and allotment of wages, and may contain any other stipulations which are not contrary to law (*o*): Provided, that if the master of any ship belonging to any British possession has an agreement with his crew made in due form according to the law of the possession to which such ship belongs, or in which her crew were engaged, and engages single seamen in the United Kingdom, such seamen may sign the agreement so made, and it shall not be necessary for them to sign an agreement in the form sanctioned by the Board of Trade."

Sect. 150 also enacts, that—

"In the case of all foreign-going ships, in whatever part of her Majesty's dominions the same are registered, the following rules shall be observed with respect to agreements; (that is to say,)

(1.) Every agreement made in the United Kingdom (except in such cases of agreements with substitutes as are hereinafter specially provided for) shall be signed by each seaman in the presence of a shipping master:

(2.) Such shipping master shall cause the agreement to be read over and explained to each seaman, or otherwise ascertain that each seaman understands the same before he signs it, and shall attest each signature:

(3.) When the crew is first engaged the agreement shall be signed in duplicate, and one part shall be retained by the shipping master, and the other part shall contain a special place or form for the descriptions and signatures of substitutes or persons engaged subsequently to the first departure of the ship, and shall be delivered to the master:

(4.) In the case of substitutes engaged in the place of seamen who have duly signed the agreement, and whose services are lost within twenty-four hours of the ship's putting to sea by death, desertion, or other unforeseen cause, the engagement shall, when practicable, be made before some

(*o*) See *Frazer* v. *Hatton*, ubi supra.

shipping master duly appointed in the manner hereinbefore specified; and whenever such last-mentioned engagement cannot be so made, the master shall, before the ship puts to sea, if practicable, and if not, as soon afterwards as possible, cause the agreement to be read over and explained to the seamen; and the seamen shall thereupon sign the same in the presence of a witness, who shall attest their signatures." Form of contract.

Running agreements may, however, be entered into in certain cases, on the following terms—

Sect. 151. "In the case of foreign-going ships making voyages averaging less than six months in duration, running agreements with the crew may be made to extend over two or more voyages, so that no such agreement shall extend beyond the next following thirtieth day of June, or thirty-first day of December, or the first arrival of the ship at her port of destination in the United Kingdom after such date, or the discharge of cargo consequent upon such arrival; and every person entering into such agreement, whether engaged upon the first commencement thereof or otherwise, shall enter into and sign the same in the manner hereby required for other foreign-going ships; and every person engaged thereunder, if discharged in the United Kingdom, shall be discharged in the manner hereby required for the discharge of seamen belonging to other foreign-going ships.

Sect. 152. "The master of every foreign-going ship for which such a running agreement as aforesaid is made shall, upon every return to any port in the United Kingdom before the final termination of the agreement, discharge or engage before the shipping-master at such port any seaman whom he is required by law so to discharge or engage, and shall upon every such return indorse on the agreement a statement (as the case may be), either that no such discharges or engagements have been made or are intended to be made before the ship again leaves port, or that all such discharges or engagements have been duly made as hereinbefore required, and shall deliver the agreement so indorsed to the shipping master; and any master who wilfully makes a false statement in such indorsement shall incur a penalty not exceeding twenty pounds; and the shipping master shall also sign an indorsement on the agreement to the effect that the provisions of this Act relating to such agreement have been complied with, and shall redeliver the agreement so indorsed to the master."

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With respect to home-trade ships, s. 155 enacts that—

"In the case of home-trade ships, crews or single seamen may, if the master thinks fit, be engaged before a shipping master in the manner hereinbefore directed with respect to foreign-going ships; and in every case in which the engagement is not so made, the master shall, before the ship puts to sea, if practicable, and if not, as soon afterwards as possible, cause the agreement to be read over and explained to each seaman, and the seaman shall thereupon sign the same in the presence of a witness, who shall attest his signature."

The statute, by s. 156, likewise provides that—

"In cases where several home-trade ships belong to the same owner, the agreement with the seaman may, notwithstanding anything herein contained, be made by the owner instead of by the master, and the seamen may be engaged to serve in any two or more of such ships (*p*), provided that the names of the ships and the nature of the service are specified in the agreement; but, with the foregoing exception, all provisions herein contained which relate to ordinary agreements for home-trade ships shall be applicable to agreements made in pursuance of this section."

Sect. 157 of the same statute enacts that—

"If in any case a master carries any seaman to sea without entering into an agreement (*q*) with him in the form and manner, and at the place and time hereby in such case required, the master in the case of a foreign-going ship, and the master or owner in the case of a home-trade ship, shall for each such offence incur a penalty not exceeding five pounds."

Seamen engaged in any colony, for any ship registered in the United Kingdom, or for any ship registered in another colony, must be engaged before a shipping master or officer appointed to engage seamen, and if there be none such, then before an officer of customs (*r*). Masters engaging seamen for a British ship in any foreign country must do so before a British consular officer, if there be one (*s*).

(*p*) See *Frazer* v. *Hatton*, 2 C. B. N. S. 512.

(*q*) But the omission, it would seem, does not render the ship unseaworthy, or the voyage illegal; the provision is simply for the protection of the seamen. *Redmond* v. *Smith*, 7 M. & G. 457.

(*r*) 17 & 18 Vict. c. 104, s. 159.

(*s*) Ibid. s. 160. This is only directory: *Frazer* v. *Hatton*, 2 C. B. N. S. 512.

With respect to these agreements, it is further provided by 17 & 18 Vict. c. 104, s. 161— Form of contract.

"(4.) The master of every foreign-going ship shall, within forty-eight hours after the ship's arrival at her final port of destination in the United Kingdom, or upon the discharge of the crew, whichever first happens, deliver such agreement to a shipping master at the place; and such shipping master shall thereupon give to the master a certificate of such delivery; and no officer of customs shall clear any foreign-going ship inwards without the production of such certificate:

And if the master of any foreign-going ship fails to deliver the agreement to a shipping master at the time and in the manner hereby directed, he shall for every default incur a penalty not exceeding five pounds."

Then by sect. 162—

"The following rules shall be observed with respect to the production of agreements and certificates of competency or service for home-trade ships; (that is to say,)

(1.) In the case of home-trade ships of more than eighty tons burden, no agreement shall extend beyond the next following thirtieth day of June or thirty-first day of December, or the first arrival of the ship at her final port of destination in the United Kingdom after such date, or the discharge of cargo consequent upon such arrival:

(2.) The master or owner of every such ship shall, within twenty-one days after the thirtieth day of June and the thirty-first day of December in every year, transmit or deliver to some shipping master in the United Kingdom every agreement made within the six calendar months next preceding such days respectively, and shall also, in the case of home-trade passenger ships, produce to the shipping master the certificates of competency or service which the said master, and his first or only mate, as the case may be, are hereby required to possess:

(3.) The shipping master shall thereupon give to the master or owner a certificate of such delivery and production; and no officer of customs shall grant a clearance or transire for any such ship as last aforesaid, without the production of such certificate; and if any such ship attempts to ply or go to sea without such clearance or transire, any such

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officer may detain her until the said certificate is produced:

And if the agreement for any home-trade ship is not delivered or transmitted by the master or owner to a shipping master at the time and in the manner hereby directed, such master or owner shall for every default incur a penalty not exceeding five pounds."

Provision is made for the authentication of any erasure, interlineation, or alteration in the agreement by the attestation of some shipping master, justice, officer of customs, or other public functionary, or (if made out of her Majesty's dominions) of a British consular officer, or, where there is no such officer, of two respectable British merchants. Without such authentication such erasure, &c., is to be wholly inoperative (*t*); and likewise a penalty is imposed for any fraudulent alteration or delivering a false copy (*u*).

Then, by sect. 165, it is provided that—

"Any seaman may bring forward evidence to prove the contents of any agreement or otherwise to support his case, without producing or giving notice to produce the agreement or any copy thereof."

And, by sect. 166—

"The master shall, at the commencement of every voyage or engagement, cause a legible copy of the agreement (omitting the signatures) to be placed or posted up in such part of the ship as to be accessible to the crew, and in default shall for each offence incur a penalty not exceeding five pounds."

It was decided under the former Acts (consolidated by the Merchant Shipping Act, 1854), that, though an agreement contrary to their provisions was void, it was not avoided in consequence of its containing stipulations in addition to those given in the Act, if not contrary to them in letter or spirit (*x*). Indeed, the Acts themselves, by invalidating certain clauses tending to deprive the seamen of advantages, it was thought, impliedly recognised the power of introducing others not having a tyrannical or unreasonable operation; and considerable latitude

(*t*) 17 & 18 Vict. c. 104, s. 163. See it in Appendix.

(*u*) Ibid. s. 164.

(*x*) *The Minerva*, 1 Hagg. 347; *The George Home*, Ibid. 377, ad finem.

seems to be allowed by the foregoing enactment. In construing all contracts made by seamen, however, the Courts follow out the politic inclination of the legislature to protect and favour that deserving class of labourers. And it has been expressly stated in the Court of Admiralty (*y*) that the tribunal will bear in mind the general ignorance and improvidence of seamen, and their inability to appreciate the meaning and effect of a long and multifarious instrument. The master, therefore, will not be allowed to obtain any advantage from the use of general or ambiguous terms, such, for instance, as "*to New South Wales or elsewhere*" (*z*). It was held, too, under the former Acts, that, where a written agreement had been made, it was the only evidence of the contract, and that no new term could be introduced by parol (*a*). Form of contract.

Any person not licensed by the Board of Trade, other than the owner (*b*), master, mate of a ship, some person *bonâ fide* the servant and in the constant employ of the owner, or a duly appointed shipping master, who engages or supplies any seaman or apprentice to be entered on board any ship in the United Kingdom, incurs a penalty of 20*l.* (*c*).

Contracts with seamen are exempt from stamp duty (*d*). Such contracts may, under the Merchant Shipping (Payment of Wages and Rating) Act, 1880, s. 8, be rescinded.

"Where a proceeding is instituted in or before any Court in relation to any dispute between an owner or master of a ship and a seaman, or apprentice to the sea service, arising out of or incidental to their relation as such, or is instituted for the purpose of this section, the Court, if having regard to all the circumstances of the case they think it is just so to do, may rescind any contract between the owner or master and the seaman or apprentice, or any contract of apprenticeship, upon such terms as the Court may think just,

(*y*) *The Minerva*, ubi supra. And see also 8 & 9 Vict. c. 116.

(*z*) *The Minerva*, ubi supra; *The George Home*, ubi supra; *The Westmoreland*, 1 W. Rob. 216; *The Eliza*, 1 Hagg. 182; *The Countess of Harcourt*, Ibid. 248; *The Nonpareil*, 33 L. J. Adm. 201.

(*a*) *White* v. *Wilson*, 2 B. & P. 116; *The Isabella*, 2 C. Rob. 241; *Elsworth* v. *Woolmore*, Abb. Ship. 459, 12th ed.

(*b*) *Hughes* v. *Sutherland*, 7 Q. B. D. 160.

(*c*) 17 & 18 Vict. c. 104, s. 147 (1).

(*d*) If made in a form sanctioned by the Board of Trade, 17 & 18 Vict. c. 104, s. 9; 33 & 34 Vict. c. 97, s. 3; and see *Wilson* v. *Zulueta*, 14 Q. B. 405. And for coastwise voyages, 33 & 34 Vict. c. 97, sched.

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and this power shall be in addition to any other jurisdiction which the Court can exercise independently of this section" (*e*).

Sect. 11 of the same Act extends the Employers and Workmen Act, 1875 (*f*), to seamen and apprentices. The remedies given by sect. 243 of the Merchant Shipping Act, 1854 (*g*), are in substitution for any other remedy against seamen for breach of contract; and a shipowner cannot recover damages under sect. 4 of the Employers and Workmen Act, 1875, though the damages claimed are under 10*l.* (*h*). The Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), does not apply to seamen (*i*).

Section II.—*Duties and Rights of Seamen under the Contract.*

Duties and rights of seamen under the contract.

The first duty of the seaman under the contract is, of course, to join and work the ship on board of which he has engaged to serve (*k*), and obey the master: and the due performance of his contract is thus enforced by 17 & 18 Vict. c. 104, s. 243 (*l*), viz.:—

"Whenever any seaman who has been lawfully engaged, or any apprentice to the sea service commits any of the following offences, he shall be liable to be punished summarily as follows; (that is to say,)

(1.) For desertion (*m*) he shall be liable to forfeit all or any part of the clothes and effects he leaves on board, and all or any part of the wages or emoluments which he has then earned, and also, if such desertion takes place abroad, at the discretion of the Court, to forfeit all or any part of the wages or emoluments he may earn in any other ship in which he may be employed until his next return to the United Kingdom, and to satisfy any excess of wages paid by the master or owner of the ship from which he deserts, to any substitute engaged in his place at a higher rate of wages than the rate stipulated to be paid to him:

(*e*) 43 & 44 Vict. c. 16, s. 8. For the purposes of this section, the term "Court" includes any magistrate or justice having jurisdiction in the matter to which the proceeding relates.

(*f*) 38 & 39 Vict. c. 90, supra.

(*g*) Infra, pp. 536, 537, 538.

(*h*) *Great Northern Steamship Fishing Co.* v. *Edgehill*, 11 Q. B. D. 225.

(*i*) 43 & 44 Vict. c. 16, s. 11.

(*k*) *Renno* v. *Bennett*, 3 Q. B. 768.

(*l*) Amended by 43 & 44 Vict. c. 16, s. 12.

(*m*) As to what constitutes desertion, see post, pp. 552, 553. By 52 & 53 Vict. c. 46, s. 3 (see Appendix), a register of deserters is to be kept by the superintendents of mercantile marine offices.

Duties and rights of seamen under the contract.

(2.) For neglecting or refusing without reasonable cause to join his ship, or to proceed to sea in his ship, or for absence without leave at any time within twenty-four hours of the ship's sailing from any port, either at the commencement or during the progress of any voyage, or for absence at any time without leave and without sufficient reason from his ship or from his duty, not amounting to desertion, or not treated as such by the master, he shall be liable to forfeit out of his wages a sum not exceeding the amount of two days' pay, and in addition, for every twonty-four hours of absence, either a sum not exceeding six days' pay, or any expenses which have been properly incurred in hiring a substitute :

(3.) For quitting the ship without leave after her arrival at her port of delivery and before she is placed in security, he shall be liable to forfeit out of his wages a sum not exceeding one month's pay :

(4.) For wilful disobedience to any lawful command, he shall be liable to imprisonment for any period not exceeding four weeks, with or without hard labour ; and also at the discretion of the Court to forfeit out of his wages a sum not exceeding two days' pay :

(5.) For continued wilful disobedience to lawful commands, or continued wilful neglect of duty, he shall be liable to imprisonment for any period not exceeding twelve weeks, with or without hard labour ; and also, at the discretion of the Court, to forfeit for every twenty-four hours' continuance of such disobedience or neglect, either a sum not exceeding six days' pay, or any expenses which have been properly incurred in hiring a substitute :

(6.) For assaulting any master or mate he shall be liable to imprisonment for any period not exceeding twelve weeks, with or without hard labour :

(7.) For combining with any other or others of the crew to disobey lawful commands, or to neglect duty, or to impede the navigation of the ship or the progress of the voyage, he shall be liable to imprisonment for any period not exceeding twelve weeks, with or without hard labour :

(8.) For wilfully damaging the ship, or embezzling or wilfully damaging any of her stores or cargo, he shall be liable to forfeit out of his wages a sum equal in amount to the loss thereby sustained, and also, at the discretion of the Court, to imprisonment for any period not exceeding twelve weeks, with or without hard labour :

Duties and rights of seamen under the contract.

(9.) For any act of smuggling of which he is convicted, and whereby loss or damage is occasioned to the master or owner, he shall be liable to pay to such master or owner such a sum as is sufficient to reimburse the master or owner for such loss or damage; and the whole or a proportionate part of his wages may be retained in satisfaction or on account of such liability, without prejudice to such further remedy."

Where a remedy for the seaman's breach of contract exists under this section, the right to resort to any other remedy is by implication excluded (*n*).

If the seaman or apprentice commit any of the offences mentioned in the above section, an entry (*o*) is to be made of the facts in the official log, and signed by the master as well as the mate or one of the crew, and of this a copy is to be furnished to the offender, or it is to be read over to him if he be in the ship, and any reply he may make is likewise to be entered in the log.

In order to secure the services of the seamen on board, a summary power of apprehending deserters without warrant was given to the master or owner by sect. 246 of 17 & 18 Vict. c. 104. This section and sect. 248 of the same Act have been repealed by 43 & 44 Vict. c. 16, s. 12, and by sect. 10 of the latter Act it is provided as follows:

Sect. 10. "The following provisions shall, from the commencement of this Act, have operation within the United Kingdom:

"A seaman or apprentice to the sea service shall not be liable to imprisonment for deserting, or for neglecting, or refusing, without reasonable cause, to join his ship, or to proceed to sea in his ship, or for absence without leave at any time within twenty-four hours of his ship's sailing from any port, or for absence at any time without leave, and without sufficient reason, from his ship, or from his duty.

"Whenever, either at the commencement or during the progress of any voyage, any seaman or apprentice neglects or refuses to join, or deserts from, or refuses to proceed to sea in any ship in which he is duly engaged to serve, or is found otherwise absenting himself therefrom without leave, the master or any mate, or the owner,

(*n*) *Great Northern Steamship Fishing Co.* v. *Edgehill*, 11 Q. B. D. 225.

(*o*) 17 & 18 Vict. c. 104, s. 244.

ship's husband, or consignee, may, with or without the assistance of the local police officers or constables, who are hereby directed to give the same, if required, convey him on board; provided that if the seaman or apprentice so requires he shall first be taken before some Court capable of taking cognizance of the matters to be dealt with according to law; and that if it appears to the Court before which the case is brought that the seaman or apprentice has been conveyed on board or taken before the Court on improper or insufficient grounds, the master, mate, owner, ship's husband, or consignee, as the case may be, shall incur a penalty not exceeding twenty pounds, but such penalty, if inflicted, shall be a bar to any action for false imprisonment.

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"If a seaman or apprentice to the sea service intends to absent himself from his ship or his duty, he may give notice of his intention, either to the owner or to the master of the ship, not less than forty-eight hours before the time at which he ought to be on board his ship; and in the event of such notice being given, the Court shall not exercise any of the powers conferred on it by sect. 247 of the Merchant Shipping Act, 1854.

"Subject to the foregoing provision of this section, the powers conferred by sect. 247 of the Merchant Shipping Act, 1854, may be exercised, notwithstanding the abolition of imprisonment for desertion and similar offences, and of apprehension without warrant.

"Nothing in this section shall affect sect. 239 of the Merchant Shipping Act, 1854."

Sect. 247 of the Merchant Shipping Act, 1854 (as amended by 43 & 44 Vict. c. 16, s. 12), is as follows:—

Sect. 247. "Whenever any seaman or apprentice is brought before any Court on the ground of his having neglected or refused to join or to proceed to sea in any ship in which he is engaged to serve, or of having deserted or otherwise absented himself therefrom without leave, such Court may, if the master or the owner or his agent so requires, ... cause him to be conveyed on board for the purpose of proceeding on the voyage, or deliver him to the master or any mate of the ship, or the owner or his agent, to be by them so conveyed, and may in such case order any costs and expenses properly incurred by or on behalf of the master or owner by reason of the offence to be paid by the offender, and, if necessary, to be deducted from any wages which he has then earned, or which by virtue of his then existing engagement he may afterwards earn."

There being an implied obligation in the contract that means

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shall have been taken to insure the seaworthiness of the ship, the breach of this would, of course, form an answer to any charge of desertion or complaint of refusal to proceed in her on the part of the seaman; but he may, instead of doing this, complain that she is unsafe to the Board of Trade, who may detain her and investigate the matter. If this complaint be made by an individual the Board may require of the complainant security for costs and compensation to the owner for his loss by reason of its detention and survey, should it be found that there was not reasonable or probable cause for them; but if the complaint be made by one-fourth of the crew, being not less than three, and the Board or its officers think this not frivolous or vexatious, this security may be dispensed with (*p*).

The next duty of a seaman under this contract is to exert himself *to the utmost* in the service of the ship (*q*). Therefore, any promise of extra pay as an inducement to extraordinary exertion in that respect is *nudum pactum*, and void (*r*). If the services are such as he is not bound to perform—if, for instance, a ship is so short-handed that the completion of her voyage becomes unsafe, and the master voluntarily promises the remaining seamen a sum of money in addition to their wages for completing the voyage—this remuneration for extraordinary services may be recovered (*s*). Where a ship had been abandoned by the master, the crew were entitled to salvage for salvage services afterwards rendered by them (*t*). If he is promoted during the voyage, he may recover the wages of his new position (*u*). If he be improperly discharged, before or at the commencement of the voyage, the statute 17 & 18 Vict. c. 104, s. 167, enacts, that—

"Any seaman who has signed an agreement, and is afterwards

(*p*) 39 & 40 Vict. c. 80, ss. 6, 10, 11.

(*q*) See 17 & 18 Vict. c. 104, s. 183, post, pp. 551, 552. By sect. 239 of the same statute any seaman who, by wilful breach or neglect of duty, or drunkenness, does any act tending to the loss, destruction or serious damage of the ship, or the life or limb of any one on board, or refuses or omits to do any act proper or requisite to be done by him for preserving the ship from immediate loss, destruction, or serious damage, or preserving any person on board from immediate danger of life or limb, is guilty of a misdemeanour.

(*r*) *Harris* v. *Watson*, Peake, 72; *Harris* v. *Carter*, 3 E. & B. 559.

(*s*) *Hartley* v. *Ponsonby*, 7 El. & Bl. 872.

(*t*) *The Florence*, 16 Jur. 572.

(*u*) *Hanson* v. *Royden*, L. R. 3 C. P. 47.

discharged before the commencement of the voyage, or before one month's wages are earned, without fault on his part justifying such discharge, and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he may have earned, due compensation for the damage thereby caused to him, not exceeding one month's wages, and may, on adducing such evidence as the Court hearing the case deems satisfactory of his having been so improperly discharged as aforesaid, recover such compensation as if it were wages duly earned."

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A seaman will have a right to his full wages, although prevented by a hurt received in the performance of his duty, or by sickness, from performing his service, if he remain with the ship (*v*), unless the illness has been caused by his own wilful act or default (*x*). The statutes 17 & 18 Vict. c. 104, ss. 185, 209, 210, and 25 & 26 Vict. c. 63, s. 19, contain provisions for the payment of wages due to seamen left behind under a certificate of their not being in a condition to proceed on the voyage. A seaman also has a right to wages during an embargo, provided that the ship afterwards perform her voyage (*y*). But if he is sent home as a witness by the consul or other lawful authority, and does not rejoin his ship, he cannot recover wages accruing after he quitted her (*z*). If a seaman die during the voyage, his representatives may claim his wages *pro ratâ* (*a*).

By statute 17 & 18 Vict. c. 104 (*b*), it is provided, that a seaman may leave his ship for the purpose of forthwith entering the Queen's naval service without forfeiture of wages, notwithstanding his agreement; and the master must deliver to the seaman his clothes and effects, and must pay a proportionate amount of his wages, either in money or by bill drawn on the owners at sight, to the officer in command of the Queen's ship,

(*v*) Abbott, p. 463, 12th ed.; *Chandler* v. *Grieves*, 2 H. Bl. 606, n. (*a*).

(*x*) See 30 & 31 Vict. c. 124, s. 8, post, p. 555.

(*y*) *Beale* v. *Thompson*, 3 B. & P. 405; 4 East, 546; 1 Dow. 299; *Johnson* v. *Broderick*, 4 East, 566.

(*z*) *Melville* v. *De Wolf*, 4 E. & B. 844.

(*a*) *Armstrong* v. *Smith*, 1 B. & P. N. R. 299; *Cutter* v. *Powell*, 6 T. R. 320. And see the provisions of 17 & 18 Vict. c. 104, s. 184, and s. 194 to s. 204; 25 & 26 Vict. c. 63, s. 20, and 45 & 46 Vict. c. 55, s. 4 (a), as to the payment of the wages of deceased seamen; 25 & 26 Vict. c. 63, s. 21, where seamen or apprentices are lost with the ship; and 52 & 53 Vict. c. 46, s. 4, as to payment of British seamen in foreign money.

(*b*) Sect. 214 to sect. 219. See as to the old law on this point, *Wiggins* v. *Ingleton*, 2 Ld. Raym. 1211.

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and the money or produce of the bill is ultimately (*c*) to be paid to the seaman. If the bill be not paid, the seaman may sue on it, or recover the wages due to him in the ordinary course. But in order to compensate the shipowner for any loss (*d*), if the seaman has quitted without the consent of the master or owner, who is compelled to provide a substitute, and his wages exceed the amount the original seaman would have received, the master or owner may obtain the difference from Government.

With respect to the *time* from which the seaman's wages begin, the statute, sect. 181, provides that—

"A seaman's right to wages and provisions shall be taken to commence, either at the time at which he commences work, or at the time specified in the agreement for his commencement of work or presence on board, whichever first happens."

With respect to the *time* for the payment of the wages, the decision in *Button* v. *Thompson* (*e*) is important. There the seaman's agreement was in the form sanctioned by the Board of Trade, for a voyage from Shields to Alexandria, and, if required, to any port or ports in the Mediterranean, Black Sea, Danube, &c., and home to the ship's final port of discharge in the United Kingdom or Continent of Europe, the voyage not expected to exceed twelve months. The seaman, through his own negligence and misconduct, was left behind at a port in the Danube. It was held that he might recover wages up to the time of being left behind; for that the contract was for a succession of voyages of indefinite duration, though "not expected to exceed twelve months," and that his wages, though, perhaps, not recoverable till the expiration of the stipulated period of service, were yet vested and a debt at the end of each month of service, subject only to forfeiture in certain events. The Merchant Shipping Act, 1854, by s. 168, enacts that—

"All stipulations for the allotment of any part of the wages of a seaman during his absence, which are made at the commencement

(*c*) But not until the time he would have been entitled to receive his wages, if he had remained in the service of the ship he has quitted.

(*d*) By sect. 216, if wages have been advanced, or the owner or master has made himself liable for wages in advance, he may be recompensed by the Admiralty.

(*e*) L. R. 4 C. P. 330, per Byles and Montague Smith, JJ.; diss. Brett, J.

of the voyage, shall be inserted in the agreement (*f*), and shall state the amounts and times of the payments to be made; and all allotment notes shall be in forms sanctioned by the Board of Trade."

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And now, by 43 & 44 Vict. c. 16, s. 3, if the seaman so requires, the agreement with him shall stipulate for the allotment of a part of his wages, not exceeding one-half, in favour of certain relatives (*i.e.*, his wife, father, mother, grandfather, grandmother, child, grandchild, brother or sister), or the allotment may be made in favour of a savings bank. This section also provides that—

"A payment under an allotment note shall begin at the expiration of one month, or, if the allotment is in favour of a savings bank, of three months, from the date of the agreement, or at such later date as may be fixed by the agreement, and shall be paid at the expiration of every subsequent month, or of such other periods as may be fixed by the agreement, and shall be paid only in respect of wages earned before the date of payment."

Means are provided (*g*) for enforcing, in the County Court or summarily, payment by relatives of the seaman of any allotment note thus issued, provided the owner does not prove that the wages have been forfeited. This provision is confined to the actual owner, who has the management of the ship for the time being (*h*).

By s. 187 of the Merchant Shipping Act, 1854, it is enacted that—

"The master or owner of every ship shall pay to every seaman his wages within the respective periods following (that is to say), in the case of a home-trade ship, within two days after the termination of the agreement, or at the time when such seaman is discharged, whichever first happens; and in the case of all other ships (except ships employed in the southern whale fishery or on other voyages, for which seamen by the terms of their agreement are wholly compensated by shares in the profits of the adventure), within three days after the cargo has been delivered, or within five days after the seaman's discharge, whichever first happens; and in all cases the seaman shall, at the time of his discharge, be entitled to be paid on account a sum equal to one-fourth part of the balance due to him; and every master or owner who neglects or refuses to

(*f*) As to the validity of advance notes, see *M'Kune* v. *Joynson*, 5 C. B. N. S. 218, and 52 & 53 Vict. c. 46, s. 2.

(*g*) 17 & 18 Vict. c. 104, s. 169.

(*h*) *Meiklereid* v. *West*, 1 Q. B. D. 428.

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make payment in manner aforesaid, without sufficient cause (*i*), shall pay to the seaman a sum not exceeding the amount of two days' pay for each of the days, not exceeding ten days, during which payment is delayed beyond the respective periods aforesaid, and such sum shall be recoverable as wages."

Conditional advance notes were declared illegal by 43 & 44 Vict. c. 16, s. 2. But this provision was repealed by the Merchant Shipping Act, 1889 (52 & 53 Vict. c. 46), which (s. 2) enacts that—

"(1.) Any agreement with a seaman made under section 149 of the Merchant Shipping Act, 1854, may contain a stipulation for payment to or on behalf of the seamen, conditionally on his going to sea in pursuance of the agreement, of a sum not exceeding the amount of one month's wages payable to the seaman under the agreement.

"(2.) Save as authorized by this section, any agreement by or on behalf of the employer of a seaman for the payment of money to or on behalf of the seaman conditionally on his going to sea from any port in the United Kingdom shall be void, and no money paid in satisfaction or in respect of any such agreement shall be deducted from the seaman's wages, and no person shall have any right of action, suit, or set off against the seaman or his assignee in respect of any money so paid or purporting to have been so paid."

With respect to the *mode* of payment, by 17 & 18 Vict. c. 104, s. 170, all seamen discharged in the United Kingdom from any British foreign-going ship must, under a penalty of 10*l.*, be discharged and receive their wages in the presence of a superintendent, except in cases where a competent Court otherwise directs. In the case of home-trade ships seamen may, if the owner desires, be discharged and receive their wages in the like manner.

Not less than twenty-four hours (*j*) before paying off or discharging any seaman, the master shall deliver to him, or if he is to be discharged before a superintendent, to such superintendent, a full and true account, in a form sanctioned by the Board of Trade, of his wages and all deductions therefrom, and in default shall forfeit 10*l.* No deduction is to be allowed, except in respect of matter subsequent, unless it be included in such statement (*k*).

(*i*) See *Frazer* v. *Hatton*, 2 C. B. N. S. 512; *The Princess Helena*, Lush. 190.

(*j*) 17 & 18 Vict. c. 104, s. 171.

(*k*) Ibid.

Upon the discharge (*l*) of any seaman, or payment of his wages, the master shall sign and give him a certificate, in a prescribed form, specifying the period of service, and time and place of discharge; and the master's refusal to give it subjects him to a penalty not exceeding 10*l.* The superintendent is empowered (*m*) finally to hear and decide any question between a master or owner and any of the crew which both parties agree by writing to submit to him; and for this purpose he is armed with authority to call for the log-book and papers (*n*), and to examine witnesses.

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Now 43 & 44 Vict. c. 16, s. 4, provides that—

"In the case of *foreign-going ships*—

(1.) The owner or master of the ship shall pay to each seaman on account at the time when he lawfully leaves the ship at the end of his engagement 2*l.*, or one-fourth of the balance due to him, whichever is least, and shall pay him the remainder of his wages within two clear days (exclusive of any Sunday, fast day in Scotland, or bank holiday) after he so leaves the ship.

(2.) The master of the ship may deliver the account of wages mentioned in sect. 171 of the Merchant Shipping Act, 1854, to the seaman himself at or before the time when he leaves the ship, instead of delivering it to a superintendent of a mercantile marine office.

(3.) If the seaman consents the final settlement of his wages may be left to the superintendent of a mercantile marine office, under regulations to be made by the Board of Trade, and the receipt of the superintendent shall in that case operate as a release by the seaman, under sect. 175 of the Merchant Shipping Act, 1854.

(4.) In the event of the seaman's wages or any part thereof not being paid or settled as in this section mentioned, then, unless the delay is due to the act or default of the seaman, or to any reasonable dispute as to liability, or to any other cause not being the act or default of the owner or master, the seaman's wages shall continue to run and be payable until the time of the final settlement thereof.

(5.) Where a question as to wages is raised before the superintendent of a mercantile marine office between the master or owner of a ship and a seaman or apprentice, if the

(*l*) 17 & 18 Vict. c. 104, s. 172.
(*m*) Ibid. s. 173.
(*n*) Ibid. s. 174.

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amount in question does not exceed 5*l.*, the superintendent may adjudicate, and the decision of the superintendent in the matter shall be final; but if the superintendent is of opinion that the question is one which ought to be decided by a court of law, he may refuse to decide it."

By sect. 175 of the Merchant Shipping Act, 1854 (*o*)—

"The following rules shall be observed with respect to the settlement of wages: (that is to say,)

(1). Upon the completion before a shipping master of any discharge and settlement, the master or owner and each seaman shall respectively, in the presence of the shipping master, sign, in a form sanctioned by the Board of Trade, a mutual release of all claims in respect of the past voyage or engagement, and the shipping master shall also sign and attest it, and shall retain and transmit it as herein directed:

(2.) Such release, so signed and attested, shall operate as a mutual discharge and settlement of all demands between the parties thereto in respect of the past voyage or engagement:

(3.) A copy of such release, certified under the hand of such shipping master to be a true copy, shall be given by him to any party thereto requiring the same; and such copy shall be receivable in evidence upon any future question touching such claims as aforesaid, and shall have all the effect of the original of which it purports to be a copy:

(4.) In cases in which discharge and settlement before a shipping master are hereby required, no payment, receipt, settlement or discharge otherwise made shall operate or be admitted as evidence of the release or satisfaction of any claim:

(5.) Upon any payment being made by a master before a shipping master, the shipping master shall, if required, sign and give to such master a statement of the whole amount so paid; and such statement shall, as between the master and his employer, be received as evidence that he has made the payments therein mentioned."

The master is also (*p*), upon every discharge before a superintendent, to sign, in a form sanctioned by the Board of Trade, a report of the conduct, character, and qualifications of the persons

(*o*) 17 & 18 Vict. c. 104. (*p*) Ibid. s. 176.

discharged, or state, in a column for that purpose, that he declines to give any opinion upon such particulars or any of them. The superintendent is to transmit this to the Registrar-General of Seamen, or such other person as the Board of Trade directs, and also, if desired to do so by the seaman, give him, or indorse on his certificate of discharge, a copy of so much of the report as concerns him.

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With respect to the discharge of seamen abroad, and to prevent the improper leaving behind, or forcing of them on shore, the following provisions are made by the Merchant Shipping Act, 1854 (*q*):—

Sect. 205. "Whenever any British ship is transferred or disposed of at any place out of her Majesty's dominions, and any seaman or apprentice belonging thereto does not, in the presence of some British consular officer, or, if there be no such consular officer there, in the presence of one or more respectable British merchants residing at the place, and not interested in the said ship, signify his consent in writing to complete the voyage if continued, and whenever the service of any seaman or apprentice belonging to any British ship terminates at any place out of her Majesty's dominions, the master shall give to each such seaman or apprentice a certificate of discharge in the form sanctioned by the Board of Trade as aforesaid, and in the case of any certificated mate whose certificate he has retained, shall return such certificate to him, and shall also, besides paying the wages to which such seaman or apprentice is entitled, either provide him with adequate employment on board some other British ship bound to the port in her Majesty's dominions at which he was originally shipped, or to some other port in the United Kingdom as is agreed upon by him, or furnish the means of sending him back to such port, or provide him with a passage home, or deposit with such consular officer or such merchant or merchants as aforesaid such a sum of money as is by such officer or merchants deemed sufficient to defray the expenses of his subsistence and passage home, and such expenses shall be a charge upon the ship and may be recovered from the owners."

Sect. 206. "If the master or any other person belonging to any British ship wrongfully forces on shore and leaves behind, or otherwise wilfully and wrongfully leaves behind, in any place, on shore or at sea, in or out of her Majesty's dominions, any seaman or apprentice belonging to such ship before the completion of the

(*q*) 17 & 18 Vict. c. 104.

Duties and rights of seamen under the contract.

voyage for which such person was engaged, or the return of the ship to the United Kingdom, he shall for each such offence be deemed guilty of a misdemeanour."

Sect. 207. "If the master of any British ship does any of the following things: (that is to say,)

(1.) Discharges any seaman or apprentice in any place situate in any British possession abroad (except the possession in which he was shipped), without previously obtaining the sanction in writing endorsed on the agreement of some public shipping master, or other officer duly appointed by the local government in that behalf, or (in the absence of any such functionary) of the Chief Officer of Customs resident at or near the place where the discharge takes place:

(2.) Discharges any seaman or apprentice at any place out of her Majesty's dominions, without previously obtaining the sanction so endorsed as aforesaid of the British consular officer there, or (in his absence) of two respectable merchants resident there:

(3.) Leaves behind any seaman or apprentice at any place situate in any British possession abroad on any ground whatever, without previously obtaining a certificate in writing so endorsed as aforesaid from such officer or person as aforesaid, stating the fact and the cause thereof, whether such cause be unfitness or inability to proceed to sea, or desertion or disappearance:

(4.) Leaves behind any seaman or apprentice at any place out of her Majesty's dominions, on shore or at sea, on any ground whatever, without previously obtaining the certificate, endorsed in manner and to the effect last aforesaid, of the British consular officer there, or (in his absence) of two respectable merchants, if there is any such at or near the place where the ship then is:

He shall for each such default be deemed guilty of a misdemeanour: and the said functionaries shall, and the said merchants may, examine into the grounds of such proposed discharge, or into the allegation of such unfitness, inability, desertion, or disappearance as aforesaid, in a summary way, and may for that purpose, if they think fit so to do, administer oaths, and may either grant or refuse such sanction or certificate as appears to them to be just."

The burden of proving such sanction or certificate is thrown

upon the master (*r*); and in the case of distressed seamen being found abroad, who may have been shipwrecked, discharged, or left abroad, provisions are made (*s*) for their relief and conveyance home, out of the moneys granted for the relief of distressed seamen.

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By sect. 213 it is then provided—

"If any seaman or apprentice belonging to any British ship is discharged or left behind, at any place out of the United Kingdom, without full compliance on the part of the master with all the provisions in that behalf in this Act contained, and becomes distressed, and is relieved under the provisions of this Act, or if any subject of her Majesty, after having been engaged by any person (whether acting as principal or agent) to serve in any ship belonging to any foreign power, or to the subject of any foreign power, becomes distressed and is relieved as aforesaid, the wages (if any) due to such seaman or apprentice, and all expenses incurred for his subsistence, necessary clothing, conveyance home, and burial, in case he should die abroad before reaching home, shall be charged upon the ship, whether British or foreign, to which he so belonged as aforesaid," &c. (*t*).

The Board of Trade, besides suing for any penalties, may sue for or recover the wages and costs either from the master, owner, or the person with whom the engagement was made.

At common law the owner of a ship did not warrant to the seaman that she was seaworthy (*u*). Now, however, it is enacted by the Merchant Shipping Act, 1876 (*x*), that—

"In every contract of service express or implied between the owner of a ship and the master or any seaman thereof, and in every instrument of apprenticeship whereby any person is bound to serve as an apprentice on board any ship, there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship, that the owners of the ship, and the master and every agent charged with the loading of the ship, or the preparing thereof for sea, or the sending thereof to sea, shall use all reasonable means to insure the seaworthiness of the ship for the

(*r*) 17 & 18 Vict. c. 104, s. 208.

(*s*) Sects. 211, 212; 25 & 26 Vict. c. 63, s. 22; 45 & 46 Vict. c. 55, ss. 4, 6, 10.

(*t*) And see this regulated and extended by 18 & 19 Vict. c. 91, s. 16.

(*u*) *Couch* v. *Steel*, 3 E. & B. 402; 23 L. J. Q. B. 121.

(*x*) 39 & 40 Vict. c. 80, s. 5.

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voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same: provided that nothing in this section shall subject the owner of a ship to any liability by reason of the ship being sent to sea in an unseaworthy state, where, owing to special circumstances, the so sending thereof to sea is reasonable and justifiable."

Regulations are contained in the Merchant Shipping Acts, 1854 and 1867 (*q*), enabling seamen to complain of bad provisions, to recover compensation for the bad quality, or the reduction of their allowance, and securing a supply for them of proper medicine and anti-scorbutics; and in the Merchant Shipping Act, 1867 (*r*), prescribing the accommodation to which they shall be entitled on board. By the Merchant Shipping Act, 1854 (*s*), the expense of providing surgical and medical advice, with attendance and medicine for any seaman receiving injury in the service of the ship, as well as of his subsistence, until he is cured, brought home, or dies, and, if he die, of his burial, is to be borne by the owner. By the Merchant Shipping Act, 1867 (*t*), if a seaman who is ill has not been provided with proper food, medicine, &c., and the illness has not arisen from other causes, the owner or master will be liable to pay all expenses incurred by reason of such illness, not exceeding three months' pay.

Section III.—*Wages, how lost or forfeited.*

Wages, how lost or forfeited.

The wages of seamen, whether hired by the voyage or the month, are sometimes *lost* and sometimes *forfeited*. By the common law, *freight* was said to be the *mother of wages;* and if during the voyage a total loss or capture of the ship took place the seamen lost their wages (*x*). But if there were an outward and

(*q*) 17 & 18 Vict. c. 104, ss. 221, 222, 223, 225, 226, 232; 30 & 31 Vict. c. 124, ss. 4, 6, 7.

(*r*) 30 & 31 Vict. c. 124, s. 9.

(*s*) 17 & 18 Vict. c. 104, s. 228.

(*t*) 30 & 31 Vict. c. 124, s. 7.

(*x*) Abbott, p. 464, 12th edit. There were some exceptions to this doctrine. See *The Neptune*, 1 Hagg. Adm. Rep. 227. And the rule did not extend to the master: *Hawkins* v. *Twizell*, 5 E. & B. 883.

a homeward voyage, they were entitled to wages for the former, if the ship were lost during the latter, unless the two were by agreement consolidated into one (*y*); for then no freight would have been earned. So, if there were several cargoes and several voyages, they had a right to wages up to the conclusion of the last. If the ship went out empty to look for freight, and returned without procuring any, the seamen were entitled to their wages (*z*); and when money had been advanced to the owner in part of freight, they had a right to wages *pro ratâ* out of that, although the vessel had been wrecked before the termination of the voyage (*a*). If, in case of a wreck, the cargo were saved, and the merchant paid part of the freight in respect thereof, the seamen seem, both on principle and authority, to have been entitled to part of their wages (*b*). Indeed, it was questioned whether their right to this part could be prevented from accruing by an express stipulation in the contract of hiring; but it was at last settled that, in a court of common law at least, it might be so (*c*). And it was held, where by great labour they had saved part of the ship, that they were entitled to wages out of the produce (*d*).

Wages, how lost or forfeited.

Now the Merchant Shipping Act, 1854, by sect. 183 (*e*), provides with respect to all *British*, including *colonial* (*f*), ships, that—

"No right to wages shall be dependent on the earning of freight: and every seaman and apprentice who would be entitled to demand and recover any wages if the ship in which he has served had earned freight, shall, subject to all other rules of law and conditions applicable to the case, be entitled to claim and recover the

(*y*) *Anon.*, 1 Ld. Raym. 639; 12 Mod. 408; 2 Magens, 113. See *Appleby* v. *Dode*, 8 East, 300; *Jesse* v. *Roy*, 1 C. M. & R. 316; *The Juliana*, 2 Dods. Adm. R. 504.

(*z*) *The Neptune*, 1 Hagg. Adm. Rep. 227; Abbott, p. 465.

(*a*) *Anon.*, 2 Shower, 283. See *Saunders* v. *Drew*, 3 B. & Ad. 445.

(*b*) Abbott, p. 465, 12th ed.

(*c*) *Jesse* v. *Roy*, 1 C. M. & R. 316. See *The Juliana*, 2 Dods. Adm. Rep. 504.

(*d*) *The Neptune*, 1 Hagg. Adm. Rep. 227; *The Reliance*, 2 W. Rob. 119.

(*e*) 17 & 18 Vict. c. 104.

(*f*) Ibid. s. 109. Where colonial ships are in the possession they belong to, they are in some cases excepted (see the section). With respect to other ships, the law above stated still prevails.

Wages, how lost or forfeited.

same, notwithstanding that freight has not been earned; but in all cases of wreck or loss of the ship, proof that he has not exerted himself to the utmost to save the ship, cargo, and stores shall bar his claim."

No seaman, too, shall by any agreement forfeit his lien on the ship, or be deprived of any remedy for the recovery of his wages; and every stipulation by which any seaman consents to abandon his right to wages in the case of the loss of the ship, or any right in the nature of salvage, shall be wholly inoperative (*g*). But if the agreement terminate prematurely, by reason of the wreck or loss of the ship, or if he be left on shore abroad under a certificate of illness or inability (*h*) to proceed, the seaman is only entitled to his wages for the time he has served.

Neglect or refusal to assist the master in his defence against pirates *forfeits* the wages (*i*), and a justifiable discharge for *gross* misconduct (such as habitual neglect of duty, constant drunkenness or disobedience (*k*)) entails a loss of them (*l*). In furtherance of this principle, the Merchant Shipping Act, 1854 (*m*), provides, that a naval court (*n*), held under it on the high seas or abroad, who have jurisdiction over such offences, may discharge any seaman, and order his wages to be forfeited, and retained by the owner by way of compensation, or paid into the Exchequer.

According, also, to the doctrine of the common law, desertion from the ship forfeits the seaman's wages (*o*). The Merchant

(*g*) 17 & 18 Vict. c. 104, s. 182. But by 25 & 26 Vict. c. 63, s. 18, this provision does not apply in case of a ship to be employed on salvage services.

(*h*) 17 & 18 Vict. c. 104, s. 185.

(*i*) 22 & 23 Car. 2, c. 11, s. 6, revised edit.

(*k*) *The Atlantic*, Lush. 566.

(*l*) *The Exeter*, 2 C. Rob. Adm. Rep. 261; *The Blake*, 1 Wm. Rob. Adm. Rep. 73; *Button* v. *Thompson*, L. R. 4 C. P. 330, at p. 343.

(*m*) 17 & 18 Vict. c. 104, s. 263.

(*n*) See 17 & 18 Vict. c. 104, ss. 260, 261, 262.

(*o*) *The Baltic Merchant*, Edw. Adm. Rep. 86; Molloy, B. 2, c. 3, s. 10; *The Bulmer*, 1 Hagg. Adm. Rep. 163. See *The Eliza*, Ibid. 182; *Countess of Harcourt*, Ibid. 248; *The Pearl*, 5 C. Rob. 224; *Neave* v. *Pratt*, 2 B. & P. N. R. 408. The common law doctrine was affirmed and extended by 11 & 12 Will. 3, c. 7, s. 17; 2 Geo. 2, c. 36, s. 3; 2 Geo. 3, c. 31; 31 Geo. 3, c. 39, ss. 3, 4; 37

Wages, how lost or forfeited.

Shipping Act, 1854, s. 243, as we have already seen (*p*), adopts the same principle; and in order to facilitate the enforcement of this forfeiture (*q*), renders his quitting the ship before the expiration of his engagement, with an entry of the fact of his desertion in the official log-book, sufficient *primâ facie* evidence to support the resistance to the claim of the sailor for his wages, and throws on him the onus of proving a proper discharge, or a sufficient excuse for his absence.

If the desertion take place abroad, the entry in the log ought to be produced to a public functionary, who is to endorse on the agreement a certificate of the desertion, and forward a certified copy of the entry in the log, and of the indorsement, to the Registrar-General of Seamen, and these documents are made evidence in any legal proceedings relating to the desertion (*r*).

Quitting the ship with leave of the master, and refusing to return when ordered, is desertion (*s*); but quitting the ship and refusing to proceed on a voyage not designated by the articles (*t*), or a voyage which would expose the seaman to greater risk than was contemplated when his agreement was entered into (*u*), is not so; nor is a man a deserter who has been compelled to quit the ship by inhuman treatment (*x*), or by want of provisions (*y*), or dismissed without lawful cause (*z*). So merely quitting the ship without leave, and going on shore for a temporary purpose, *e. g.*, to obtain legal advice as to the effect of the articles, does not constitute desertion (*a*).

Geo. 3, c. 73, s. 1; 4 Geo. 4, c. 25, s. 9. These Acts were repealed by 5 & 6 Will. 4, c. 19, and are only mentioned historically. The application of the common law as to desertion was not excluded by them: *The Westmoreland*, 1 W. Rob. Adm. Rep. 216; *The Two Sisters*, 2 W. Rob. Adm. Rep. 125.

(*p*) See ante, p. 536; *Button* v. *Thompson*, L. R. 4 C. P. 330.

(*q*) Sect. 250.

(*r*) Sect. 249.

(*s*) *The Bulmer*, 1 Hagg. A. R. 163; *The Pearl*, 5 C. Rob. Adm. Rep. 224.

(*t*) *The Eliza*, 1 Hagg. Adm. Rep. 182; *Countess of Harcourt*, Ibid. 248.

(*u*) *Burton* v. *Pinkerton*, L. R. 2 Ex. 340.

(*x*) *Edward* v. *Trevellick*, 4 E. & B. 59.

(*y*) *The Castilia*, 1 Hagg. Adm. Rep. 59.

(*z*) *Limland* v. *Stephens*, 3 Esp. 269; *Sigard* v. *Roberts*, 3 Esp. 71.

(*a*) *The Westmoreland*, 1 W. Rob. Adm. Rep. 216; *Button* v. *Thompson*, L. R. 4 C. P. 330. And by 17 & 18 Vict. c. 104, s. 232, the seaman is entitled to go on shore for the purpose of making a complaint to a magistrate, &c. See 36 & 37 Vict. c. 85, s. 9.

Wages, how lost or forfeited.

The Merchant Shipping Act, 1854, in the terms already set forth (*b*), authorizes deductions to be made from the wages for various acts of misconduct, which may be determined in any proceeding instituted with respect to the wages (*c*). If, too, a seaman be dismissed during the voyage for gross misconduct other than desertion, he will lose all claim to accruing wages, as in the case of any other servant, but he will not *forfeit* those actually due (*d*).

Among the instances of misconduct for which deduction may be made, are embezzlement and injury to the ship or cargo. The penalty thus imposed is in accordance with the common law, by which it had been decided, that, if the cargo be embezzled or injured by the fraud or negligence of the seaman, the owner had a right to deduct a compensation from the wages of those whose misconduct had produced the injury (*e*); but he had no right to make any deduction on that account from the wages of the innocent (*f*).

The Merchant Shipping Act, 1854 (*g*), likewise enacts, that—

"Whenever in any proceeding relating to seamen's wages, it is shown that any seaman or apprentice has in the course of the voyage been convicted of any offence by any competent tribunal, and rightly punished therefor by imprisonment or otherwise, the Court hearing the case may direct a part of the wages due to such seaman, not exceeding 3*l*., to be applied in reimbursing any costs

(*b*) 17 & 18 Vict. c. 104, s. 243, ante, pp. 536 et seq. By sect. 149, the agreement is to contain the regulations as to fines which the parties agree to adopt; sect. 256 provides how they are to be enforced and applied. As to the mode in which the amount of forfeiture is to be calculated, where the contract is by the voyage, run, or share, see sect. 252.

(*c*) 17 & 18 Vict. c. 104, s. 254.

(*d*) *Button* v. *Thompson*, L. R. 4 C. P. 330. It seems clear that if the seaman is engaged not for an entire voyage, but by the month, wages already due cannot be forfeited even by the subsequent desertion of the seaman: *Taylor* v. *Laird*, 1 H. & N. 266. But where the seaman is engaged for a specific voyage by the month, as is usual, the question is more difficult: see *Button* v. *Thompson*, L. R. 4 C. P. 330; and the judgments of Dr. *Lushington* in *The Blake* (1 W. Rob. Adm. Rep. 73) and *The Duchess of Kent* (Ibid. 283).

(*e*) Molloy, B. 2, c. 3, s. 9; 2 Shower, 167; 1 Ld. Raym. 650.

(*f*) *Thompson* v. *Collins*, 1 B. & P. N. R. 347.

(*g*) 17 & 18 Vict. c. 104, s. 251.

properly incurred by the master in procuring such conviction and punishment."

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An entry of any of these offences ought forthwith to be made in the official log, and signed by the master, and if he be in the ship, a copy should be furnished to the culprit, or it should be read over to him. An entry that this has been done, and of his answer, if any, should likewise be made; and in default of this being complied with, any Court subsequently hearing the case may refuse to receive evidence of the offence (*h*). A similar provision is contained (*i*) in the Act, as to the entries in the log and the communication of them in cases of misconduct, for which the agreement imposes a fine to be deducted from the wages, which fine is to be paid over to the superintendent.

By sect. 186, also, it is provided, that—

"No seaman or apprentice shall be entitled to wages for any period during which he unlawfully refuses or neglects to work when required, whether before or after the time fixed by the agreement for his beginning work, nor unless the Court hearing the case otherwise directs, for any period during which he is lawfully imprisoned for any offence committed by him."

Illness, death (*k*), and entering the Queen's service do not, as already stated (*l*), work a forfeiture of the seaman's wages. But by statute 30 & 31 Vict. c. 124, s. 8, it is provided—

"Where a seaman is by reason of illness incapable of performing his duty, and it is proved that such illness has been caused by his own wilful act or default, he shall not be entitled to wages for the time during which he is by reason of such illness incapable of performing his duty."

(*h*) Ibid. s. 244.

(*i*) Ibid. s. 256.

(*k*) As to the wages and effects of deceased seamen, see 17 & 18 Vict. c. 104, ss. 194 to 204, and 25 & 26 Vict. c. 63, ss. 20, 21.

(*l*) Ante, p. 541.

Section IV.—*Remedies of Seaman for his Wages.*

Remedies of seaman for his wages.

It only remains to state the remedies which the law has provided for the recovery of seamen's wages.

As already stated, twenty-four hours before the discharge of any seaman, the master must deliver to him, or to the superintendent if he is to be discharged before him, an account of his wages, and all deductions, in a form approved by the Board of Trade (*m*). The time within which the wages are to be paid and the penalty imposed for any delay without sufficient cause, have been already mentioned (*n*). The superintendent before whom they are paid is also empowered to decide any question which the parties may agree by writing to submit to him (*o*); and, upon the final completion of the settlement, the master or owner and the seaman are to sign a mutual release of all claims, which is to be settled by the superintendent. This is conclusive, and in such cases no other evidence of a settlement is admitted (*p*).

Before the recent statutes, if the hiring had been on the usual terms, and made by words or by writing only, and not by deed, and their wages were unpaid, the seamen, or any one or more of them, and every officer, except the master (whatever was the amount of wages in dispute), might sue in the Court of Admiralty, and, by the process of that Court, arrest the ship as a security for the demand, or cite the *master* (*q*) or owners personally to answer them (*r*); and that, not only for the wages earned during the voyage, but for those earned in fitting the ship out, if the owners would not afterwards despatch it (*s*). This remedy still remains, and it is not confined to English subjects, but, generally speaking, is open to foreign seamen,

(*m*) Ante, p. 544.

(*n*) Ante, pp. 543, 544.

(*o*) Ante, p. 545.

(*p*) Ante, p. 546.

(*q*) *The Salacia*, 32 L. J. Adm. 41.

(*r*) Abbott, p. 490, 12th edit., citing *the Seamen*, Winch, 8; *Alleson* v. *Marsh*, 2 Vent. 181; *Anon.*, 3 Mod. 379; *Bens* v. *Parre*, 2 Ld. Raym. 1206; *the Boatswain*, *Ragg* v. *King*, 2 Str. 858; 1 Barnard. 297; *the Carpenter*, *Wheeler* v. *Thompson*, 1 Str. 707; *the Surgeon*, Say. 136; *the Mate*, *Bayley* v. *Grant*, 1 Ld. Raym. 632; Salk. 33; *Read* v. *Chapman*, 2 Str. 937.

(*s*) *Wells* v. *Osman*, 2 Ld. Raym. 1044; *Wells* v. *Osmond*, 6 Mod. 238; *Mills* v. *Gregory*, Say. 127.

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whose claim is founded on the maritime law (*t*). Where the seamen thus proceed against the ship, their claim is preferred to all other charges on her (except salvage (*u*) and the maritime lien for damages arising out of damage done by a foreign vessel in a collision for which she is to blame (*x*)), since to their labour alone is her preservation and existence attributable (*y*). If the agreement were by deed, or contained special terms, the seamen's remedy was by action in the Courts of common law (*z*), which remedy was also open to them in cases where the Admiralty had jurisdiction, and it was the only one to which the master could, in general, have recourse, if he failed to reimburse himself, as he may, out of the ship's freight and earnings (*a*). But now, by sect. 10 of the Admiralty Court Act, 1861 (*b*), claims by seamen for wages, whether they be due under a special contract or otherwise, and also claims by masters for their wages and disbursements on account of the ship, subject to the exceptions presently mentioned (*c*), may be preferred in the Admiralty Division of the High Court of Justice (*d*); provided that if less than 50*l.* is recovered, the plaintiff is not entitled to costs without a certificate from the judge (*e*). County Courts having Admiralty jurisdiction have jurisdiction over all claims for wages to the amount of 150*l.*, or to any amount if the parties agree (*f*). Whether the party sued in the Court of Admiralty or elsewhere, the proceeding must have been, and where available, must still be, commenced within six years, except in case of disability (*g*). The seamen have a right to sue

(*t*) Abbott, p. 489, 12th ed.; *The Golubchick*, 1 W. Rob. 143. In some cases English seamen are restrained from suing abroad. See 17 & 18 Vict. c. 104, s. 190, infra, p. 559.

(*u*) *The Gustaf*, 31 L. J. Adm. 207.

(*x*) *The Elin*, 8 P. D. 129.

(*y*) *The Favourite*, 2 C. Rob. 232; *The Salacia*, 32 L. J. Adm. 41.

(*z*) See Abbott, p. 490, 12th edit.; *The Sydney Cove*, 2 Dods. 12; *Opy* v. *Child*, Salk. 31; *Day* v. *Searle*, 2 Str. 961; *How* v. *Nappier*, 4 Burr. 1944; *Menetone* v. *Gibbons*, 3 T. R. 267; *Buck* v. *Attwood*, 2 Str. 761; *The Mona*, 1 W. Rob. 137; *The Riby Grove*, 2 W. Rob. 52; *The Debrecsia*, 3 W. Rob. 33; *The Harriet*, Lush. 285.

(*a*) *Read* v. *Chapman*, 2 Str. 937; *The Favourite*, 2 C. Rob. Adm. Rep. 233; *Ragg* v. *King*, 2 Str. 858; *Clay* v. *Sudgrave*, Salk. 33; 1 Ld. Raym. 576; 12 Mod. 405; Carth. 518. But see below.

(*b*) 24 & 25 Vict. c. 10, s. 10.

(*c*) Post, pp. 559 et seq.

(*d*) 36 & 37 Vict. c. 66, ss. 16, 34, 88, 89.

(*e*) 24 & 25 Vict c. 10, s. 10.

(*f*) 31 & 32 Vict. c. 71, s. 13.

(*g*) Stat. 4 Anne, c. 16, ss. 17, 18, 19; 21 Jac. 1, c. 16, ss. 3, 7.

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either the master (*h*) or the owners; and, whenever it becomes necessary to produce the agreement in Court, it lies on them, not upon the seamen, to produce it (*i*).

Formerly the master, if he failed to reimburse himself, as he may, out of the ship's freight and earnings, had no remedy for his wages except in Courts of common law (*k*). But the Merchant Shipping Act, 1854 (*l*), provides that—

"Every master of a ship shall, so far as the case permits, have the same (*m*) rights, liens, and remedies for the recovery of his wages which by this Act, or by any law or custom, any seaman, not being a master, has for the recovery of his wages; and if in any proceeding in any Court of Admiralty or Vice-Admiralty touching the claim of a master to wages, any right of set-off or counter-claim is set up, it shall be lawful for such Court to enter into and adjudicate upon all questions, and to settle all accounts then arising or outstanding and unsettled between the parties to the proceeding, and to direct payment of any balance which is found to be due."

The Admiralty Court Act, 1861 (*n*), by sect. 10 enacts that the Admiralty Division (*o*) of the High Court shall have jurisdiction "over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship." These provisions, it was once thought, gave the master a maritime lien on the ship and freight. The contrary having been decided by the House of Lords (*p*), it was expressly enacted by 52 & 53 Vict. c. 46, s. 1, that "every master of a ship, &c. shall, so far as the case permits, have the same rights, liens and remedies for the recovery of disbursements properly made by him on account of the ship, and for liabilities properly incurred by him on account of the ship, as a master now has for the recovery of his wages.

In the case of British and colonial ships, these remedies have

(*h*) *The Salacia*, 32 L. J. Adm. 41.

(*i*) *Bowman* v. *Manzelman*, 2 Camp. 315; 17 & 18 Vict. c. 104, s. 165.

(*k*) *The Favourite*, 2 C. Rob. Adm. Rep. 233, at p. 237.

(*l*) 17 & 18 Vict. c. 104, s. 191.

(*m*) *The Princess Helena*, 1 Lush. 190; *The Salacia*, 32 L. J. Adm. 41.

(*n*) 24 Vict. c. 10.

(*o*) 36 & 37 Vict. c. 66, ss. 16, 34, 88, 89.

(*p*) *The Sara*, 14 App. Cas. 209, overruling *The Mary Ann*, L. R. 1 A. & E. 8.

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been considerably qualified, and more summary proceedings substituted. The Merchant Shipping Act, 1854, provides, by sect. 188, that—

"Any seaman or apprentice, or any person duly authorised on his behalf, may sue in a summary manner before any two justices of the peace acting in or near to the place at which the service has terminated, or at which the seaman or apprentice has been discharged, or at which any person upon whom the claim is made is or resides, or in Scotland either before any such justices, or before the sheriff of the county within which any such place is situated, for any amount of wages due to such seaman or apprentice not exceeding 50*l.* over and above the costs of any proceeding for the recovery thereof, so soon as the same becomes payable; and every order made by such justices or sheriff in the matter shall be final."

And by sect. 189, that—

"No suit or proceeding for the recovery of wages under the sum of 50*l.* shall be instituted by or on behalf of any seaman or apprentice in any Court of Admiralty or Vice-Admiralty, or in the Court of Session in Scotland, or in any superior Court of Record in her Majesty's dominions (*q*), unless the owner of the ship is adjudged bankrupt or declared insolvent, or unless the ship is under arrest or is sold by the authority of any such Court as aforesaid, or unless any justices acting under the authority of this Act refer the case to be adjudged by such Court, or unless neither the owner nor master is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore."

Though in terms confined to "any seaman or apprentice," these sections are applicable to the master also (*r*).

The right to sue in Courts abroad is also restricted in the following instances (*s*)—

"No seaman who is engaged for a voyage or engagement which is to terminate in the United Kingdom shall be entitled to sue in any Court abroad for wages, unless he is discharged with such sanction as herein required, and with the written consent of the master, or proves such ill-usage on the part of the master or by his authority as to warrant reasonable apprehension of danger to the life of such seaman, if he were to remain on board; but if any

(*q*) *The Harriet*, Lush. 285; *Rossi* v. *Grant*, 5 C. B. N. S. 699.

(*r*) *The Blakeney*, Swab. 428.

(*s*) Sect. 190.

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seaman on his return to the United Kingdom proves that the master or owner has been guilty of any conduct or default which, but for this enactment, would have entitled the seaman to sue for wages before the termination of the voyage or engagement, he shall be entitled to recover in addition to his wages such compensation, not exceeding twenty pounds, as the Court hearing the case thinks reasonable."

Upon any such proceeding (*t*)—

"Any question concerning the forfeiture of, or deductions from, the wages of any seaman or apprentice may be determined in any proceeding lawfully instituted with respect to such wages, notwithstanding that the offence in respect of which such question arises, though hereby made punishable by imprisonment as well as forfeiture, has not been made the subject of any criminal proceedings."

The Admiralty Division of the High Court may entertain the claims of seamen against foreign ships; but notice of the action must be sent to the consul of the country to which the ship belongs (*u*).

(*t*) By sect. 254.

(*u*) *The Nina*, L. R. 2 P. C. 38. See *The Herzogin Marie*, Lush. 292.

CHAPTER X.

APPRENTICESHIP.

Apprentice-ship.

THE contract of apprenticeship is, as its name denotes, a bargain for *instruction* (*a*) to be bestowed by one person upon another, who, in return, agrees to give up his whole time and services to his instructor, and frequently also to bestow upon him a pecuniary remuneration.

The relation which it creates is one of very ancient origin, and the reciprocal rights and duties which it involves greatly resemble those of parent and child; for the master is entitled to the whole produce of the labour of his apprentice (*b*), and may, in case of disobedience by the latter to his lawful commands, or upon the detection of any immorality in his behaviour, administer to him, if an infant, reasonable and wholesome corporal chastisement, such as a father may inflict upon his child, or a schoolmaster upon his pupil; the right to do so issuing in each case out of the *patria potestas*, the delegation of which has been, in all ages, allowed for the sake of the good government and education of young persons (*c*).

The state of the apprentice, however, differs from that of a school-boy in this material particular, viz., that an apprenticeship, being, at common law, looked upon as a contract between

(*a*) See *St. Pancras* v. *Parish of Clapham*, 6 Jur. N. S. 700; *Rex* v. *Crediton*, 2 B. & Ad. 493; *Rex* v. *Ightham*, 4 Ad. & E. 937; *Ellen* v. *Topp*, 6 Exch. 424.

(*b*) See *Anon.*, 12 Mod. 415; *Puckington* v. *Chepton Beenchamp*, Str. 582; *Barber* v. *Dennis*, 1 Salk. 68; *Foster* v. *Stewart*, 3 M. & S. 191; *Morison* v. *Thompson*, L. R. 9 Q. B. 480.

(*c*) 1 Bl. Com. 428; *Penn* v. *Ward*, 2 C. M. & R. 338. The master cannot delegate this power: 9 Co. 76.

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the master and the apprentice, could not have been created without the intervention of the latter (*e*). In the case of parish apprentices, this mutual consent is now, however, dispensed with, and the whole subject regulated by statutes, which will be found collected in the various treatises on poor laws (*f*).

The contract of apprenticeship is one of those by which a person under age is permitted by law to bind himself, upon that general ground adverted to by Lord *Mansfield* in *Drury* v. *Drury* (*g*), viz., "that if an agreement be *for the benefit* of an infant, it shall bind him" (*h*). He may indeed elect to avoid the agreement at his full age (*i*), or even while under age, *if it be manifestly for his benefit so to do* (*k*).

The stat. 5 Eliz. c. 4, created many regulations and restrictions respecting the mode of binding and the qualifications of apprentices; which being found extremely inconvenient in practice, it was, by 54 Geo. 3, c. 96, enacted, that any person may take or become an apprentice, though not according to the provisions of that Act, provided that the statute shall not prejudice the customs or by-laws of any corporation or company. The contract of binding must also, by the statute of Elizabeth, have been by deed indented (*l*). And though 54 Geo. 3, c. 96, has now dispensed with that formality, still, even under it, a writing is required, and a mere parol binding would not constitute an apprenticeship.

The binding is, however, even now, usually effected by

(*e*) *Rex* v. *Arnesby*, 3 B. & Ald. 584; *Rex* v. *Cromford*, 8 East, 25.

(*f*) See Burn's Justice, tit. *Apprentices* and *Poor*; and see a summary of them, Arch. Poor Laws. See also 4 & 5 Will. 4, c. 76, s. 61; 7 & 8 Vict. c. 101, s. 12; and as to apprentices to the sea service, 17 & 18 Vict. c. 104, ss. 141 to 145 inclusive.

(*g*) Per *Buller*, J., in *Maddon* v. *White*, 2 T. R. at p. 161.

(*h*) Accord. *Rex* v. *St. Petrox*, 4 T. R. 196; *Rex* v. *St. Mary's*, 1 Bott, 605, 5th ed.; *Rex* v. *Arundel*, 5 M. & S. 257. See *Maddon* v. *White*, 2 T. R. 159; *Rex* v. *Weddington*, 1 Bott, 532, 5th ed.

(*i*) *Ex parte Davis*, 5 T. R. 715.

(*k*) *Rex* v. *Great Wigston*, 3 B. & C. 484. See *Rex* v. *Gwinear*, 1 Ad. & E. 152; *Reg.* v. *Lord*, 12 Q. B. 757; *Cooper* v. *Simmons*, 31 L. J. M. C. 138; *Leslie* v. *Fitzpatrick*, 3 Q. B. D. 229; *Meakins* v. *Morris*, 12 Q. B. D. 352.

(*l*) See *Smith* v. *Birch*, 1 Bott, P. L. 528, 5th ed.; *Castor* v. *Aicles*, Salk. 68.

deed (*n*), containing covenants by the master and apprentice for the faithful discharge of their respective duties towards each other. These covenants, whether entered into by the infant and master, or by the master and some other person, are generally (*o*) independent, and the performance of neither side is a condition precedent to that of the other (*p*). An infant may, as has been seen, bind himself an apprentice, yet no action will lie against him upon any covenants contained in the instrument by which he does so (*q*). The master is not, however, without remedy for the misbehaviour of his infant apprentice, since he may, as we have seen, correct him personally if he do amiss, taking care to use due moderation in the infliction of the punishment. He may also complain of him before justices of peace (*r*). A court of summary jurisdiction may, under the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), make an order directing the apprentice to perform his duties, and, in the event of non-compliance, order him to be imprisoned for a period not exceeding fourteen days (s. 6 (11)). It may also rescind the instrument of apprenticeship, ordering the whole or any part of the premium to be repaid. The master cannot, under this Act, enforce a deed of apprenticeship containing covenants not for the benefit of the apprentice, if an infant—*e.g.*, a stipulation that the master need not pay wages during a "turn out" (*s*)—or maintain an action against any adult person who has covenanted for the good behaviour of the infant in the deed of apprenticeship (*t*); and the liability of such a

(*n*) See the ordinary printed form in Burn's Justice, *Apprentices;* and see *Rex* v. *Harrington*, 6 N. & M. 165.

(*o*) *Westwick* v. *Theodor*, L. R. 10 Q. B. 224; *Phillips* v. *Clift*, 4 H. & N. 168. But when a master contracts to instruct an apprentice in several trades and abandons one, he cannot sue for a subsequent refusal to serve; *Ellen* v. *Topp*, 6 Exch. 424; and see *Raymond* v. *Minton*, L. R. 1 Ex. 244.

(*p*) *Winstone* v. *Linn*, 1 B. & C. 460; *Hughes* v. *Humphreys*, 6 B. & C. 680; *Wise* v. *Wilson*, 1 C. & K. 662; *Phillips* v. *Clift*, 4 H. & N. 168.

(*q*) *Gilbert* v. *Fletcher*, Cro. Car. 179; 1 Bott, 527, 5th ed.

(*r*) 32 Geo. 3, c. 57; 33 Geo. 3, c. 55; 5 & 6 Vict. c. 7; and 38 & 39 Vict. c. 86. See Burn's Justice, tit. *Apprentices; Cooper* v. *Simmons*, 31 L. J. M. C. 138.

(*s*) *Meakins* v. *Morris*, 12 Q. B. D. 352.

(*t*) *Whitley* v. *Loftus*, 8 Mod. 190; *Elwes* v. *Vaughan*, 1 Lut. 386; *Branch* v. *Ewington*, Dougl. 518. Every *slight* absence is not a breach of the cove-

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person continues, though the infant should, on coming of age, elect to avoid the deed (*u*).

The apprentice, on his part, is entitled to have the covenants in the indentures duly performed towards him (*v*). And, even independently of the instrument of apprenticeship, the master may be sued, or, in a gross case of misconduct, even indicted, for ill-usage and neglect of him (*w*). By 14 & 15 Vict. c. 11, s. 1, the master wilfully neglecting to provide necessary food, clothing, or lodging, when bound to do so, or maliciously assaulting the apprentice, whereby his life is endangered, or it is likely his health may be permanently injured, may be imprisoned for a term not exceeding three years (*x*). It would be murder in him were he to suffer an apprentice of tender years to suffer for want of food.

An apprentice, though absent from work during a temporary illness, is yet entitled to any wages provided by the deed of apprenticeship to be paid (*y*).

The apprenticeship may be determined by consent of parties; provided, if the apprentice be under age, that the dissolution be for his advantage (*z*), and provided the indentures, if any, be got rid of (*a*); or by an infant's election at his full age (*b*); or by the master's bankruptcy (*c*); or by the death of the master (*d*), or the death or permanent illness of the apprentice (*e*); or by the intervention of the court of quarter sessions; or a county court judge; or a stipendiary magistrate;

nant against *absenting*: *Wright* v. *Gihon*, 3 C. & P. 583; and illness affords a good answer: *Boast* v. *Firth*, L. R. 4 C. P. 1.

(*u*) *Cuming* v. *Hill*, 3 B. & Ald. 59. As to the measure of damages, see *Lewis* v. *Peachey*, 1 H. & C. 518.

(*v*) As to whether the law would *imply* a covenant to employ the apprentice, see *Aspdin* v. *Austin*, 5 Q. B. 671; *Dunn* v. *Sayles*, Id. 685; *Reg.* v. *Lord*, 12 Q. B. 757; *Worthington* v. *Sudlow*, 2 B. & S. 508. As to any remedy in Equity, see *Webb* v. *England*, 29 Beav. 44.

(*w*) *Rex* v. *Ridley*, 2 Camp. 650; *Rex* v. *Friend*, R. & R. C. C. 20.

(*x*) See *R.* v. *Self*, 1 Leach, 137.

(*y*) *Patten* v. *Wood*, 51 J. P. 549.

(*z*) *Rex* v. *Weddington*, Burr. S. C. 766.

(*a*) *Rex* v. *Bow*, 4 M. & S. 383.

(*b*) *Wray* v. *West*, 15 L. T. 180.

(*c*) 46 & 47 Vict. c. 52, s. 41.

(*d*) *Farrow* v. *Wilson*, L. R. 4 C. P. 744; *Whincup* v. *Hughes*, L. R. 6 C. P. 78. Unless the indenture provides for the service continuing with the master's executors: *Cooper* v. *Simmons*, 7 H. & N. 707; 31 L. J. M. C. 138.

(*e*) *Boast* v. *Firth*, L. R. 4 C. P. 1; *Robinson* v. *Davison*, L. R. 6 Ex. 269.

or justices (*f*). The tribunals have the power either of making an order directing the apprentice to perform his duties, or they may rescind the instrument of apprenticeship, and order the return of the whole or any part of the premium (*g*), upon complaint, founded on just grounds, of either the master or apprentice.

It is necessary, before leaving this subject, to say a few words upon what is called the *assignment* of an apprentice. A master cannot *assign* an apprentice without the consent of the latter (*h*). And though, by the consent of all parties, the services of the apprentice may be transferred, yet, in the generality of cases, this operates as an agreement between the master and the transferee that the apprentice shall, with his own consent, perform his contract to the former by doing service to the latter (*i*). By the custom of London, indeed, an *assignment*, properly so called, of an apprentice, may be made by one freeman to another (*k*), so as to transfer the benefit of the covenants to the assignee.

An apprentice bound to serve a firm, W. E., their partners and successors, is not bound to serve when the firm is dissolved and part of the business is carried on at L. by two of the partners, and part at D. by other two. There is an implied condition in indentures of apprenticeship that the contract is to be performed at the place where the business was carried on when the contract (*l*) was concluded. "There is a broad distinction between this case and that of an apprentice taken into the house. In the latter case, I am inclined to think that the master would be entitled to take the apprentice with him if he removed to another place, and that it would be beyond the

(*f*) See 5 Eliz. c. 4, s. 35, and 54 Geo. 3, c. 96, s. 3, and *Hawkesworth's and Hillary's case*, 1 Wms. Saund. 316, and notes. 38 & 39 Vict. c. 90, and Burn's Justice, tit. *Apprentices*.

(*g*) 38 & 39 Vict. c. 90, s. 6.

(*h*) *Coventry* v. *Woodhall*, Hob. 134; *Baxter* v. *Burfield*, 2 Str. 1266. An award that an apprentice shall be assigned was in one case held void: *Horne* v. *Blake*, cited 2 Str. 1267.

(*i*) See *Austin* v. *Eccles*, 1 Ld. Raym. 683; *S. C.*, 1 Bott, 580, 5th ed.

(*k*) Com. Dig. "London"; Keble, 255.

(*l*) *Eaton* v. *Western*, 9 Q. B. D. 636.

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power of the apprentice to refuse to go. But here the apprentice was not in the house, but was provided with board and lodging by his father" (*m*).

The stamp on Apprenticeship Instruments is now regulated by 33 & 34 Vict. c. 97 (*n*).

(*m*) Ib., per Sir *James Hannen*, at p. 641.

(*n*) Sects. 39 and 40, and sched. Where no premium, 2*s*. 6*d*. For every 5*l*. of premium, or part of the same sum, 5*s*. The premium must be truly set forth: s. 40.

CHAPTER XI.

GUARANTIES.

SECTION 1. *Nature and Form of Contract.*
2. *Surety, how far liable.*
3. *Surety, how discharged.*
4. *Surety, how indemnified.*
5. *Representations in the Nature of Guaranties.*

SECTION I.—*Nature and Form of Contract* (*a*).

Nature and form of contract.

A GUARANTY is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is himself, in the first instance, liable to such payment or performance (*b*). A mere *offer* to guarantee is

(*a*) As disputes are frequently occasioned by the inartificial wording of guaranties, the following general form, which may be safely adopted in any case, may, it is thought, be useful:—

London, the — day of —, 18—.

In consideration that Mr. C. D. will at my request (*or*, "has at my request")—[*here state the consideration for which the guaranty is given*], I do hereby guarantee to him the said Mr. C. D. [*here state the sum or thing guaranteed*]. This guaranty is to continue in force for the period of [*state period if agreed on*] and no longer.

Witness my hand, A. B.

(*b*) Fell on Guaranties, p. 1. Probably the following is a better definition: "A contract of guaranty is an express contract between the *surety* (the person who gives the guaranty) and the *creditor* (the person to whom the guaranty is given) to perform the promise or discharge the liability, actually incurred, or in contemplation, of a third person called the principal debtor, in case of his not performing the promise or discharging the liability." See De Colyar on Guaranties, p. 54, 2nd ed.; *Imperial Bank* v. *London and St. Katherine Dock Co.*, 5 Ch. D., per *Jessel*, M. R., at p. 200. The definition in the Indian Contract Code, s. 126, is as follows:—"A contract of guaranty is a contract to perform the promise or discharge the liability of a third person in case

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insufficient until accepted (*c*). But if the guaranty be given at the request of the person to whom it is given, no notice of acceptance by him is necessary (*d*).

By stat. 29 Car. 2, c. 3, s. 4—

"No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

This section prevents a *verbal* guaranty from being *sued upon* (*e*). It is to be observed, however, that verbal guaranties are not void. Thus, if money have been paid in pursuance of it, the money cannot be recovered back (*f*). Though no action can be brought upon a guaranty which does not satisfy the provisions of the statute, yet the Court will enforce it against an attorney who has undertaken to pay his client's debt and costs, by virtue of their summary jurisdiction over their own officers (*g*). If a party admit that he has made a binding guaranty, by paying money into Court on a claim charging him with it, that renders proof of a written instrument unnecessary (*h*); but it is otherwise if he do an act which merely admits that an agreement was made, without admitting that such a one was made as would be binding under the statute (*i*).

of his default." This does not emphasise the fact that the contract must be express. The definitions must vary according as it applies or not to a guaranty within the meaning of the Statute of Frauds.

(*c*) *M'Iver* v. *Richardson*, 1 M. & S. 557.

(*d*) See *Mozley* v. *Tinckler*, 1 C. M. & R. 692; *Davies* v. *Richards*, 8 Davis (U. S. S. C.), at p. 527.

(*e*) Though it be given abroad and binding there: *Leroux* v. *Brown*, 12 C. B. 801. But see this questioned, per *Willes*, J., in *Williams* v. *Wheeler*, 8 C. B. N. S. 299. The defence of the statute must now be specially pleaded; Rules of Supreme Court, 1883, Ord. XIX., r. 20.

(*f*) *Shaw* v. *Woodcock*, 7 B. & C. 73. See *Griffith* v. *Young*, 12 East, 513.

(*g*) *Evans* v. *Duncombe*, 1 C. & J. 372; *Senior* v. *Butt*, Hil. T. 1827, K. B., and *Payne* v. *Johnson*, Trin. T. 1787, Exch., there cited; *In re Greaves*, cited 5 Dowl. 187.

(*h*) *Middleton* v. *Brewer*, Peake, 15; Prec. in Ch. 208. See *Lucas* v. *Dixon*, 22 Q. B. D. 357.

(*i*) *Rondeau* v. *Wyatt*, 2 H. Bl. 63.

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A *del credere* contract is not a guaranty within the Statute of Frauds. The authorities are not at one as to the reason for the exclusion of such contracts. That given by *Parke*, B., in *Couturier* v. *Hastie* (*k*) is:—

"If they (the agents) had for a percentage guaranteed the debt owing, or performance of the contract by the vendee, being totally unconnected with the sale, they would not be liable, without a note in writing signed by them; but being the agents to negotiate the sale, the commission is paid in respect of that employment; a higher reward is paid in consideration of their taking greater care in sales to their customers, and precluding all question whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than ordinary agents, namely, responsibility for the solvency and performance of their contracts by their vendees. This is the *main object* of the reward; and though it may terminate in a liability to pay the debt of another, that is not the *immediate object* for which the consideration is given" (*l*).

It has been held that the statute applies, although the action be not brought upon the parol agreement, provided the effect of allowing it to be maintained would be to *charge* the defendant thereby (*n*). But when a person, sued upon his acceptance, pleaded that it was for the plaintiff's own accommodation, he was allowed to show that it was discounted to raise money which the plaintiff had undertaken to pay pursuant to a verbal guaranty (*o*).

As conformity to the provisions of the statute is thus requisite, it will be proper to consider them separately.

(*k*) 8 Ex. at p. 55.

(*l*) That the law is as stated in the text is clear. But the above reasons are unsatisfactory. In *Wickham* v. *Wickham* (2 K. & J. 478) *Wood*, V.-C., suggests that the judges in *Couturier* v. *Hastie*, supra, thought that the agreement "was not a simple guaranty, but a distinct and positive undertaking on his part on which he would become primarily liable; otherwise, I cannot see how the learned judges could arrive at the conclusion that the undertaking was not within the Statute of Frauds." The *del credere* agent is not primarily liable. See ante, p. 128.

(*n*) See *Carrington* v. *Roots*, 2 M. & W. 248; *Sykes* v. *Dixon*, 9 Ad. & E. 693. But see *Cresswell* v. *Wood*, 10 Ad. & E. 460; *Eastwood* v. *Kenyon*, 11 Ad. & E. 438.

(*o*) *Cresswell* v. *Wood*, 10 Ad. & E. 460.

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No action shall be brought, to charge the defendant, upon any special promise to answer for the debt, default, or miscarriage of another.—In order that a contract may fall within these terms, it is essential that it should be for the payment or performance of something *for which another person is liable*, or will, in the contemplation of the parties, become liable. "There can be no suretyship," said Lord *Selborne* in *Lakeman* v. *Mountstephen* (*p*), "unless there be a principal debtor, who, of course, may be constituted in the course of the transaction by matters *ex post facto*, and need not be so at the time; but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed." For instance, where A., in consideration that B. would not sue J. S., promised to pay the money due from J. S., this was held to be within the statute (*q*); for J. S. was liable to the payment of his debt before and after A.'s promise, which therefore was, strictly, "*to answer for the debt of J. S.*" But, where it was agreed between A., his creditors, and one J. S., that J. S. should pay the creditors ten shillings in the pound, to be received by them in full satisfaction, and that they should assign their debts to J. S., this contract was held not within the statute, because J. S. had not contracted to *pay* the debts of A., but to *purchase* them from A.'s creditors, and would, after such purchase, have a right to use the names of the creditors, in order to recover the debts from A. (*r*). The original liability must not be extinguished. Thus, where the defendant, in consideration that the plaintiff would discharge out of custody a person whom he had taken on a *ca. sa.*, promised to pay the debt on a certain day, or render that person, the Court held the promise not within the statute, because the

(*p*) L. R. 7 H. L. at p. 24; Pothier on Contracts, Vol. I.

(*q*) *Rothery* v. *Curry*, B. N. P. 276; accord. *Kirkham* v. *Marter*, 2 B. & Ald. 613; *Fish* v. *Hutchinson*, 2 Wills. 94; *Winckworth* v. *Mills*, 2 Esp. 484; *Thompson* v. *Bond*, 1 Camp. 4; *Ex parte Adney*, Cowp. 460; *French* v. *French*, 2 M. & G. 644.

(*r*) *Anstey* v. *Marden*, 1 B. & P. N. R. 124; *Stephens* v. *Squire*, 5 Mod. 205. See *Read* v. *Nash*, 1 Wils. 305 (liability for sums by a minor not within the statute). *Read* v. *Nash* has been questioned. See 1 Wms. Saund. 211 *b*, n. 1.

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debt was gone by the discharge of the debtor out of custody (*s*). In *Thomas* v. *Cook* (*t*) it was laid down that a promise to *indemnify* was not within the statute, and this seems generally to be the better opinion.

A transfer to a creditor of a debt due to the debtor from a third person is not within the statute. Thus, if C. be A.'s debtor, and B.'s creditor, an agreement by B. to pay his debt to A. in discharge of C.'s liability is not within the statute (*u*). But, *quære*, if the debt from B. to C. had been contingent at the time of making such agreement (*x*).

A promise to pay another man's debt out of that other man's own funds, when they shall come to the hands of the person promising, or out of certain funds to be received by him, is not within the statute (*y*). In such a case no third person is answerable for the promise.

The promise must be made to the creditor. The Court of Queen's Bench decided, in *Eastwood* v. *Kenyon* (*z*), that if A. promise B. that he (A.) will pay to C. a debt due to C. from B., that promise is not within the 4th section of the Statute of Frauds, and, consequently, need not be reduced to writing. The Court further stated its opinion that the statute applies only to promises made to the person to whom another is answerable (*a*); and this opinion has been since confirmed and acted

(*s*) *Goodman* v. *Chase*, 1 B. & Ald. 297.

(*t*) 8 B. & C. 728. In the 7th ed. of this work it is stated that "a promise to indemnify may or may not be within the statute according to circumstances." This is submitted to be the correct rule in regard to express promises to indemnify. See *Pollock*, C. B., in *Cripps* v. *Hartnoll*, 4 B. & S. 419; *Reader* v. *Kingham*, 13 C. B. N. S. 344; *Wildes* v. *Dudlow*, L. R. 19 Eq. 198. See further on this point *Green* v. *Cresswell*, 10 Ad. & E. 453; *Cripps* v. *Hartnoll*, 2 B. & S. 697; 4 B. & S. 414; *Batson* v. *King*, 4 H. & N. 739; *Mallet* v. *Bateman*, 16 C. B. N. S. 530; L. R. 1 C. P. 163 (promise to give a guaranty within the statute).

(*u*) *Wilson* v. *Coupland*, 5 B. & Ald. 228.

(*x*) See *Parkins* v. *Moravia*, 1 C. & P. 376. There seems, notwithstanding the observations of *Abbott*, C. J., to the contrary, no rational distinction between the two cases.

(*y*) *Andrews* v. *Smith*, 2 C. M. & R. 627; *Stephens* v. *Pell*, 2 C. & M. 710; *Dixon* v. *Hatfield*, 2 Bing. 439. See *Walker* v. *Rostron*, 9 M. & W. 411.

(*z*) 11 Ad. & E. 438.

(*a*) In a note to the original and subsequent editions, doubts are cast on the accuracy of *Eastwood* v. *Kenyon*, for the following among other reasons:—(1) because promises, such

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upon by the Courts of Exchequer (*b*), Common Pleas (*c*), and by *Malins*, V.-C., in *Wildes* v. *Dudlow* (*d*).

A distinction was once taken between a promise to pay for goods, &c., for another, *before* and *after* delivery (*e*); but this is overruled, and it is now clear that, if the person for whose use the goods are furnished is liable at all, any promise by a third person, on sufficient consideration, to pay that debt must be in writing (*f*). In a word, the question by which it must be tested, whether a contract be or be not within the statute, is, *What is the promise?* Is it a promise to answer for the debt, default, or miscarriage of another, for which that other remains liable? If so, it must be in writing (*g*).

The reader must, however, be apprised, that it has been thought to follow from some of the decisions (*h*), that a man may bind himself to pay another's debt by a parol promise founded on a new consideration. This idea has been contro-

as the promise in that case, may be as complex, and the length of time that is to precede their accomplishment as great, as in the case of an ordinary guaranty, and they may, therefore, equally need written evidence; (2) because cases may be put in which these promises would become, in effect, guaranties; *e.g.*, where the promise is made to the debtor, or the stranger as trustee for the creditor, or where the debtor or stranger afterwards assign to the creditor; and (3) because the opinion expressed in *Eastwood* v. *Kenyon* appears to diverge from *Green* v. *Cresswell*, 10 Ad. & E. 453. It is, however, observed: "In making these observations, however, it is intended only to suggest the possibility of a discussion which may hereafter arise, not to impugn the proposition cited from *Eastwood* v. *Kenyon*, which indeed must ultimately be sustained if the meaning of the words, *promise to answer for the debt, default, or miscarriage of another*, be taken, as they well may, to refer to a promise to become a substitute to every intent for that other—to *answer* to the same *call* to which he would have answered under pain of the same liability." See *Batson* v. *King*, 4 H. & N. 739; *Cripps* v. *Hartnoll*, 2 B. & S. 697; 4 B. & S. 414.

(*b*) *Hargreaves* v. *Parsons*, 13 M. & W. 561.

(*c*) *Reader* v. *Kingham*, 13 C. B. N. S. 344.

(*d*) L. R. 19 Eq. 198.

(*e*) *Jones* v. *Cooper*, Cowp. 228.

(*f*) *Matson* v. *Wharam*, 2 T. R. 80; *Anderson* v. *Hayman*, 1 H. Bl. 120; *Birkmyr* v. *Darnell*, 1 Salk. 27; *S. C.*, 2 Ld. Raym. 1085.

(*g*) 1 Wms. Saund. 211 to 211 *e*; *Bushell* v. *Beavan*, 1 Bing. N. C. 103.

(*h*) *Houlditch* v. *Milne*, 3 Esp. 86; *Williams* v. *Leaper*, 2 Wils. 308; 3 Burr. 1886, recognised in *Castling* v. *Aubert*, 2 East, 325; *Edwards* v. *Kelly*, 6 M. & S. 204; *Bampton* v. *Paulin*, 4 Bing. 264. See, however, *Thomas* v. *Williams*, 10 B. & C. 664. See *Mallet* v. *Bateman*, L. R. 1 C. P. 163; and *Claney* v. *Pigott*, 2 Ad. & E. 473.

verted, and the cases explained, and reconciled to the rule as above stated, in an elaborate note, 1 Wms. Saund. 211*c*, n. 1; where it is contended, that the nature of the consideration cannot affect the terms of the promise itself, unless, as in *Goodman* v. *Chase* (*i*), it be an extinguishment of the liability of the original party. In the cases referred to, there was no principal debtor; and, indeed, in *Edwards* v. *Kelly*, cited above, the judges all professed to decide, on the ground that the promise there was not to pay the debt of another (*k*). Nature and form of contract.

Where A. has been concerned in inducing a tradesman to deliver goods to B., it often becomes a question whether the goods must be looked upon as actually *sold* to A., though delivered to B., or whether they must be considered as sold to B., A. becoming a surety for the price. In the former case, A. would be liable as a principal, and the contract would not fall within the statute. In the latter, A. would be liable only as surety, and only on a written guaranty. To decide this question, *to whom was credit given?* is, generally speaking (*l*), the province of a jury, who are to take into their consideration all the circumstances of the case (*m*). If, upon notice given to the plaintiff to produce his books, it appear that the credit was not originally given to A., that is strong, though not conclusive, evidence that he is but a surety (*n*).

It has been laid down, that a verbal promise to pay the debt of another, and also do some other thing, is void altogether (*o*). This seems, however, to hold good in those cases only in which

(*i*) Ante, p. 571, note (*s*).

(*k*) The debt of the principal debtor was suspended. The cases (*Edwards* v. *Kelly*, *Williams* v. *Leaper*, *Bampton* v. *Paulin*, supra) are not easily reconcilable. It has been suggested that they are examples of the rule that to bring a promise within the statute there must be an absence of all liability on the part of the promisor, except such as arises from express promise: *Fitzgerald* v. *Dressler*, 7 C. B. N. S. 374; De Colyar on Guarantees, 2nd ed. p. 116.

(*l*) See a case in which it arose on the record: *Taylor* v. *Hilary*, 1 C. M. & R. 741.

(*m*) *Mountstephen* v. *Lakeman*, L. R. 5 Q. B. 613; 7 Q. B. 196; 7 H. L. 17.

(*n*) *Keate* v. *Temple*, 1 B. & P. 158; *Croft* v. *Smallwood*, 1 Esp. 121.

(*o*) *Chater* v. *Beckett*, 7 T. R. 201; *Thomas* v. *Williams*, 10 B. & C. 664. See *Head* v. *Baldrey*, 6 Ad. & E. 459; *Storr* v. *Scott*, 6 C. & P. 241.

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the parts of the contract are so blended together that they cannot be separated (*p*).

Unless the agreement, &c.—The term *agreement* comprehends *contracting parties* (*q*), a *consideration*, and a *promise;* and it was held, that not only must all these exist in fact, but they must appear in the writing (*r*). It was, however, sufficient if the consideration could be gathered from the whole tenor of the writing; not that a mere *conjecture*, however plausible, would satisfy the statute, but it was enough if there was a well-grounded inference to be necessarily collected from the terms of the memorandum (*s*). This rule, requiring parties to express in the terms of a popular instrument, rarely prepared under professional advice, a consideration which the law would recognise as sufficient to support a promise—gave rise to numberless questions. Many of these involved most subtle and refined distinctions, and justice and right were constantly defeated by technical objections, in consequence of the defective form of the instrument, though the facts would have supported it. In order to obviate such results, the Mercantile Law Amendment Act, 1856 (*t*), provided that:—

"No special promise to be made by any person, after the passing of this Act, to answer for the debt, default, or miscarriage of another person, being in writing and signed by the party to be charged therewith, or some other person by him thereunto lawfully

(*p*) *Wood* v. *Benson*, 2 C. & J. 94.

(*q*) *Williams* v. *Lake*, 2 E. & E. 349; *Williams* v. *Byrnes*, 1 Moore, P. C. Ca. N. S. 154; *Vandenbergh* v. *Spooner*, L. R. 1 Ex. 316 (but query, whether this case rightly decided).

(*r*) *Wain* v. *Warlters*, 5 East, 10; *Jenkins* v. *Reynolds*, 3 B. & B. 14; *Saunders* v. *Wakefield*, 4 B. & Ald. 595; 1 Wms. Saund. 211, in notis.

(*s*) See the judgment of *Tindal*, C. J., in *Hawes* v. *Armstrong*, 1 Bing. N. C. at p. 766; and of *Patteson*, J., in *James* v. *Williams*, 5 B. & Ad. 1109; *Morrell* v. *Cowan*, 7 Ch. D. 151. And see *Jarvis* v. *Wilkins*, 7 M. & W. 410; where the following guaranty was held good:—

"I undertake to pay to R. J. 6*l.* 4*s.* for a suit *ordsred* by D. P.

(Signed) "S. W. W."

And if ambiguous, parol evidence is admissible to show what the parties meant: as where it was "Mr. D. informs me you require some person as guarantee for goods *supplied* to him by you in his business, I have no objection to act as such for payment of your account:" *Hoad* v. *Grace*, 7 H. & N. 494.

(*t*) 19 & 20 Vict. c. 97, s. 3. See it in App.

authorised, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document."

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This provision applies only to guaranties given after the passing of the Act (*u*), and, therefore, all instruments executed before that time remain subject to the same objections, and must be interpreted by the same rules as formerly prevailed. The necessity of the actual existence of a consideration, sufficient in law to support a promise (*x*), is not dispensed with, but its existence is left open to oral proof. If, therefore, it be questioned, the person asserting a claim under a guaranty must show that it was based on a good legal consideration, which, as a practical rule (*y*), may be said to consist of any benefit accruing to him who makes the promise, or any loss, trouble, or disadvantage undergone by, or charge imposed upon him to whom it is made. A consideration, consequently, wholly past or executed will not support the promise; thus, if A. be indebted to B., this will form no valid consideration for C.'s afterwards promising to pay that debt (*z*); the creditor yields nothing, nor does C. gain any advantage. But if an executed consideration has been moved at the request of the promisor, the case will be different. For instance, if B. had trusted A. at the instance or request of C., his promise to pay it couples itself with that antecedent request (*a*), which induced him to allow it to be contracted, and will be supported by it. The consideration for a guaranty must also, according to some cases, be of *some* (*b*) value in contemplation of law. But if this proposition means more than that, there

(*u*) 29th July, 1856.

(*x*) See *Rann* v. *Hughes*, 4 Bro. P. C. 27; 7 T. R. 350, n. (*a*); *Reech* v. *Kennegal*, 1 Ves. sen. 126; *Hawkes* v. *Saunders*, Cowp. 289; *Cooper* v. *Joel*, 1 De G. F. & J. 240.

(*y*) See *Harris* v. *Venables*, L. R. 7 Ex. 235; Smith on Contracts, by Malcolm, p. 90; De Colyar on Guarantees (2nd ed.), p. 20.

(*z*) *Wain* v. *Warlters*, 5 East, 10, and 2 Smith's Lead. Ca. 266, 9th ed.; *Saunders* v. *Wakefield*, 4 B. & Ald. 595; *Allnutt* v. *Ashenden*, 5 M. & G. 392; *Hoad* v. *Grace*, 7 H. & N. 494.

(*a*) *Payne* v. *Wilson*, 7 B. & C. 423; *Stead* v. *Liddard*, 1 Bing. 196; *Coe* v. *Duffield*, 7 Moore, 252; *James* v. *Williams*, 5 B. & Ad. 1109.

(*b*) 1 Roll. Abr. 23, pl. 29; *Edwards* v. *Baugh*, 11 M. & W. 641; *Semple* v. *Pink*, 1 Ex. 74.

Nature and form of contract.

must be a consideration, it is incorrect; all that is requisite is the existence of some consideration; for the Courts will not entertain the question of its adequacy (*c*), a question which the parties must be taken, in the absence of fraud, to have decided for themselves. A guaranty, therefore, to pay a debt in consideration of the creditor giving his debtor a certain (*d*) time for payment, however short, or to pay a past debt, however large, as well as any future debt, in consideration of the creditor continuing his transactions or giving further credit to any amount, will be binding. And this will be the case, though the guaranty is simply conditional, and the creditor does not enter into any binding engagement to continue the transactions or give further credit, if the creditor subsequently satisfies the condition (*e*). Thus, in one case (*f*), the creditor, having *bonâ fide* continued his dealings with the principal debtors, the following guaranty was held to be an available security for the antecedent as well as the subsequent debt:—

"As you are about to enter upon transactions in business with Messrs. Claridge, Brothers, & Nicholls, with whom you have already had dealings, in the course of which they may from time to time become largely indebted to you: in consideration of your doing so, I agree to be responsible to you for, and guarantee to you the payment of, any sums of money which that firm—whether it may consist of the same members as at present or others—*now is or may at any time be indebted to you*, so that I am not called on to pay more than the sum of 2,000*l.*" (*g*).

(*c*) *Brooks* v. *Haigh*, 10 Ad. & E. 323; *Coles* v. *Pack*, L. R. 5 C. P. 65.

(*d*) *Harris* v. *Venables*, L. R. 7 Ex. 235. As to the construction of guarantees upon such a consideration, see *Oldershaw* v. *King*, 2 H. & N. 399, 517; from which it would seem that if no specific time be mentioned, a *reasonable* time will be implied, and the guaranty will be good: *Semple* v. *Pink*, 1 Ex. 74, is open to doubt. See *Wynne* v. *Hughes*, 21 W. R. 628; and *Harris* v. *Venables*, supra.

(*e*) *Westhead* v. *Sproson*, 6 H. & N. 728; *Crears* v. *Hunter*, 19 Q. B. D. 341; *S. C.*, sub nom. *Crears* v. *Burnyeat*, 56 L. J. Q. B. 518.

(*f*) *Johnston* v. *Nicholls*, 1 C. B. 251.

(*g*) And see *Oldershaw* v. *King*, 2 H. & N. 517; *Chapman* v. *Sutton*, 2 C. B. 634; *Colbourn* v. *Dawson*, 10 C. B. 765; *Boyd* v. *Moyle*, Id. 644; *White* v. *Woodward*, 5 C. B. 810. A moral consideration is not sufficient to support a promise (*Littlefield* v. *Shee*, 2 B. & Ad. 811, 812); except where the express promise revives a precedent good legal consideration, which might have been enforced at law, through the

Though the parties and the promise must appear, the *amount* of the debt guaranteed need not be mentioned (*h*). Nature and form of contract.

Or some memorandum or note thereof, &c.—Under this, as well as under the 17th section, the contract may be collected from several distinct papers, provided they can be sufficiently connected without oral testimony (*i*); and as the writing is necessary to *evidence* the contract, not to *constitute* it, the memorandum need not have been delivered to the party relying on it. Therefore, a letter from a man to his own agent, or to any one else, setting out the agreement, is sufficient (*k*).

Signed by the party to be charged, or some other person, thereunto, by him, legally authorised.—See the remarks upon the corresponding words in the 17th section, *post*, Ch. XII., *Contracts of Sale*.

It has been laid down that a signature by the party as a witness to the instrument containing or referring to the agreement is sufficient, if, when signed, he was aware of the contents (*l*); and in what part of the instrument the signature is placed is immaterial, whether at the beginning or end (*m*). The guaranty will be valid if it be signed by the party *to be charged*, though it be not signed by the other contracting party (*n*); for

medium of an implied promise, had it not been suspended by some positive rule of law: *Wennall* v. *Adney*, 3 B. & P. 247, 249, 253; *Eastwood* v. *Kenyon*, 11 Ad. & E. at p. 447.

(*h*) *Bateman* v. *Phillips*, 15 East, 272.

(*i*) *Ridgway* v. *Wharton*, 6 H. L. Cas. 238; 27 L. J. Ch. 46; *Horsey* v. *Graham*, L. R. 5 C. P. 9; *Nene Valley Drainage Commissioners* v. *Dunkley*, 4 Ch. D. 1: *Baumann* v. *Jones*, L. R. 3 Ch. 508; and post, Chap. XII., *Contracts of Sale*.

(*k*) Per Lord *Hardwicke*, in *Welford* v. *Beazely*, 3 Atk. 503; *Bateman* v. *Phillips*, 15 East, 272; *Longfellow* v. *Williams*, Peake's Add. Ca. 225; *Gibson* v. *Holland*, L. R. 1 C. P. 1 (letter addressed to the attorney of plaintiff). See *Dobell* v. *Hutchinson*, 3 Ad. & E. 355.

(*l*) *Welford* v. *Beazely*, supra; *Coles* v. *Trecothick*, 9 Ves. 251, per Lord *Eldon*. But see *Gosbell* v. *Archer*, 2 Ad. & E. 500. See on this subject, post.

(*m*) *Ogilvie* v. *Foljambe*, 3 Mer. 62; *Selby* v. *Selby*, Id. 6; *Knight* v. *Crockford*, 1 Esp. 190; *Right* v. *Price*, Doug. 241. See *Bluck* v. *Gompertz*, 7 Exch. 862.

(*n*) *Laythoarp* v. *Bryant*, 2 Bing. N. C. 735; *Reuss* v. *Picksley*, L. R. 1 Ex. 342. See *Tawney* v. *Crowther*, 3 Bro. C. C. 318; *Hutton* v. *Gray*, 2 Ch. Ca. 164; *Seton* v. *Slade*, 7 Ves. 265; *Knight* v. *Crockford*, 1 Esp. 190.

Nature and form of contract.

(to use the words of *Tindal*, C. J., in *Laythoarp* v. *Bryant* (*o*)), there is "no case, nor any reason for saying that the signature of both parties is that which makes the agreement. The agreement is in fact made before any signature." Both parties must, it is true, have concurred in making the agreement; but the statute only requires that one, viz., the party to be charged, should sign the document that is evidence to it. A letter of guarantee to a bank, signed in the name of the firm, and also by the individual partners, was held to create joint and several liability (*p*).

In consequence of the decision in *Pasley* v. *Freeman* (*q*), which showed a mode of evading the 4th section by bringing an action in *tort* for deceit, alleging a false and fraudulent representation by the defendant with respect to the solvency of the third person, and that credit was given by the plaintiff on the faith of the representation, the 6th section of Lord Tenterden's Act (9 Geo. 4, c. 14) was passed. It declares that—

"No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person to the intent or purpose that such other person may obtain credit, money, or goods upon,* unless such representation or assurance be made in writing, signed by the party to be charged therewith."

* *Sic.*

The signature of an agent will not satisfy the statute (*r*).

The law merchant implies a contract of suretyship between the drawer and indorsee, and between indorsers and subsequent holders, of bills of exchange (*s*).

It is, in some cases, necessary that a guaranty should be stamped. The stat. 33 & 34 Vict. c. 97, imposes a stamp duty of 6*d.* on agreements, the subject-matter whereof is of the value of 5*l.* and upwards, not otherwise charged. To this there are, however, some exceptions, particularly of agreements for the

(*o*) 2 Bing. N. C. at p. 744. See *Reuss* v. *Picksley*, L. R. 1 Ex. 342.

(*p*) *Ex parte Harding*, 12 Ch. D. 557.

(*q*) 3 T. R. 51.

(*r*) *Swift* v. *Jewsbury*, L. R. 8 Q. B. 244; 9 Q. B. 301.

(*s*) See Bills of Exchange Act, 45 & 46 Vict. c. 61, s. 55; *Steele* v. *M'Kinlay*, 5 App. Cas. 754; *Wilkinson* v. *Unwin*, 7 Q. B. D. 636.

sale of goods. Contracts of guaranty are within the Act. Where the principal contract would require a stamp, so does the guaranty, and *vice versâ* (*t*). Nature and form of contract.

Section II.—*Surety, when and how far liable.*

The creditor is not bound by English law to sue the debtor before suing the surety (*u*). Nor, in the absence of express stipulation, is he even required to give notice to the surety of the debtor's default. The surety, however, is entitled to have his liability proved in the same way as the liability of the principal debtor; so that, if there be no special agreement to that effect, a judgment or award against the principal debtor is not binding on the surety, and is not evidence against him (*x*). Surety, when and how far liable.

The extent of the surety's liability depends, of course, on the peculiar construction of each guaranty. A contract to guarantee the payment of "any debt A. B. may contract in his business as jeweller, not exceeding one hundred pounds, after this date," is a contract which renders the guarantor answerable for any debts, not exceeding 100*l.*, which A. B. may, *from time to time*, contract in the way of his business (*y*). Such a contract is called *a continuing guaranty*. Disputes frequently arise, whether an instrument falls within this description or not. The best rule on the subject seems to be that laid down by Lord *Ellenborough* in *Merle* v. *Wells* (*z*), viz., that "if a party means to be surety only for a single dealing, he should take care to say so" (*a*).

(*t*) *Rein* v. *Lane*, L. R. 2 Q. B. 144; *Warrington* v. *Furbor*, 8 East, 242; *Watkins* v. *Vince*, 2 Stark. 368; *Martin* v. *Wright*, 6 Q. B. 917; *Glover* v. *Halkett*, 2 H. & N. 487; *Chatfield* v. *Cox*, 18 Q. B. 321.

(*u*) *Ranelagh* v. *Hayes*, 1 Vern. 189; *Wright* v. *Simpson*, 6 Ves. 714, 733; *A.-G.* v. *Resby*, Hardres, p. 377.

(*x*) *Ex parte Young*, *In re Kitchin*, 17 Ch. D. 668 (C. A.).

(*y*) *Merle* v. *Wells*, 2 Camp. 413; accord. *Laurie* v. *Scholefield*, L. R. 4 C. P. 622.

(*z*) 2 Camp. 413.

(*a*) For instances in which the guaranty has been confined to a single transaction, see *Melville* v. *Hayden*, 3 B. & Ald. 593; *Kay* v. *Groves*, 6 Bing. 276; *Tayleur* v. *Wildin*, L. R. 3 Ex. 303; *Nicholson* v. *Paget*, 1 C. & M. 48; in which last case the Court ex-

Surety, when and how far liable.

In fact, the contract of guaranty "should," as was said by *Martin*, B., in *Wood* v. *Priestner* (*b*), "be read in the same way as any other contract," and must be construed with regard to the whole of the surrounding circumstances. In *Heffield* v. *Meadows* (*c*) the guaranty was: "I, J. M., will be answerable for 50*l.* that W. T., butcher, may buy of I. H." *Willes*, J., in deciding that this was a continuing guaranty said:—

"It is obvious that we cannot decide that question, upon the mere construction of the document itself, without looking at the surrounding circumstances to see what was the subject-matter which the parties had in their contemplation when the guaranty

pressed itself averse to extending the rule of construction against guarantors. And see *Heffield* v. *Meadows*, L. R. 4 C. P. 595; *Hitchcock* v. *Humfrey*, 5 M. & G. 559; *Martin* v. *Wright*, 6 Q. B. 917; *Coles* v. *Pack*, L. R. 5 C. P. 65; *Nottingham Hide Co.* v. *Bottrill*, L. R. 8 C. P. 694; *Burgess* v. *Eve*, L. R. 13 Eq. 450. The decisions run very close, ex. gr., *Nicholson* v. *Paget*, supra: —"*I hereby agree to be answerable for the payment of* 50*l. for F. L., in case F. L. does not pay for the gin, &c., he receives from you:*"—Held *not* a continuing guaranty; *Allnutt* v. *Ashenden*, 5 M. & G. 392:—

"*Messrs. Allnutt & Arbouin,*

"50 *Mark Lane.*

"*Sirs,—I hereby guarantee Mr. John Jenning's account with you for wine and spirits to the amount of* 100*l.*

E. Ashenden.

"*Sittingbourne, April* 14, 1838."

Held *not* to be a continuing guaranty. But see *Mason* v. *Pritchard*, 12 East, 227; and *Horlor* v. *Carpenter*, 3 C. B. N. S. 172. In *Hargreave* v. *Smee*, 6 Bing. 244, the Court thought that the ordinary rule, verba fortius accipiuntur contra proferentem, applied to these as to other instruments. In *Wood* v. *Priestner*, L. R. 2 Ex. 66, 282, a guaranty: "*In consideration of the credit given by H. Co. to my son for coal supplied by them to him, I hereby hold myself responsible as a guarantee to them for the sum of* 100*l., and in default of payment of any accounts due, I bind myself by this note to pay to H. Co. whatever may be owing to an amount not exceeding* 100*l.*:" was held by the Courts of Exchequer and Exchequer Chamber a continuing guaranty. In *Laurie* v. *Scholefield*, L. R. 4 C. P. 622, the guaranty was: "In consideration of the Union Bank agreeing to advance, and advancing, to R. & Co. any sum or sums of money they may require, during the next eighteen months, not exceeding in the whole 1,000*l.*, we hereby, jointly and severally, guarantee the payment of any such sum as may be owing to the bank at the expiration of the said period of eighteen months." This was held to be a continuing guaranty. In *Morrell* v. *Cowan*, 7 Ch. D. 151, the guaranty was as follows: "In consideration of you, the said G. M., having at my request agreed to supply and furnish goods to M. M. C., I hereby guarantee to you, the said G. M., the sum of 500*l.* This guaranty is to continue in force for the period of six years and no longer." Reversing the decision of the Court below, the Court of Appeal held that this was limited to goods supplied after the guaranty.

(*b*) *Wood* v. *Priestner*, L. R. 2 Ex. 66, 282.

(*c*) L. R. 4 C. P. 595.

Surety, when and how far liable.

was given. It is proper to ascertain that, for the purpose of seeing what the parties were dealing about, not for the purpose of altering the terms of the guaranty by words of mouth passing at the time, but as part of the conduct of the parties, in order to determine what was the scope and object of the intended guaranty. Having done that, it will be proper to turn to the language of the guaranty to see if that language is capable of being construed so as to carry into effect that which appears to have been really the intention of both parties" (*d*).

In *Simpson* v. *Manley* (*e*), it was held by the Court of Exchequer, that the words, "if you give A. credit, we will be responsible," were not equivalent to saying, "if you give him *the credit usual in your trade*," viz., that of grocers. In *Combe* v. *Woolfe* (*f*), the guaranty was—

"Messrs C. D. & Co.

"I hereby guarantee and engage to see you paid for any porter that you may send Mr. A. B. of this town, until you receive notice to the contrary from me.

"L. W."

The custom of the plaintiffs was to give six months' credit, and then sometimes to take a bill at two; the plaintiffs having given A. B. eleven months' credit, it was held, that they thereby discharged the surety.

In *Holland* v. *Teed* (*g*) the guaranty was given to a banking house consisting of several partners for the repayment of bills drawn upon them by one of their customers at any advances to be made from time to time to the firm of C. & Co., "to continue in force for one year from the date hereof." *Wigram*, V.-C., decided that the guaranty ceased at the death of one of the partners before the expiration of the year.

For the purpose of ascertaining the intention of the parties, the Courts look to the extrinsic or surrounding circumstances. Thus, in *Leathley* v. *Spyer* (*h*), two persons gave to the committee of Lloyd's a guaranty for any debt that "J. S. may

(*d*) See also judgment of Willes, J., in *Leathley* v. *Spyer*, L. R. 5 C. P. 595.

(*e*) 2 C. & J. 12. See *Samuell* v. *Howarth*, 3 Meriv. 272, and *Howell* v. *Jones*, 1 C. M. & R. 97.

(*f*) 8 Bing. 156.

(*g*) 7 Hare, 50. See, also, *Pemberton* v. *Oakes*, 4 Russ. 154.

(*h*) L. R. 5 C. P. 595. See ante, p. 580.

Surety, when and how far liable.

contract in his capacity of broker." Read literally, it was a guaranty for the acts of J. S. But read in the light of the course of business, the guaranty was construed to extend to the debts of H., whom J. S. had appointed his substitute (*f*).

Questions often arise (*g*) as to whether a guaranty given to or for a firm continues in force after a change in its constitution. In order to lay down a definite rule upon this point, the Mercantile Law Amendment Act (*h*) provides that—

"No promise to answer for the debt, default, or miscarriage of another, made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, default, or miscarriage of a firm consisting of two or more persons or of a single person trading under the name of a firm, shall be binding on the person making such promise in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of the firm, unless the intention of the parties that such promise shall continue to be binding, notwithstanding such change, shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise."

This provision merely expressed the then existing rule of construction (*i*).

A person who guarantees the due payment of a bill becomes liable for the interest, if it be not paid at maturity (*m*).

Section III.—*Surety, how discharged.*

Surety, how discharged.

If the creditor discharge the principal, or enter into any agreement with him (*n*), by which the surety's situation is altered for the worse (*o*), or which deprives the surety of any

(*f*) H., in this remarkable case, was a partner of J. S., but was never a member or subscriber of Lloyd's.

(*g*) See the cases ante, pp. 55, 56.

(*h*) 19 & 20 Vict. c. 97, s. 4. See App.

(*i*) *Backhouse* v. *Hall*, 6 B. & S. 507. See *Wright* v. *Russell*, 3 Wils. 530; *Weston* v. *Barton*, 4 Taunt. 673.

(*m*) *Ackermann* v. *Ehrensperger*, 16 M. & W. 99.

(*n*) *Fraser* v. *Jordan*, 8 E. & B. 303.

(*o*) *Watts* v. *Shuttleworth*, 5 H. & N. 235; 7 H. & N. 353; *Sanderson* v. *Aston*, L. R. 8 Ex. 73.

Surety, how discharged.

rights, even though his position is improved (*p*), or which would render a proceeding against the surety a fraud upon the principal, he discharges the surety. For instance, if he agree (*i.e.*, enter into a binding contract (*q*)) with the principal debtor to give him time; for then, if he forbear proceeding during the time given, he wrongs the surety by prolonging his responsibility. While, on the other hand, if he proceed against the surety, he gives him a remedy over against the principal, and thus exposes the latter to proceedings, contrary to the faith of his agreement (*r*). So, if he substitute a new agreement instead of that for the performance of which the surety was responsible (*s*), or the duties of the principal be so altered as materially to affect the peril of the surety (*t*); or, it has been said, if the principal be guilty of gross laches whereby a security to which the surety on paying the debt would be entitled is lost (*u*); or, if there has been connivance amounting to fraud (*x*).

But the surety will not be discharged by mere forbear-

(*p*) *Polak* v. *Everett*, 1 Q. B. D. at p. 674, per *Blackburn*, J.

(*q*) *Philpot* v. *Briant*, 4 Bing. 717; *Clarke* v. *Birley*, 41 Ch. D. 422.

(*r*) *Combe* v. *Wolfe*, 8 Bing. 156; *Howell* v. *Jones*, 1 C. M. & R. 97; *Lewis* v. *Jones*, 4 B. & C. 506; *Isaac* v. *Daniel*, 8 Q. B. 500; *Hawkshaw* v. *Parkins*, 2 Swanst. 539; *Oakley* v. *Pasheller*, 4 Cl. & F. 207; *Oriental F. Co.* v. *Overend, Gurney & Co.*, L. R. 7 Ch. 142; 7 H. L. 348; *Davies* v. *Stainbank*, 6 De Gex, M. & G. 670; *Pooley* v. *Harradine*, 7 E. & B. 431; *Rees* v. *Berrington*, 2 Ves. jun. 540; *Law* v. *E. I. Co.*, 4 Ves. jun. 824; *Nisbet* v. *Smith*, 2 Bro. C. C. 579; *Ex parte Smith*, 3 Bro. C. C. 1; *Ex parte Gifford*, 6 Ves. 805; *Evans* v. *Bremridge*, 25 L. J. Chanc. 102, 334; *Boultbee* v. *Stubbs*, 18 Ves. 20; *Ex parte Glendinning*, Buck, 517; *Kearsley* v. *Cole*, 16 M. & W. 128. See the notes to *Lewis* v. *Jones*, ubi sup. As to the necessity of showing that the creditor knew him to be in reality only a surety in cases where he has contracted as principal, see *Strong* v. *Foster*, 17 C. B. 201; *The Mutual Loan F. Ass.* v. *Sudlow*, 5 C. B. N. S. 449 *Pooley* v. *Harradine*, ubi sup.

(*s*) *Whitcher* v. *Hall*, 5 B. & C. 269; *Evans* v. *Bremridge*, ubi sup. *Eyre* v. *Bartrop*, 3 Madd. 221; *Bonser* v. *Cox*, 6 Beav. 110.

(*t*) *Bonar* v. *Macdonald*, 3 H. L. Ca. 226; *Oswald* v. *Mayor of Berwick*, 5 H. L. Ca. 856; *S. C.*, 1 E. & B. 295; 3 E. & B. 653; *The North W. R. Co.* v. *Whinray*, 10 Ex. 77; *Pybus* v. *Gibb*, 6 E. & B. 902; *Skillett* v. *Fletcher*, L. R. 1 C. P. 217; 2 C. P. 469. In some instances the contract is divisible; see that case and *Harrison* v. *Seymour*, L. R. 1 C. P. 518.

(*u*) *Wulff* v. *Jay*, L. R. 7 Q. B. 756; *Sanderson* v. *Aston*, L. R. 8 Ex. 73. But quære as to the latter case.

(*x*) *Mayor of Durham* v. *Fowler*, 22 Q. B. D. at pp. 405, 419.

Surety, how discharged.

ance (*a*), unless, indeed, there be some stipulation in the guaranty binding the party guaranteed to use due diligence against the principal (*b*), nor by acceptance of a collateral security (*c*), nor if he himself have agreed to the indulgence given the principal (*d*), or have subsequently assented to it (*e*). And the surety will not be discharged, even where the creditor has altogether released and discharged the principal, if the surety have expressly consented to remain liable (*f*), or if, though the principal is discharged or time is given to him by the creditor, there is a reservation of the creditor's rights against the surety (*g*).

The question of what alterations in a contract will release the surety was considered by the Court of Appeal in the recent case of *Holme* v. *Brunskill* (*h*). There the plaintiff had agreed to let a farm of about 234 acres, with a right of pasturing sheep on the commons and fields adjoining, and a flock of 700 sheep to G. B. as yearly tenant. And the defendant entered into a bond for the due delivery by G. B. at the determination of the tenancy of the like number, species, and quality of good and sound sheep. Afterwards the plaintiff entered into an agreement with G. B., his tenant, by which the latter surrendered one field, and the

(*a*) *Orme* v. *Young*, Holt, 84; *Goring* v. *Edmonds*, 6 Bing. 94; *Musket* v. *Rogers*, 5 Bing. N. C. 728; *Carter* v. *White*, 25 Ch. D. 666.

(*b*) *Holl* v. *Hadley*, 2 Ad. & E. 758. See *Musket* v. *Rogers*, 5 Bing. N. C. 728; *Watson* v. *Alcock*, 22 L. J. Ch. 858; *Wulff* v. *Jay*, L. R. 7 Q. B. 756.

(*c*) *Twopenny* v. *Young*, 3 B. & C. 208; *Bell* v. *Banks*, 3 M. & G. 258; *Ansell* v. *Baker*, 15 Q. B. 20.

(*d*) *Tyson* v. *Cox*, 1 T. & R. 395; *Maltby* v. *Carstairs*, 7 B. & C. 735.

(*e*) *Smith* v. *Winter*, 4 M. & W. 454. As to evidence of assent, see *Leathley* v. *Spyer*, L. R. 5 C. P. 595.

(*f*) *Couper* v. *Smith*, 4 M. & W. 519; see *Ex parte Harvey*, 23 L. J. Bank. 26; *Union Bank of M.* v. *Beech*, 3 H. & C. 672.

(*g*) *Boaler* v. *Mayor*, 19 C. B. N. S. 76; *Kearsley* v. *Cole*, 16 M. & W. 128, cited by *Willes*, J., in *Bateson* v. *Gosling*, L. R. 7 C. P. 9, at p. 13.

Sects. 134 and 135 of the Indian Contract Act sum up the effect of the English decisions:—

"Sect. 134. The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

"Sect. 135. A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract."

(*h*) L. R. 3 Q. B. D. 495, at p. 505. See also *Polak* v. *Everett*, 1 Q. B. D. 669.

Surety, how discharged.

former reduced the rent by 10*l*. In an action against the surety in consequence of the flock of sheep having been delivered by G. B. at the determination of his tenancy reduced in number and deteriorated in value and quality, *Denman*, J., at the trial, left it to the jury to say whether the new agreement made any substantial or material difference in the relation of the parties as regards the capacity to do the things mentioned in the bond, and for which the action was brought. The jury answered in the negative, and assessed the damages at 132*l*. Upon appeal, *Cotton*, L. J., delivering the judgment of *Thesiger*, L. J., and himself (*Brett*, L. J., dissenting), thus stated the rule :—

"The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged, yet that, if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration, or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged. This is in accordance with what is stated to be the law by *Amphlett*, L. J., in the *Croydon Gas Company* v. *Dickenson*" (*i*).

In the latter case (*j*), *Bramwell*, L. J., says: "There are three ways in which the surety might be discharged. First, by time being given to the debtor; secondly, by an alteration in the contract between the principals (*i.e.*, the principal and the creditor); and thirdly, by the principals dealing together so as to affect the position of the surety to his prejudice."

The Bankruptcy Act, 1883 (*k*), specially provides, by s. 30, sub-s. 4, that an order of discharge of a bankrupt under that Act

(*i*) 2 C. P. D. at p. 51. See *Polak* v. *Everett*, 1 Q. B. D. 669.

(*j*) 2 C. P. D. at p. 51.

(*k*) 46 & 47 Vict. c. 52, in Appendix.

Surety, how discharged.

shall not release any person who, at the date of the receiving order, was surety, or in the nature of a surety, for him; and by s. 18, sub-s. 15, it is provided that "the acceptance by a creditor of a composition or scheme shall not release any person who under this Act would not be released by an order of discharge if the debtor had been adjudged bankrupt" (*i*); and a surety for the payment of rent under a lease to the principal will not be discharged by a disclaimer of the lease by the principal's trustee in bankruptcy (*k*).

If the creditor omit to perform any condition, express or implied, imposed upon him by the guaranty, the surety will of course not be liable (*l*). And fraud—for instance, the concealment of some material part of the principal's contract from the surety—vitiates and avoids his engagement (*m*).

"The principle to be drawn from the cases," said *Tindal*, C. J., delivering the judgment of the Court in *Stone* v. *Compton* (*n*), "we take to be this; that if, *with the knowledge or assent of the creditor*, any *material part* of the transaction between the creditor and his debtor is misrepresented to the surety, the misrepresentation being such that, but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased, the security so given is void at law on the ground of fraud."

(*i*) See *Petty* v. *Cooke*, L. R. 6 Q. B. 790.

(*k*) *Harding* v. *Preece*, 9 Q. B. D. 281; *E. and W. India Dock Co.* v. *Hill*, 22 Ch. D. 14.

(*l*) *Glyn* v. *Hertel*, 8 Taunt. 208; *Bacon* v. *Chesney*, 1 Stark. 192, per Lord *Ellenborough*; *Holl* v. *Hadley*, 5 Bing. 54; *Evans* v. *Whyle*, 5 Bing. 485; *Bulkely* v. *Lord*, 2 Stark. 406; *Elworthy* v. *Maunder*, 5 Bing. 295; *Clarke* v. *Green*, 3 Exch. 619; *Morten* v. *Marshall*, 2 H. & C. 305. In *Phillips* v. *Foxall*, L. R. 7 Q. B. 666, which was the case of a continuing guaranty for the honesty of a servant, and subsequently in *Sanderson* v. *Aston* L. R. 8 Ex. 73, it was held that the continuing of the principal in the service after default, without notice to the surety, discharged the latter. Sed quære. *Guardians of Mansfield Union* v. *Wright*, 9 Q. B. D. 683; *Mayor of Durham* v. *Fowler*, 22 Q. B. D. 394.

(*m*) *Pidcock* v. *Bishop*, 3 B. & C. 605; *Lee* v. *Jones*, 17 C. B. N. S. 482. See also *Railton* v. *Mathews*, 10 C. & F. 934; and *Fry*, J., in *Davies* v. *London & Provincial Insurance Co.*, 8 Ch. D. at p. 475. But the mere omission, without fraud, to communicate such matter will not vitiate the guaranty; *North B. In. Co.* v. *Lloyd*, 10 Ex. 523. See also *Stewart* v. *M'Kean*, *ib.* 675; *Lee* v. *Jones*, ubi supra; *Mayor of Durham* v. *Fowler*, 22 Q. B. D. 394.

(*n*) 5 Bing. N. C. 142.

Surety, how discharged.

The death of the surety does not affect the liability of his estate in respect of credit already given to the principal. Where, however, a surety, who has given a continuing guaranty, dies, *and notice of his death is given to the creditor* by the surety's executor, the executor will not be responsible for any liability incurred by the principal after the notice where the surety himself, if living, could have put an end to the guaranty (*p*).

Generally, a continuing guaranty, unless containing an express stipulation to the contrary, is revocable by the surety (*q*). But the nature of the transaction may show that the guaranty is not revocable. This would be so in cases where a relationship of contract is established between the principal and the creditor, and the surety gives the guaranty for the principal in that relationship, *e.g.*, where a guaranty is given for the performance by a tenant of the covenants in a lease granted to him, and the relationship of landlord and tenant is established on the faith of the guaranty. In these cases the guaranty is not revocable by the surety, and his executor is liable upon it after the surety's death (*r*).

If there are two or more sureties, the release of one discharges the others in all cases where the obligation of the co-sureties is *joint* or *joint and several*, for there the joint suretyship of the others is part of the consideration for the contract of each (*s*). Not so where the sureties are bound *severally* only, and the suretyship of the one is no part of the contract of the others, except in cases where, and to the extent to which, the right of contribution (a right which will be presently explained (*t*)) is thereby lost to the others (*u*).

It has been held that the death of a co-surety under a joint and

(*p*) *Coulthart* v. *Clementson*, 5 Q. B. D. 42; *Harriss* v. *Faucett*, L. R. 8 Ch. 866; *Bradbury* v. *Morgan*, 31 L. J. Ex. 462; 1 H. & C. 249.

(*q*) Note (*cc*), p. 588, post.

(*r*) *Lloyd's* v. *Harper*, 16 Ch. D. 290 (guaranty for a person on his admission as an underwriting member of Lloyd's); *Calvert* v. *Gordon*, 3 M. & R. 124.

(*s*) *Ward* v. *National Bank of New Zealand*, 8 App. Cas. (P. C.) 755, at pp. 764, 765, 766; *Bonser* v. *Cox*, 4 Beav. 379; *Nicholson* v. *Revill*, 4 Ad. & E. 675.

(*t*) See post, pp. 591 *et seq.*

(*u*) *Ward* v. *National Bank of New Zealand*, supra. See De Colyar on Guarantees, 2nd ed., p. 368.

Surety, how discharged.

several continuing guaranty does not by itself release the others from liability for future advances (*y*).

If a guaranty has been altered in a material particular while in the creditor's hands, without the consent of the guarantor, it becomes void (*z*).

Generally speaking, too, any matter which would operate in favour of the principal as an answer to, or in reduction of, the debt, *e.g.*, a set off, &c., may be taken advantage of by the surety (*a*). The surety will be discharged *pro tanto* if the creditor loses or parts with any security to which the former would have been entitled (*b*), and he is entitled to credit for sums received by the creditor under the bankruptcy of the debtor (*c*).

It has been decided that a continuing guaranty for advances is countermandable by parol (*cc*).

Section IV.—*Surety, how indemnified.*

Surety, how indemnified.

As soon as the surety's obligation to pay is become absolute, he has a right to apply to be indemnified by his principal (*d*). But this he cannot do till he is under actual liability (*e*).

After he has paid the debt of his principal, or any part of it,

(*y*) *Beckett* v. *Addyman*, 9 Q. B. D. 783 (C. A.). See *Bradbury* v. *Morgan*, 31 L. J., Ex. 462; 1 H. & C. 249; *Harriss* v. *Fawcett*, L. R. 15 Eq. 311; 8 Ch. 866. But quære, if the creditor had notice of the death; see the last case and *Offord* v. *Davies*, ubi inf.

(*z*) *Andrews* v. *Lawrence*, 19 C. B. N. S. 768; *Davidson* v. *Cooper*, 13 M. & W. 343; *The Bank of Hindustan, &c.* v. *Smith*, 36 L. J. C. P. 241. The two last cases related to instruments under seal. In the former, *Denman*, C. J., said the doctrine of *Pigot's Case*, 11 Co. Rep. 27 *a*, extended to unsealed instruments; but there has been a disposition to narrow the effect of that decision: *Aldous* v. *Cornwall*, L. R. 3 Q. B. 573.

(*a*) *Murphy* v. *Glass*, L. R. 2 P. C. 408; *Beohervaise* v. *Lewis*, L. R. 7 C. P. 372; Rules of Supreme Court, 1883, Ord. XIX. r. 3. Compare *Bowyear* v. *Pawson*, 6 Q. B. D. 540.

(*b*) *Wulff* v. *Jay*, L. R. 7 Q. B. 756; *Strange* v. *Fooks*, 4 Giff. 408; *Taylor* v. *Bank of New South Wales*, 11 App. Cas. 596, 602.

(*c*) See *Ellis* v. *Emmanuel*, 1 Ex. D. 157.

(*cc*) *Brocklebank* v. *Moore*, Starkie on Evidence, 3rd ed. vol. ii. p. 510, n. (*n*); *Offord* v. *Davies*, 12 C. B. N. S. 748. See *Burgess* v. *Eve*, L. R. 13 Eq. 450; *Goss* v. *Lord Nugent*, 5 B. & Ad. 58.

(*d*) *Nisbet* v. *Smith*, 2 Bro. C. C. 579; *Lee* v. *Rook*, Mos. 318; *Bechervaise* v. *Lewis*, L. R. 7 C. P. 372; *Duncan, Fox & Co.* v. *North and South Wales Bank*, 6 App. Cas. 1.

(*e*) See *Cock* v. *Ravie*, 6 Ves. 283.

Surety, how indemnified.

he may obtain reimbursement (*f*), and may sue *toties quoties* he is compelled to make a payment on account of it (*g*). He also has a right, which formerly was a right in equity only, to have any fund, which was charged with the principal debt, applied for his indemnification (*h*), and to have all the securities taken by the creditor preserved for him (*i*). This right extends to securities unknown to the surety and to those acquired after the contract of suretyship was entered into (*k*).

The Mercantile Law Amendment Act (*l*) expressly provides that—

"Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the ad-

(*f*) *Warrington* v. *Furbor*, 8 East, 242. And this he may do, notwithstanding he has executed a composition deed between the principal and his creditors, including the debt, but containing a reservation of remedies against sureties, under which he has been afterwards compelled to pay the debt: *Kearsley* v. *Cole*, 16 M. & W. 128. As to the right to recover interest, see *Ex parte Bishop, In re Fox*, 15 Ch. D. 400; *Petre* v. *Duncombe*, 20 L. J. Q. B. 242. As to his right to be reimbursed the costs of an action, see *Beech* v. *Jones*, 5 C. B. 696; *Le Blanche* v. *Wilson*, 21 W. R. 109; and *Hammond* v. *Bussey*, 20 Q. B. D. 79.

(*g*) *Davies* v. *Humphreys*, 6 M. & W. 153.

(*h*) See *Wright* v. *Morley*, 11 Ves. 12; *Glossop* v. *Harrison*, Coop. 61; *Ex parte Rushforth*, 10 Ves. 409; *In re Westzinthus*, 5 B. & Ad. 817; *Gedye* v. *Matson*, 25 Beav. 310 (surety who had paid off mortgage debt entitled to a charge on the estate). So a set-off due to the principal, *Murphy* v. *Glass*, L. R. 2 C. P. 408; *Bechervaise* v. *Lewis*, L. R. 7 C. P. 372; *Hobson* v. *Bass*, L. R. 6 Ch. 792.

(*i*) *Mayhew* v. *Crickett*, 2 Swanst. 185.

(*k*) *Pledge* v. *Buss*, Johns. 663; *Duncan, Fox & Co.* v. *N. & S. Wales Bank*, 6 App. Cas. 1; *Forbes* v. *Jackson*, 19 Ch. D. 615.

(*l*) 19 & 20 Vict. c. 97, s. 5. This alters the law as laid down in *Copis* v. *Middleton*, T. & R. 224; *Robinson* v. *Wilson*, 2 Madd. 434. As to the construction of the section, see *In re Cockran*, L. R. 5 Eq. 209; *In re Russell*, 29 Ch. D. 254.

Surety, how indemnified.

vances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: Provided always, that no co-surety, co-contractor, or co-debtor, shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable."

It appears that, even if the surety were under a disability which prevented him from obtaining, in his own person, the benefit of securities which had been set apart for the creditor, equity would have restrained the creditor from proceeding against the surety till he had resorted to those securities (*m*). And where the principal has assigned his effects to a trustee for his creditors, a creditor who has a guaranty may be forced to apply in discharge thereof a rateable part of any payment he may receive from the trustee (*n*). This obligation does not always exist. In cases where the amount of the guaranty is less than the amount of the principal's indebtedness, the Court, in a review, in *Ellis* v. *Emmanuel* (*o*), of the authorities, showed that the question depends on whether the intention was to guarantee the whole debt or to guarantee a part only. *Primâ facie* a guaranty for a floating balance is merely for a proportionate part of the debt; but whether the guaranty is for the whole debt or a part only is a question of construction for the Court (*p*).

In some respects the surety may stand in a better position than the creditor. If, for instance, the creditor of a firm were to obtain judgment against one partner he could not, according to *Kendall* v. *Hamilton* (*q*), sue another partner. This rule, it would appear, does not take away the rights of a surety for one partner as against another partner (*r*).

(*m*) *Wright* v. *Nutt*, 3 Bro. C. C. 326; 1 H. Bl. 136; *Cottin* v. *Blane*, 2 Anst. 544; *Wright* v. *Sampson*, 6 Ves. 714.

(*n*) *Bardwell* v. *Lydall*, 7 Bing. 489; and see *Raikes* v. *Todd*, 8 Ad. & E. 846; *Hobson* v. *Bass*, L. R. 6 Ch. 792; *Gee* v. *Pack*, 33 L. J. Q. B. 49.

(*o*) 1 Ex. D. 157.

(*p*) Ibid.

(*q*) 4 App. Cas. 504.

(*r*) *Badeley* v. *Consolidated Bank*, 34 Ch. D. 536.

Surety, how indemnified.

As the surety has a right to reimbursement from his principal *in toto*, so he has from his co-sureties for the same debt or duty (*s*) *pro tanto*, whether they are so under the same or separate instruments (*t*). This latter right is called the right to *contribution*, and was recognised both in law and equity (*u*), with this distinction, that at law a surety was, in every case, entitled to contribution from his co-sureties, in proportion to their number, without regard to the insolvency of any one of them, which equity, on the contrary, regarded. Thus, if A., B., and C. were co-sureties, A., having paid the debt, was entitled to recover, *at law*, a third only from B., though C. might have become insolvent (*v*); whereas, *in equity*, he was entitled to one half (*x*). But, both in law and equity, if he had been reimbursed in part, the contribution must be calculated by the residue (*y*). This distinction is now obsolete; the Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 24 and 25 (11), having enacted that in case of a conflict or variance between the rules of law and equity, the latter shall prevail. It is said that, where one surety becomes so at the instance of another, the latter cannot call on him for contribution (*z*).

We have seen that the surety's right to *reimbursement* from his principal accrues *toties quoties* he is compelled to make a payment. With regard to his right to *contribution*, it is different; for until one has paid more than his proportion, either

(*s*) *Cowell* v. *Edwards*, 2 B. & P. 268; *Deering* v. *Winchelsea*, Ibid. 270.

(*t*) *Whiting* v. *Burke*, L. R. 10 Eq. 539; 6 Ch. 342.

(*u*) 19 & 20 Vict. c. 97, s. 5, in App.

(*v*) *Cowell* v. *Edwards*, 2 B. & P. 268; *Browne* v. *Lee*, 6 B. & C. 689; *Batard* v. *Hawes*, 2 E. & B. 287; *Lowe* v. *Dixon*, 16 Q. B. D. 455.

(*x*) *Peter* v. *Rich*, 1 Cha. Rep. 19; *Hole* v. *Harrison*, 1 Ch. Ca. 246; *Layer* v. *Nelson*, 1 Vern. 456. The decree of Hadrian proceeded on this principle, "Ex epistola divi Hadriani compellitur creditor a singulis, *qui modo solvendo sint* litis contestatæ tempore, partes petere. *Ideoque si quis ex fidejussoribus eo tempore solvendo non sit, hoc cæteros onerat:*" Inst. ib. 3, tit. 20. See Hunter's Roman Law, 2nd ed., p. 577.

(*y*) *Knight* v. *Hughes*, 3 C. & P. 467; M. & M. 247; *Roach* v. *Thompson*, M. & M. 487; *Swain* v. *Wall*, 1 Cha. Rep. 80.

(*z*) *Turner* v. *Davies*, 2 Esp. 478; De Colyar's Law of Guarantees, 2nd ed. 313. See *Thomas* v. *Cook*, 8 B. & C. 728, which turned chiefly on the Statute of Frauds.

Surety, how indemnified.

of the whole debt or of the part which remains due from his principal, it is not clear that he ever will be entitled to demand anything from the other; and, before that, he has no equity to receive a contribution, and consequently no right of action, which is founded on the equity to receive it. Thus, if the surety, more than six years before the action, have paid a portion of the debt, and the principal has paid the residue within six years, the Statute of Limitations will not run from the payment by the surety, but from the payment of the residue by the principal; for, until the latter date, it does not appear that the surety has paid more than his share. The practical advantage of this rule is considerable, as it would tend to a multiplicity of suits, and to a great inconvenience, if each surety might sue the others for a rateable proportion of what he has paid the instant he had paid any part of the debt. But whenever it appears that one has paid more than his proportion of what the sureties can ever be called upon to pay, then, and not till then, it is also clear that such part ought to be repaid by the others, and the action will lie for it (*a*). As soon, too, as a surety has paid the original debt or performed the stipulated duty (*b*), he has a right to have any judgment, specialty, or security held by the original creditor transferred to him, and notwithstanding such payment or performance might otherwise be deemed at law to have satisfied it, to obtain through the medium of it a just proportion of his loss from any co-surety, co-contractor, or co-debtor, who is precluded from pleading the payment or performance as an answer.

The right to contribution equally exists whether the sureties were engaged jointly or severally, in one instrument or in several instruments, and whether they knew of each other's engagements or not; for, in all these cases alike, a payment by one is a benefit to all (*c*). But any surety may, of course, by

(*a*) *Davies* v. *Humphreys*, 6 M. & W. at p. 169; *Batard* v. *Hawes*, 2 E. & B. 287.

(*b*) 19 & 20 Vict. c. 97, s. 5, in Appendix.

(*c*) *Deering* v. *Winchelsea*, 2 B. & P. 270; *Whiting* v. *Burke*, L. R. 6 Ch. 342. See the judgment in *Craythorne* v. *Swinburne*, 14 Ves. 160; and 19 & 20 Vict. c. 27, s. 5.

using words to that effect, so modify his contract that he will be liable only on the default of previous sureties, who will then be entitled to no contribution from him (*d*). Surety, how indemnified.

Not only are sureties entitled to contribution among each other, they are entitled to the benefit of securities which one of them has taken to indemnify himself; and it matters not that the others were ignorant when they entered into the contract of the existence of them (*e*). "Whatever," said *Fry*, J., "goes to diminish the total amount of the burden must, in my judgment, be brought into hotchpot" (*f*).

The indorser of a bill of exchange who has paid the holder is entitled to recover over against the acceptor, and the relationship between the indorser and acceptor is sometimes described as that of suretyship; the acceptor is considered the principal and the indorsers as sureties, and the indorser who has paid will be entitled to any securities deposited with the holder by the acceptor (*g*).

Section V.—*Representations in the Nature of Guaranties.*

This chapter would be hardly complete if we were to take no notice of certain representations which have very much the same effect as guaranties, and for some time materially interfered with the operation of the 4th section of the Statute of Frauds. In consequence of the case of *Pasley* v. *Freeman* (*h*) (where such an action was decided to be maintainable), it became the practice to bring actions in which parties were charged, not strictly as guarantees for others, in which case the Statute of Frauds would have applied and the guaranty must have been in writing, but as having made wilfully false representations as to the credit of others, whom the plaintiffs were thereby induced to Representations in the nature of guaranties.

(*d*) *Craythorne* v. *Swinburne*, 14 Ves. 160.

(*e*) *Steel* v. *Dixon*, 17 Ch. D. 825; *In re Arcedeckne*, 24 Ch. D. 709 (*Pearson*, J.).

(*f*) *Steel* v. *Dixon*, 17 Ch. D. at p. 832.

(*g*) *Duncan, Fox, & Co.* v. *N. and S. Wales Bank*, 6 App. Cas. 1.

(*h*) 3 T. R. 51.

Representations in the nature of guaranties.

trust, and so committed a tortious act, for which they were liable to the party deceived in damages. Now these representations might have been made the ground of an action although not in writing; for they did not amount to guaranties, but were of the same description as the false representations spoken of hereafter in the chapter on Sales; and yet it very often happened, that the same evidence which would have proved a parol guaranty, would also prove such representation of solvency as has just been described. The 4th section of the Statute of Frauds being thus frequently evaded, it was, in order to remedy the mischief, enacted in stat. 9 Geo. 4, c. 14, commonly called Lord Tenterden's Act, that

"Sect. 6. No action shall be brought whereby to charge any person upon or by reason of any representation or assurance, made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon (*i*), unless such representation or assurance be made in writing (*k*), signed by the party to be charged therewith."

The effect of this section was elaborately discussed in the great case of *Lyde* v. *Barnard* (*l*), where the Court was equally divided, Lord *Abinger*, C. B., and *Gurney*, B., holding that a representation of the solvency of a fund belonging to A., in order that a third party might advance money on the security thereof, was a representation within the meaning of this Act, *Parke*, B., and *Alderson*, B., holding the reverse, unless, indeed, it should appear that the representation, though concerning the state of the fund, had partly reference to A.'s own personal solvency. This question was touched on in *Swann* v. *Phillips* (*m*), where the Court of Queen's Bench seems to have been in favour of the opinion of Lord *Abinger* and Baron *Gurney*.

Where the defendant has received the proceeds of goods obtained by his debtor from the plaintiff by means of a misrepresentation by the defendant falling within this statute,

(*i*) Thus in the statute.

(*k*) See *Tatton* v. *Wade*, 18 C. B. 371.

(*l*) 1 M. & W. 101.

(*m*) 8 Ad. & E. 457.

Representations in the nature of guaranties.

though an action may possibly lie to recover back the money, still, if the whole case rests on the misrepresentation, the statute applies, and it must be shown to have been in writing (*n*).

The Act applies to a representation made by one partner concerning the credit of the firm (*o*).

The signature of an agent of the person making the representation is not sufficient (*p*).

(*n*) *Swift* v. *Winterbotham*, L. R. 8 Q. B. 244; nom. *Swift* v. *Jewsbury*, 9 Q. B. 301 (Exch. Ch.); *Hasloek* v. *Fergusson*, 7 Ad. & E. 86.

(*o*) *Devaux* v. *Steinkeller*, 6 Bing. N. C. 84.

(*p*) See *Swift* v. *Jewsbury*, supra.

CHAPTER XII.

CONTRACTS OF SALE.

SECTION 1. *Ability of Vendor to Sell.*
2. *Form and Requisites of Contract.*
3. *Duties of Vendor.*
4. *Duties of Vendee.*
5. *Effect of Illegality.*

Contracts of sale.

SALE is used in two senses—(1) as an executory contract, and (2) as an executed contract of sale or a conveyance: (1) as a contract which does not pass the property, but gives a right of action against the seller; and (2) as a contract which passes the property and gives a right *ad rem*. Used in the sense of a conveyance, it may be defined as a contract, by which the property in goods, wares, and merchandises is transferred from one person to another in consideration of a price paid or to be paid (*a*).

Barter or Exchange is, correctly speaking, a transmutation of property from one man to another, for a consideration not given

(*a*) 2 Bl. Com. 446. Lord *Blackburn* defines sale as "a mutual agreement between the owner of goods and another, that the property in the goods shall for some price or consideration be transferred to the other at such a time and in such a manner as is then agreed." Introduction to Blackburn on Sale, 1st ed., p. 3. In the Indian Contract Act, s. 77, sale is defined as "the exchange of property for a price. It involves the transfer of the ownership of the thing sold from the seller to the buyer." See also Benjamin on Sale, 4th ed. pp. 1, 82; *South Australian Insurance Co.* v. *Randell*, L. R. 3 P. C. 101; *Dixon* v. *London Small Arms Co.*, 1 App. Cas. 632; *Ex parte Bright*, 10 Ch. D. at p. 571; article in *Law Quarterly*, Vol. I. at p. 1, on sect. 17 of the Statute of Fraudes by Mr. Justice Stephen and Sir Frederick Pollock.

Contracts of sale.

in money, but in some other sort of commodity (*b*). The distinction is for most purposes immaterial. Payment, if the parties so agree, need not be in money.

A transfer of property means *primâ facie* an entire disposition, as, in case of land, of the fee simple. Property is, however, used in a less extensive sense, and not necessarily as meaning the right to deal with an article to the full extent permitted by law. Only a part of the rights forming the idea of property may be transferred. Thus it may be said that the property in goods has passed to the purchaser though, in fact, the vendor retains the right in certain contingencies of selling, and though, in the event of his insolvency, the property in the goods will vest in the vendor's trustee in bankruptcy. Hence such expressions as "general property" and "special property" are in use (*c*). Whether the first or second is passed in a contract of sale is to be determined by the intention of the parties.

Section I.—*Ability of Vendor to Sell.*

Ability of vendor to sell.

Where a man has in himself the property in goods, the general rule is, that he, and he only, may dispose of them by *sale* to whomsoever and however he pleases (*d*). Provided that a judgment have not been obtained against him and a writ of execution, whereby the goods may be seized or attached, actually delivered to, and remains unsatisfied in the hands of, the sheriff, of which the buyer has notice (*e*); for then the goods are bound to answer the debt from the time of delivering the writ to the sheriff, as they formerly were from its teste (*f*). Even in that case, as the property remains in him, he

(*b*) See 3 Salk. 157; *Harrison* v. *Luke*, 14 M. & W. 139; and Blackburn on Sales, 2nd ed. p. 9.

(*c*) See *Jenkyns* v. *Brown*, 14 Q. B. 496, where the "general property" is said to have passed to the plaintiff, while a "special property" passed to the defendants.

(*d*) See remarks of Lord *Cairns* in *Cundy* v. *Lindsay*, 3 App. Cas. p. 463; and in *Harkness* v. *Russell*, 11 Davis, 663 (U. S. S. C.), a discussion of the rights which a purchaser of goods under a conditional sale can convey to a vendee.

(*e*) 29 Car. 2, c. 3; Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 1, in Appendix. See *Hobson* v. *Thelluson*, L. R. 2 Q. B. 642.

(*f*) See *Woodland* v. *Fuller*, 11 Ad. & E. 859.

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may dispose of them, subject to the sheriff's right to seize by virtue of the execution. And a valid sale might formerly be made of them in *market overt*, and may now (*f*) be made for a valuable consideration, and before seizure, to any *bonâ fide* purchaser *who has not notice of any writ* against the vendor's goods remaining unexecuted in the hands of the sheriff, even after the delivery of the writ to him (*g*).

Where a man has not in himself the property of goods, but only the possession, as if he be a thief or finder (*h*), he nevertheless may make a valid sale, so that the buyer will be secure of his purchase; provided that such sale be made *in market overt* during the usual market hours. This *market overt*, in the country, is only held on special days provided for particular places by charter or prescription. But in the City of London every day, except Sunday, is market day. The market place, or spot of ground set apart by custom for the sale of particular goods, is, also, in the country, the only *market overt;* but in London every shop in which goods are exposed publicly and openly to sale is *market overt*, but for such things only as the owner professes to trade in (*i*).

There are some cases in which even a sale in market overt will not secure the purchaser; as if the goods were the property of the king, or if the buyer knew they were not the seller's, or was guilty of any other fraud in the transaction. Nor do the privileges of the market overt embrace sales made in a *covert* place within its limits, as in a back room or warehouse, or in a shop whose windows are closed up (*j*); sales between sun setting

(*f*) 19 & 20 Vict. c. 97, s. 1; *Williams* v. *Smith*, 2 H. & N. 443; *Gladstone* v. *Padwick*, L. R. 6 Ex. 203.

(*g*) Per Lord *Hardwicke*, *Lowthal* v. *Tonkins*, Barnard. at p. 42; *S. C.* 2 Eq. Ca. Abr. 381; *Samuel* v. *Duke*, 3 M. & W. 622.

(*h*) *Hollins* v. *Fowler*, L. R. 7 H. L. 757.

(*i*) *Case of Market Overt*, 5 Rep. 83 b; *L'Evesque de Worcester's Case*, Moore, 360; *S. C.* Poph. 84; Comyns' Dig. "Market" E., 2 Bl. Com. 449; *Wilkinson* v. *King*, 2 Camp. 335; *Lyons* v. *De Pass*, 11 Ad. & E. 326, which see, on the question, *what is a shop*, within the custom; *Crane* v. *The London Dock Co.*, 5 B. & S. 313. As to the liability of a salesman in market overt who sells for a thief, see *Delaney* v. *Wallis*, 14 L. R. Ir. 31; and as to market overt in the country, Tudor's Cases in Mercantile Law, 3rd ed. p. 277.

(*j*) 2 Inst. 713; *Case of Market Overt* and *L'Evesque de Worcester's Case*, supra; 2 Roll. Ab. tit. "Market Overt," 50, p. 122; *Wilkinson* v. *King*, 2 Camp.

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and sun rising (*k*); cases in which the treaty for sale was begun out of market overt or by sample (*l*); sales of goods not usually sold in that particular market (*m*), the bulk not being in the market. Neither does the rule respecting *sales* in market overt extend to gifts (*n*) or pawning (*o*). Notwithstanding any intervening sales, if the original vendor, who sold without having the property, come again into possession of the goods, the original owner's right to them will revive (*p*).

Apparently the statute, while protecting an innocent purchaser, does not protect an innocent vendor; he may be liable to the true owner (*q*). In general, *a sale in market overt* will secure the purchaser, though the goods purchased have been stolen; yet stat. 24 & 25 Vict. c. 96, s. 100 (*r*), enacts that—

"If any person guilty of any such felony or *misdemeanor* as is mentioned in this Act (*s*), in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, *in such case the property shall be restored* to the owner or his representative; and in every case in this section aforesaid, the Court before whom any person shall be tried for any such felony or misdemeanor *shall have power* to award, from time to time, writs of restitution for the said property, or to order the restitution thereof in a summary manner."

The property, therefore, in the chattel upon conviction becomes revested in the owner, who may bring an action for its

335 (a wharf not a market overt in London).

(*k*) 2 Inst. 714.

(*l*) 2 Inst. 713; *Crane* v. *London Dock Co.*, supra; *Hill* v. *Smith*, 4 Taunt. at p. 532.

(*m*) *Marner* v. *Banks*, 17 L. T. N. S. 147 (Aldridge's not market overt for carriages).

(*n*) 2 Inst. 713.

(*o*) *Hartop* v. *Hoare*, 2 Str. 1187; 1 Wills. 8; 3 Atk. 44; *Packer* v. *Gillies*, 2 Camp. 336; *Crane* v. *London Dock Co.*, supra.

(*p*) 2 Bl. Com. 450.

(*q*) *Ganly* v. *Ledwidge*, Ir. R. 10 C. L. 33, followed in *Delaney* v. *Wallis*, 14 L. R. Ir. 31.

(*r*) The previous statute, 21 Hen. 8, c. 11, only extended to felonies. See *Parker* v. *Patrick*, 5 T. R. 175.

(*s*) There is an exception in the section in the case of the prosecution for a *misdemeanor* of any trustee, banker, merchant, attorney, factor, broker, or other agent intrusted with the possession of goods or documents of title to goods.

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recovery against any person who detains it, notwithstanding no writ of restitution or order under the statute has been made, as the remedy thus afforded is cumulative (*t*). The statute applies to cases where goods have been obtained by false pretences, even where the property has passed. G. was induced by false pretences to sell goods to K. and H. who were prosecuted and convicted. Afterwards the goods were sold in market overt to B., who had no notice of the fraud. K. and H. were subsequently convicted of obtaining goods by false pretences. The House of Lords decided that the property in the goods revested in G., the seller, upon conviction of K. (*u*). The statute does not affect a person who purchased the goods in market overt *after* the felony, and disposed of them again before the conviction (*v*). And the section provides that:—

"If it shall appear, before any award or order made, that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, shall have been *bonâ fide* taken or received by transfer or delivery for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had by any felony or misdemeanor, been stolen, taken, obtained, extorted, embezzled, converted or disposed of, in such case *the Court shall not award or order* the restitution of such security."

There are some very peculiar provisions with respect to the sale of *horses* in *market overt* enacted by stat. 2 & 3 Phil. & M. c. 7, and 31 Eliz. c. 12. These enactments require that the sellers of horses at fairs, &c., shall be known to the toll-keeper or some other credible person, and a note of the sales and the prices

(*t*) *Scattergood* v. *Sylvester*, 15 Q. B. 506. A person whose goods have been stolen and sold, not in market overt, may recover them by action from an innocent vendee, though he has taken no steps to prosecute the thief: *White* v. *Spettigue*, 13 M. & W. 603; *Ex parte Ball*, 10 Ch. D. 667; *Midland Ins. Co.* v. *Smith*, 6 Q. B. D. 561. And see *Chowne* v. *Baylis*, 31 Beav. 351; *Walker* v. *Matthews*, 8 Q. B. D. 109.

(*u*) *Bentley* v. *Vilmont*, 12 App. Cas. 471.

(*v*) *Horwood* v. *Smith*, 2 T. R. 750; *Bentley* v. *Vilmont*, 12 App. Cas. 471, overruling *Moyce* v. *Newington*, 4 Q. B. D. 32. See *Queen* v. *Justices of the Central Criminal Court*, L. R. 17 Q. B. D. 598; 18 Q. B. D. 314 (C. A.), as to restitution of the proceeds of the goods.

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entered in the toll-keeper's book, and a note given to the buyer. Stat. 31 Eliz. c. 12, gives the owner of a stolen horse a right to redeem it at any time within six months on paying the price *bonâ fide* given (*x*).

There are some cases in which a valid sale may be made by virtue of a *power* conferred by agreement or by law on the vendor not being the owner of the goods sold. Thus, a sheriff after seizure (*y*) of the goods of the execution debtor may sell according to the exigency of the writ of execution: and if that writ be afterwards set aside, the vendee does not seem liable to return the goods, provided he has acted *bonâ fide* (*z*). But the vendee under a distress warrant, issued upon a conviction, and invalid upon the face of it, has been thought not to be similarly protected (*a*).

An agent or a person in possession of certain documents generally used as symbols of property is, in many cases, able to make a valid sale of the goods of another by the provisions of the Factors Act, which are set out at length and commented upon in a preceding chapter (*b*).

There is an apparent exception in the case of contracts of sale induced by fraud. When the vendor intends to part with the property and possession, such contracts are voidable, not void. If, before the contract is avoided, the purchaser sells the goods, a second purchaser for value without notice of the fraud will acquire a good title as against the original owner (*c*), unless, as we have seen, the first purchaser be convicted under 24 & 25 Vict. c. 96 (*d*).

(*x*) Tudor's Cases in Mercantile Law, 3rd ed. 284.

(*y*) *Manning's Case*, infra; *Ex parte Hall, In re Townsend*, 14 Ch. D. 132. By Rules of Supreme Court, 1883, O. L. r. 2, in an action the Court may order perishable goods to be sold. See *Bartholomew* v. *Freeman*, 3 C. P. D. 316; *The Hercules*, 11 P. D. 10.

(*z*) *Manning's Case*, 8 Co. 96 b; *Doe* v. *Thorn*, 1 M. & S. 425; and the cases cited in *Lock* v. *Sellwood*, infra. As to a sale upon an execution in the county court by the high bailiff, see 9 & 10 Vict. c. 95, ss. 94, 106.

(*a*) *Lock* v. *Sellwood*, 1 Q. B. 736.

(*b*) Ante, Bk. 1, ch. 5, s. 4, pp. 145 et seq.

(*c*) *Cundy* v. *Lindsay*, 3 App. Cas. 459, at p. 464; *White* v. *Garden*, 10 C. B. 919, and see as to cases in which the contract is void, *Pease* v. *Gloahec*, L. R. 1 P. C. 219; *Babcock* v. *Lawson*, 5 Q. B. D. 284.

(*d*) *Bentley* v. *Vilmont*, ante, p. 600.

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Negotiable instruments are also an exception to the general rule, that a valid sale cannot be made, except in *market overt*, of property, to which the vendor has no right; the nature of these, and their transferability, has already been discussed in Book II., Chap. IV., to which the reader is referred.

Property in goods may *by estoppel* be acquired as against the true owners from persons who are not the owners, that is to say, the actual owners may act so as to lead to the belief that others are the true owners. In virtue of this principle, if an undischarged bankrupt is allowed by the trustee to trade and to get credit, the new creditors will be entitled to be paid out of the assets in priority to the old creditors (*e*). For similar reasons, under the Bankruptcy Act, 1883, property which is in the reputed ownership of the bankrupt in the circumstances stated in sect. 44, passes to the trustee.

Again, persons holding certain securities are entitled to sell. Thus a pawnee, though not possessing the property in the article pledged or pawned, may, unlike a person having a mere lien, on default by the pledgor or pawnor, or after the lapse of a reasonable time, sell the goods deposited with him (*f*), becoming a trustee for the pledger or pawner in respect of the surplus, if any, of the price after deducting the amount advanced, &c. The sale of pledges by pawnbrokers is now regulated by the Pawnbrokers Act, 1872 (*g*).

By many statutes persons are empowered to sell goods of which they are not the owners; *e.g.*, high bailiffs of County Courts under execution in those Courts (by 51 & 52 Vict. c. 43, s. 154); trustees in bankruptcy (by 46 & 47 Vict. c. 52, s. 56 (1)); liquidators of joint stock companies (by 25 & 26 Vict. c. 89, s. 95, par. 3); innkeepers by the Innkeepers Act, 1878 (41 & 42 Vict. c. 38).

(*e*) *Engelbach* v. *Nixon*, L. R. 10 C. P. 645.

(*f*) *Martin* v. *Reed*, 11 C. B. N. S. 730; *Johnson* v. *Stear*, 330; *Pigot* v. *Cubley*, Ib. 701; *In re Morritt*, 18 Q. B. D. at pp. 232, 235. A pawner retains his property, *Langton* v. *Waite*, L. R. 6 Eq. 165; and the right to sell, subject to the pawnee's right to do so, *Franklin* v. *Neate*, 13 M. & W. 481. As to the right of the pawnee to re-pledge, see *Donald* v. *Suckling*, 1 Q. B. 604; *Langton* v. *Waite*, L. R. 6 Eq. 165; *Halliday* v. *Holgate*, L. R. 3 Ex. 299.

(*g*) 35 & 36 Vict. c. 93, s. 19.

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A recovery in trespass or trover in respect of personal chattels, followed by satisfaction, operates against the plaintiff, as if there had been a sale to the defendant, for *solutio pretii emptionis loco habetur*; otherwise, if not followed by satisfaction, or, it is said, if the damages are not estimated on the footing of the full value (*h*).

Section II.—*Form and Requisites of a Contract of Sale.*

Form and requisites of a contract of sale.

A sale of goods must either be by *deed* or *parol*. A sale by deed is not, at present, very usual, except in cases where the thing sold is of some importance, as where the vendor wishes to convey his entire property to the vendee, or where the sheriff sells under an execution. When such a deed, which is denominated a *bill of sale*, is executed, the property in the goods conveyed by it passes out of the vendor into the vendee, by its delivery (*i*).

A sale of goods must either be by parol or deed. A parol sale of goods might, according to the common law, have been in every instance effected either by (1) an agreement to be completed *in presenti*, coupled with tender, part payment, or delivery of a part of the goods by way of earnest, or (2) by an agreement to be completed *in futuro* (*k*).

"If one sell me a horse, or any other thing, for money or any other valuable consideration, and the same thing is to be delivered

(*h*) See the authorities collected in the learned notes to *Holmes* v. *Wilson*, 10 A. & E. 503; judgment of *Tindal*, C. J., in *Cooper* v. *Shepherd*, 3 C. B. at p. 272; note of Serjeant Manning to *Barnett* v. *Brandon*, 6 M. & G. at p. 640; *Willes*, J., in *Brinsmead* v. *Harrison*, L. R. 6 C. P. at p. 589; *Ex parte Drake*, 5 Ch. D. 866. In detinue the property in the goods is in the plaintiff, and the judgment is that he do recover them; but if he obtains the *value* of the goods in execution, instead of the *goods*, it would seem on the same reasoning that the property in the goods passes to the defendant. See *Eberles Hotels Co.* v. *Jonas*, 56 L. J. Q. B. 278 (C. A.); 18 Q. B. D. 459.

(*i*) Noy's Max. c. 42; Com. Dig. "Biens," D. 3; *Carr* v. *Burdiss*, 1 C. M. & R. 782; *Brighton Rail. Co.* v. *Fairclough*, 2 M. & G. 674; *Gale* v. *Burnell*, 7 Q. B. 850.

(*k*) Com. Dig. *Agreement*, B. 3, and the other authorities cited by *Holroyd*, J., in *Tarling* v. *Baxter*, 6 B. & C. at p. 362. See *Dunmore* v. *Taylor*, Peake, 41, and the notes there.

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to me at a day certain, and by our agreement a day is set for the payment of the money; or all or part of the money is paid in hand; or I give earnest money (albeit it be but a penny) to the seller; or I take the thing bought by agreement into my possession, where no money is paid, earnest given, or day set for the payment; in all these cases there is a good bargain and sale of the thing to alter the property" (*l*).

The presumption was that the price was to be paid concurrently with the delivery of the chattels. Hence, if A. agreed to pay so much for goods, and B., the owner, agreed to take it, and no more passed, but the parties had separated, this agreement would have become void and unavailable (*m*), such separation being equivalent to a mutual consent to rescind it. But if B. had tendered the goods, or A. the price (*n*), or B. had received any part of the price, though but a penny, or A. any, even the very smallest, portion of the goods (*o*), both would have been bound to their bargain; though B. would in no case have had a right to the remainder of the price until he was himself ready to deliver the goods to A., and A. no right to the possession of the goods till he was ready to pay the whole of the price to B. (*p*). The bargain and sale might be on credit, expressly provided for, or inferred from usage, or the circumstances of the case.

After a payment or tender of the entire price, the property of the goods became vested in the vendee, so that he might, if the vendor had refused to deliver them, have maintained trover, and would have had to bear the loss had he of his own will permitted them to remain in the vendor's hands, and they had there been accidentally destroyed (*q*). Whether the

(*l*) Sheppard's Touchstone, ch. 10, p. 224.

(*m*) Lutw. 252; Dyer, fol. 30, pl. 203; 14 Hen. 8, c. 22; 2 Bl. Com. 447.

(*n*) 2 Bl. Com. 447; Sheppard's Touchstone, 225.

(*o*) 2 Bl. Com. 448; Noy's Max. c. 42. See *Hinde* v. *Whitehouse*, 7 East, 558; Sheppard's Touchstone, 224.

(*p*) Hob. 41; 2 Bl. Com. 448; *Peters* v. *Opie*, 2 Saund. 352 *b*, *in notis*. See *Bach* v. *Owen*, 5 T. R. 409; *Rawson* v. *Johnson*, 1 East, 203. There is one case in which it was laid down by *Bayley*, J., that a vendor who had sold goods on ready money terms, and whose servant *by mistake* delivered them without receiving the money, might, after a demand and refusal, bring trover: *Bishop* v. *Shillito*, 2 B. & Ald. 329, n. See *Brandt* v. *Bowlby*, 2 B. & Ad. 932.

(*q*) Sheppard's Touchstone, 225; 2 Bl. Com. 448. See *Tarling* v. *Baxter*,

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effect of part payment or earnest be to bind the bargain and alter the property, or merely to prove the contract, has been much discussed (*r*). It is submitted that the effect of payment of earnest is to prove the contract, but that the property passes independently of this by the mere agreement of the parties (*s*).

It is convenient to divide sales of goods into the following classes:—

(1) Of goods as to which nothing is required by the contract to be done by the seller before delivery in accordance with the contract;

(2) Of goods as to which the seller is bound under the contract to do something, in order to make them properly deliverable, or to determine their price;

(3) Of goods which must be separated from the mass or bulk before delivery;

(4) Of goods not yet made or manufactured;

(5) Of goods which are to form part of other goods or chattels.

In all these cases the general rule is, that the intention of the parties determines when the property passes; acts which would be held to amount to a transfer of the property will not have that effect if the intention of the parties to the contrary be apparent from the contract; and the rules which follow do not, therefore, hold good when an intention at variance with them can be deduced from the words or acts of the parties. The parties may make, expressly or by implication, any term or condition precedent to passing the property, so that it will not pass even if the goods be delivered. Thus, in the class of cases of which *Shepherd* v. *Harrison* (*t*) is an example, where a bill of lading accompanies a bill of exchange sent to the vendors, the acceptance of the latter is a condition precedent to passing the property, which remains in the seller though the

6 B. & C. 360; *Hinde* v. *Whitehouse*, 7 East, 558. As to an antecedent loss, see *Strickland* v. *Turner*, 7 Exch. 208.

(*r*) See Noy's Max. c. 42; Sheppard's Touch. 224; *Bach* v. *Owen*, 5 T. R. 409; B. N. P. 50.

(*s*) Benjamin on Sale (4th ed.), 317.

(*t*) L. R. 4 Q. B. 196, 493; 5 H. L. 116; *Rew* v. *Payne*, 53 L. T. 932; *Swain* v. *Shepherd*, 1 M. & R. 223.

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goods are in the purchaser's hands. So, in hiring agreements as to furniture, by which the hirer agrees to pay for the furniture in instalments, the property does not pass to the hirer until all the instalments are paid (*u*). But in the absence of any term, express or implied, in the contract, the rules here enumerated apply.

(1) The rule as to Class (1) is thus stated by Lord *Blackburn* (*v*) :—

"A contract for a valuable consideration, by which it is agreed that the property in a specific ascertained article shall pass from one to another, is effectual, according to the law of England, to change the property. It may be that the party who has sold the article is entitled to retain possession till the price is paid, if that was by the contract to precede delivery, but still the property is changed."

The same judge thus lucidly explains and illustrates this rule (*w*) :—

"By the English law when there was what civilians would call *emptio perfecta*, and what English lawyers call a bargain and sale—a contract for good and valuable consideration to pass the property in particular chattels—as soon as that was ascertained the property did pass, and the purchaser, although he might not be entitled to delivery, for there might be a vendor's lien or something else to prevent delivery, was entitled nevertheless to the property in the goods, to the *jus in re* as well as to the *jus ad rem*. That made a very considerable practical difference between the law of *England* and the law of *Scotland;* for the law of *Scotland* was like the civil law upon which it was founded, the maxim of the civil law being *traditionibus et usucapionibus non nudis pactis transferuntur rerum dominia* (*x*). When there was not an actual delivery,—however complete the contract might be, although it was *emptio perfecta* to the fullest extent, amounting to all that in the great chapter of the Digest upon that subject has been considered to be *emptio perfecta*, and although every farthing of the price was paid—yet the *dominium rei*, the *jus in re*, did not pass to the purchaser. Although he had the

(*u*) *Ex parte Crawcour*, 9 Ch. D. 419; *Crawcour* v. *Salter*, 18 Ch. D. 30; *Elphick* v. *Barnes*, 2 C. P. D. 321.

(*v*) *Seath* v. *Moore*, 11 App. Cas. at p. 370. As to the explanation of the rule, see judgment of *Bayley*, J., in *Dixon* v. *Yates*, 5 B. & Ad. at p. 340.

(*w*) In *M'Bain* v. *Wallace & Co.*, 6 App. Cas. at p. 608.

(*x*) Bell's Inquiries into the Contract of Sale, p. 12. See the Mercantile Law Amendment (Scotland) Act (19 & 20 Vict. c. 60), s. 1.

jus ad rem, and could, as long as the vendor was *sui juris*, compel the vendor to deliver to him the goods, he had not the *jus in re*."

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The right of the buyer to the goods, as against third persons, may, in certain circumstances, be affected by the seller being allowed to remain in possession. If the seller becomes bankrupt, the property in the goods may, under sect. 44 of the Bankruptcy Act, 1883 (*y*), pass to his trustee as goods in his possession, order, or disposition, in his trade or business, by the consent of the true owner, under such circumstances that he is the reputed owner thereof. The buyer may also be deprived of the goods by the operation of the Bills of Sale Acts; the transaction, if evidenced (*a*) by a bill of sale (*b*), whether absolute or by way of mortgage, must be registered under the Bills of Sale Act, 1878, otherwise the bill of sale will be void as against trustees in bankruptcy, or sheriff's officers and execution creditors taking the goods in execution (*c*). The bill of sale, if given *by way of security for the payment of money*, must not only be registered but be in the form prescribed by the Bills of Sale Act, 1882, otherwise it will be void (*d*). If the sale be fraudulent, for the purpose of defeating creditors, it will be void within stat. 13 Eliz. c. 5. The fact of the seller remaining in possession is evidence of fraud (*e*). A second sale by a purchaser in market overt would, as has already been stated, confer a good title upon a second purchaser (*f*).

(2) As regards Class (2), Lord *Blackburn* says:—

"It is essential that the article should be specific and ascertained in a manner binding on both parties, for *unless that be so, it cannot be construed as a contract to pass property in that article.* And in general, *if there are things remaining to be done by the seller to the article before it is in a state in which it is to be finally delivered to the*

(*y*) 46 & 47 Vict. c. 52.

(*a*) See *N. Central Waggon Co.* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.*, 13 App. Cas. 554; and *Swire* v. *Cookson*, 9 App. Cas. 653.

(*b*) See the definition of bill of sale in sect. 4 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), in the Appendix.

(*c*) Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 8.

(*d*) Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), ss. 3, 9.

(*e*) See the notes to *Twynne's Case*, Smith's L. Cas. 9th ed. p. 1, and *Swire* v. *Cookson*, 9 App. Cas. 653.

(*f*) Ante, p. 600. See also the Factors Act in Appendix, post.

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purchaser, the contract will not be construed to be one to pass the property till those things are done" (*g*).

If nothing remains to be done to the goods (*gg*) on the part of the seller as between him and the buyer before the goods purchased are to be delivered, or the price to be ascertained, the property in the goods immediately passes to the buyer, and that in the price to the seller, unless the parties have agreed to the contrary (*h*). But if any act remains to be done on the part of the seller, or seller and purchaser jointly, then the property does not pass until that act has been done. Where there was a bargain for the sale of hay, which was not to be paid for till a future period, and not to be cut down until paid for, it was held, nevertheless, that the property passed to the vendee, and that, the hay being, before the day of payment, accidentally destroyed, the loss must fall upon him (*i*). It might have been thought immaterial whether these acts remained to be done by the seller or the buyer; in either case, it might have been argued that an essential element of the contract, the consent of both parties as to the subject-matter of the contract or its price, was wanting until both were agreed as to this. The authorities, however, seem to show that when the goods have to be weighed or measured by the buyer solely for his satisfaction, or where the seller has left the matter to be determined by the buyer, the property passes (*k*).

Classes (3) and (4) may for this purpose be considered together.

Any act by the buyer in pursuance of a term of the contract, showing an intention to appropriate certain specific goods to the fulfilment of the contract, and adopted by the seller, constitutes an appropriation, and converts an executory contract into a bargain and sale.

(*g*) Lord *Blackburn*, in *Seath* v. *Moore*, 11 App. Cas. at p. 370; *Anderson* v. *Morice*, L. R. 10 C. P. at p. 619; *Simmons* v. *Swift*, 5 B. & C. at p. 862, per *Bayley*, J.

(*gg*) *Anderson* v. *Morice*, 1 App. Cas. 713.

(*h*) *Turley* v. *Bates*, 2 H. & C. 200.

(*i*) *Tarling* v. *Baxter*, 6 B. & C. 360.

(*k*) *Gilmour* v. *Supple*, 11 Moore, P. C. 551; *Zagury* v. *Furnell*, 2 Camp. 240; *Turley* v. *Bates*, 2 H. & C. 200; *Martineau* v. *Kitching*, L. R. 7 Q. B. 436. But see *Simmons* v. *Swift*, 5 B. & C. 857, at p. 863, where the concurrence of the parties in the act of weighing was necessary.

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"The selection of the goods by the one party, and the adoption of that act by the other, converts that which before was a mere agreement to sell into an actual sale, and the property thereby passes" (*l*).

In other words, when the parties have not agreed in the original contract as to specific goods, they may agree afterwards that certain goods should be appropriated to that purpose. Thus, election and assent have the same effect as if specific goods had been ascertained and agreed upon in the original contract (*m*). Two questions have here arisen: (1) When has the seller finally made his election, so as to render it irrevocable? and (2) What will constitute adoption by the buyer? The principle of the common law as to election is thus stated by *Coke* and by Lord *Blackburn*:—

"When election is given to several persons, there the first election made by any of the parties shall stand. In case election be given of two several things, always he who is the first agent, and who ought to do the first act, shall have the election" (*n*).

"When once he [the party who is to do the first act] has performed the act, the choice has been made, and the election irrevocably determined; till then, he may change his mind as to what the choice shall be, for the agreement gives him till that time to make his choice" (*o*).

Mere preparations to perform the contract, by appropriating a particular article to it, are not tantamount to election. Thus, in *Atkinson* v. *Bell* (*p*), the defendant had ordered two machines to be supplied by S., according to a pattern to be approved by K. S. completed two machines, altered them to suit the suggestions of K., packed them in boxes, and wrote to the defendant asking by what conveyance they should be sent. S. having become

(*l*) Per *Holroyd*, J., in *Rohde* v. *Thwaites*, 6 B. & C. at p. 393, cited in Blackburn on Sale, 2nd ed., p. 129, with approval.

(*m*) *Young* v. *Mathews*, L. R. 2 C. P. 127.

(*n*) *Heyward's Case*, 2 Coke's Reports, 37 a.

(*o*) Blackburn on Sale, 2nd ed., p. 130; Comyns' Digest, Election, C. 2.

(*p*) 8 B. & C. 277. This case is cited in Blackburn on Sale and other books as an example of the doctrine of election. But it may be urged that it really was a case in which there was no adoption of the appropriation. "If Bell had assented to the appropriation of these two machines, the case would have been different." Blackburn on Sale, 2nd ed., p. 132.

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bankrupt, the Court of King's Bench decided that an action for goods bargained and sold would not lie. To the same effect is *Borrowman* v. *Free* (*q*). In that case the plaintiffs first tendered a cargo of maize, which the defendants refused to accept, and which an arbitrator, to whom the matter was referred, decided was an invalid tender. The plaintiffs thereupon, within the time limited by the contract, tendered another cargo, which the defendants refused to accept. It was held by the Court of Appeal that the plaintiffs were free to make a second tender, and that the defendants were bound to accept it.

There must be both appropriation by the seller, and adoption by the buyer. The latter may, after the contract is concluded, do something which will be an approbation of the seller's appropriation; as in *Sparkes* v. *Marshall* (*r*), where the buyer showed his assent to the appropriation of a particular cargo of oats by insuring them. But the buyer may in the contract agree to or authorize a particular mode of appropriation. "The assent of the vendee," says *Willes*, J., in *Campbell* v. *Mersey Docks* (*s*), "may be given prior to the appropriation by the vendor; it may be either express or implied; and it may be given by an agent of the party—by the warehouseman or wharfinger, for instance." For instance, the vendor placing goods in sacks or bottles supplied by the purchaser amounts to an appropriation of the goods (*t*).

The following are cases in which it was held that there was no appropriation: marking particular goods without making any charge in the warehouse-keeper's books, or holding the

(*q*) 4 Q. B. D. 500. On the other hand, see *Gath* v. *Lees*, 3 H. & C. 558, where the facts were as follows: the defendant agreed to buy from the seller a quantity of cotton, to be delivered at seller's option in August or September, 1864. The seller gave notice to the defendant that the cotton was ready for delivery in August. Held that, having exercised his option, the defendant was bound to deliver in August, and that non-delivery in that month was a good equitable defence to an action for non-delivery. See *Johnson* v. *L. & Y. Rail. Co.*, 3 C. P. D. 499. *Brett*, J., says, in *Borrowman* v. *Free*, p. 505, "*Gath* v. *Lees* was not decided upon the doctrine of election, but upon the ground that the defendants, having acted upon the notice of the plaintiff, had altered their position for the worse."

(*r*) 2 Bing. N. C. 761.

(*s*) 14 C. B. N. S. 412. See also *Erle*, J., in *Aldridge* v. *Johnson*, 7 E. & B. 885; and compare *Jenner* v. *Smith*, L. R. 4 C. P. 270.

(*t*) *Aldridge* v. *Johnson*, 7 E. & B. 885; *Langton* v. *Higgins*, 4 H. & N. 402.

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seller liable for the rent (*u*); sending the goods ordered packed with others not ordered (*x*).

The word "appropriation" is not used in the older cases; its equivalent is "election" (*y*), a term in many respects apter. In *Wait* v. *Baker* (*z*), *Parke*, B., points out the different significations of the word "appropriation": "It may mean a selection on the part of the vendor where he has the right to choose the article which he has to supply in performance of his contract. Or the word may mean that *both* parties have agreed that a certain article shall be delivered in pursuance of the contract. 'Appropriation' may also be used in another sense . . . . where both parties agree upon the specific article in which the property is to pass, and nothing remains to be done in order to pass it."

Delivery, as we have seen (*a*), is not required at common law to pass the property. It is, however, one of the commonest and clearest ways in which appropriation is signified, and, after delivery to the vendee, the property in goods will pass to him, even though something remains to be done in respect of them by the vendor (*b*). Delivery to the purchaser or his agent—for example, to a carrier specially designated by him or to the ordinary carrier—in general passes the property (*c*). But the delivery may be on a condition, the breach of which re-vests the property in the vendor, and entitles him to recover back the property (*d*). Delivery of goods on board the purchaser's own vessel will generally be conclusive of an appropriation sufficient to pass the property, at all events if the goods are made deliverable to the purchaser or his order (*e*). Such, however, will not be the effect if, as in *Turner* v. *Trustees of Liverpool Docks* (*f*), the bill of lading makes the goods deliverable to the order of

(*u*) *Jenner* v. *Smith*, L. R. 4 C. P. 270.

(*x*) *Levy* v. *Green*, 1 E. & E. 969.

(*y*) *Heyward's Case*, 2 Co. Rep. 36.

(*z*) 2 Exch. at p. 8. See also the remarks of Lord *Selborne* in *Inglis* v. *Stock*, 10 App. Cas. at p. 267.

(*a*) Ante, p. 604.

(*b*) Benjamin on Sale, 4th ed. 290.

(*c*) *Dunlop* v. *Lambert*, 6 Cl. & F. at p. 620; *Ex parte Pearson*, L. R. 3 Ch. 443.

(*d*) *Bishop* v. *Shillito*, 2 B. & Ald. 329, n.; *Brandt* v. *Bowlby*, 2 B. & Ad. 932.

(*e*) *Schotsmans* v. *Lanc. & Y. Rail. Co.*, L. R. 2 Ch. 337.

(*f*) 6 Ex. 543.

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the *seller*. In short, the question is one of the intention of the shipper—whether he put them on board in pursuance of his contract, or whether he desired to remain owner of the goods and to control them (*g*)—a point to be ascertained from the form of the bill of lading, terms of the invoice, and other facts. The most common case of goods being delivered without the property passing, is that of goods delivered on "sale or return." There is no sale until approval or after the lapse of a reasonable time without return of the goods; and in the latter case, apparently, it matters not that they have not been returned through the wrongful acts of a servant, *e.g.*, theft by a servant (*h*).

(5) At common law there could not be a *sale*, as distinguished from a contract of sale, of chattels not in existence. But a chattel not complete, or its materials (*i*), may be from time to time appropriated, while in the course of making, by agreement, or by special circumstances showing an intention to that effect, or by acceptance or part payment after its completion.

Wood v. *Bell* (*k*) is a case in point. A shipbuilder had agreed to build a steamship and engines for the plaintiff; payment to be made by instalments. Some of them had been paid; the ship and engines had been constructed: but neither they nor the plates had been fixed. The Exchequer Chamber held that in these circumstances the property in the ship, but not in the engines or plates, had passed. In *Tripp* v. *Armitage* (*l*), A. agreed to build a house, make window frames, and fix them; and they were approved by a surveyor. It was held that the

(*g*) *Van Casteel* v. *Booker*, 2 Ex. 691. Compare *Coxe* v. *Harden*, 4 East, 211; *Brandt* v. *Bowlby*, 2 B. & Ad. 932; *Moakes* v. *Nicolson*, 19 C. B. N. S. 290; *Shepherd* v. *Harrison*, L. R. 5 H. L. 116, with *Craven* v. *Ryder*, 6 Taunt. 433; *Van Casteel* v. *Booker*, supra; *Key* v. *Cotesworth*, 7 Ex. 595; *Gabarron* v. *Kreeft*, L. R. 10 Ex. 274; *Ogg* v. *Shuter*, 1 C. P. D. 47; *Mirabita* v. *Imperial Ottoman Bank*, 3 Ex. D. 164.

(*h*) *Moss* v. *Sweet*, 16 Q. B. 495; *Elphick* v. *Barnes*, 5 C. P. D. at p. 326; *Ex parte Wingfield*, 10 Ch. D. at p. 593; *Ray* v. *Barker*, 4 Ex. D. at p. 282; see D. 19. 5, 17, s. 1. See as to furniture hiring agreements, *Ex parte Crawcour*, 9 Ch. D. 419, and *Crawcour* v. *Salter*, 18 Ch. D. 30.

(*i*) *Lunn* v. *Thornton*, 1 C. B. 379; *Brown* v. *Bateman*, L. R. 2 C. P. 272.

(*k*) 6 E. & B. 355. Some of the expressions in the judgments of *Heath*, J., and *Lawrence*, J., in *Mucklow* v. *Mangles*, 1 Taunt. 318, must be taken to be overruled.

(*l*) 4 M. & W. 687.

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property in them did not pass before fixing; the surveyor's approval of them did not amount to an appropriation.

There is no consensus of opinion as to the test to be applied in such cases. Lord Blackburn, in *Seath* v. *Moore* (*m*), thus states it:—

"It is competent to parties to agree for valuable consideration that a specific article shall be sold and become the property of the purchaser as soon as it has attained a certain stage; though if it is part of the bargain that more work shall be done on the article after it has reached that stage, it affords a strong *primâ facie* presumption against its being the *intention* of the parties that the property should then pass. It is, I think, a question of the construction of the contract in each case at what stage the property shall pass; and a question of fact whether that stage has been reached."

The explanation given in *Atkinson* v. *Bell* (*n*) is that the payments constituted a purchase of particular portions of the work. It would seem that in the above cases the common law courts have been led by independent reasoning to the same conclusion at which equity judges had arrived in regard to equitable assignments. All that is essential to the sale is an agreement as to specific articles: and if it be clear from the terms of the contract or the acts of the parties that there has been an appropriation with adoption, or assent, the property will be held to have passed (*o*).

Though the property in goods has passed to the purchaser, he has, in the absence of any provision to the contrary, no right to possession until payment. Though the loss will fall on the purchaser in the event of the article being destroyed, he will not be entitled to delivery until he pays the price (*p*). Where, however, the day of payment is deferred—in other words, where

(*m*) 11 App. Cas. 350, at p. 370.

(*n*) 8 B. & C. 277; so in *Ex parte Lambton*, L. R. 10 Ch. 405.

(*o*) See also *Anglo-Egyptian Co.* v. *Rennie*, L. R. 10 C. P. 271; *Holroyd* v. *Marshall*, 10 H. L. 191; the remarks of *Jessel*, M. R., in *Collyer* v. *Isaac*, 19 Ch. D. at p. 351, as to the assignment of non-existing chattels, and *Coombe* v. *Carter*, 36 Ch. D. 348.

(*p*) *Bloxam* v. *Sanders*, 4 B. & C. 941; *Sweeting* v. *Turner*, L. R. 7 Q. B. 310.

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the goods are sold on credit—the purchaser is entitled to present delivery (*q*).

The unpaid vendor's rights are usually termed a "lien," which in strictness means a personal right continuing only so long as the possessor retains possession. It is on all hands agreed that the "unpaid vendor's rights" are greater than a mere right of detention, but to what extent is somewhat uncertain. In *Martindale* v. *Smith* (*r*), the plaintiff, who had purchased oat stacks on credit, did not pay at the appointed time. He afterwards tendered payment, which was refused by the defendant, who sold the oats, on which the defendant brought trover against him, and was held entitled to recover. On the other hand, in *Milgate* v. *Kebble* (*s*), where the purchaser was in default in paying a portion of the price, and the vendor re-sold the goods, it was held that trover would not lie, as the purchaser by his default had not the right to *possession* of the goods. In *Page* v. *Cowasgee Edulgee* (*t*), where the Privy Council had the point under consideration, the effect of the decisions up to that time (A.D. 1866) was thus stated (*u*) :—

"*Martindale* v. *Smith* (*v*) and other cases have determined that, where there is an agreement to purchase property, to be paid for at a future time, and the money is not paid at the day, the property remaining in the possession of the vendor, he has no right to sell it, and if he does, the purchaser may maintain trover against him. There may be cases where the vendor might sell without rendering himself liable to an action, as where goods sold are left in the possession of the vendor, and the purchaser will not remove them and pay the price, after receiving express notice from the vendor that, if he fail so to do, the goods will be re-sold. But the authorities are uniform on this point, that if before actual delivery the vendor re-sells the property while the purchaser is in default, the re-sale will not authorise the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance of it which may be still due."

(*q*) *Spartali* v. *Benecke*, 10 C. B. 212; *Donald* v. *Suckling*, L. R. 1 Q. B. 585.
(*r*) 1 Q. B. 389.
(*s*) 3 M. & G. 100.
(*t*) L. R. 1 P. C. 127.
(*u*) Ib., at p. 145.
(*v*) Supra.

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Though goods have been sold on credit, which has not expired, the seller's right to retain possession revives in the event of the insolvency of the purchaser (*x*). Though the nature of the seller's rights under these circumstances is indefinite, it is clear that bankruptcy will not of itself rescind the contract and entitle him to re-sell; there must be something equivalent to a repudiation of the contract (*y*). Even in the case of bankruptcy, the buyer's trustee in bankruptcy may elect to fulfil the contract on paying the price in cash, provided he does so within a reasonable time. Failing this, the vendor may, without making any tender of the goods to the trustee, treat the contract as broken (*z*).

As soon as the property has passed to the vendee, it remains, as was before stated, at his risk; a doctrine strongly exemplified by a case in which Irish butters were shipped for a person in London; "payment, bill at two months from the date of landing." The butter having been lost by shipwreck, it was held that the object of the above stipulation was merely to fix the time of payment, not to make the landing of the goods a condition precedent; and that the vendor, having waited a reasonable time, might recover the price from the vendee in an action for goods bargained and sold (*a*).

Such was the common law respecting sales of personal property. Such is still the law respecting sales of goods *under the value of* 10*l.*, with this addition, that, as provided by the 4th section of the Statute of Frauds, no action that is not to be performed within the space of one year from the making thereof, can be maintained on any agreement for the sale of them, unless the agreement be in writing, and signed by the party to be

(*x*) *Bloxam* v. *Sanders*, 4 B. & C. 941; *Bloxam* v. *Morley*, ib. 951.

(*y*) See Blackburn on Sale, 2nd ed. pp. 445 *et seq.*; *Boorman* v. *Nash*, 9 B. & C. 145; *Ex parte Chalmers*, L. R. 8 Ch. at p. 291; Benjamin on Sale, 4th ed. 755.

(*z*) *Ex parte Stapleton*, 10 Ch. D. 586 (C. A.); *Morgan* v. *Bain*, L. R. 10 C. P. at pp. 25, 26; *Ex parte Stapleton*, supra, per *Jessel*, M. R. See Bankruptcy Act, 1883, s. 55, in Appendix.

(*a*) *Alexander* v. *Gardner*, 1 Bing. N. C. 671. See *Fragano* v. *Long*, 4 B. & C. 219; *Richardson* v. *Dunn*, 2 Q. B. 218; and *Anderson* v. *Morice*, ante, p. 403. As to cases in which vendee assumes risk before the property has passed, see *Martineau* v. *Kitching*, L. R. 7 Q. B. 436; and *Inglis* v. *Stock*, 10 App. Cas. 263.

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charged therewith, or some other person thereunto by him lawfully authorised (*b*). On this provision it has been decided, that an agreement is valid, though not in writing, if it possibly could be performed within the year (*c*). Thus, a contract to deliver goods at the return of a particular ship, would not be within the meaning of this section, for the ship might possibly return within a year; and though it should, in point of fact, remain abroad for five years, that would make no difference. This section of the Statute of Frauds does not require an agreement to be in writing, one part of which is to be performed within a year and the other not (*d*).

With respect to contracts for the sale of goods of *the value of* 10*l. and upwards*, they, besides being within the section of the Statute of Frauds just commented upon, are also governed by the 17th section (16th in the Revised Statutes), which enacts, that—

"No contract for the sale of any goods, wares or merchandises, for the price (*e*) of 10*l.* or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised."

No contract for the sale of any goods, wares or merchandises.—A distinction was formerly taken between cases in which the thing contracted for was in existence and capable of delivery at the time of the contract, and cases in which it was necessary that something should be done, in order to render it capable of delivery. The former cases were universally allowed to be

(*b*) 29 Car. 2, c. 3, s. 4. For history of the statute, see 3 Swans. 664, App.; also 9th Report of the Commission on Historical Manuscripts, Part II. p. 48.

(*c*) *McGregor* v. *McGregor*, 57 L. J. Q. B. (C. A.) 591; *Anon.*, Salk. 280; *Peter* v. *Compton*, Skinn. 353; 1 Sm. L. Cas. 9th ed. p. 359, and notes there.

(*d*) *Donellan* v. *Read*, 3 B. & Ad. 899; *Souch* v. *Strawbridge*, 2 C. B. 808. It has been held (*Reuss* v. *Picksley*, L. R. 1 Ex. 342) that a proposal signed by the person to be bound and accepted by word of mouth, is a sufficient *agreement* to satisfy this section. See further on this section, Chapter on Guaranties, ante, p. 578.

(*e*) *Harman* v. *Reeve*, 18 C. B. 587, where *Jervis*, C. J., points out that "price" must be taken to mean value.

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within the Act, but the decisions on the question whether the latter were so were not very consistent (*f*). However, by Lord Tenterden's Act, 9 Geo. 4, c. 14, s. 7 (*g*), it is enacted that the 17th section of the Statute of Frauds shall extend to all contracts for the sale of goods to the *value* of 10*l.* sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not, at the time of such contract, be actually made (*h*), procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

Are things attached to the soil, *e.g.*, timber, or an interest in land, within the 4th section, "goods, wares, and merchandizes" within the 17th section, as explained by 9 Geo. 4, c. 14, s. 7? When there is a contract to buy and sell the growing produce of land, afterwards to be cut down by the purchaser, and the property is to pass before severance, the contract is not for the sale of goods, but for an interest in land. But if the

(*f*) See *Rondeau* v. *Wyatt*, 2 H. Bl. 63; *Garbutt* v. *Watson*, 5 B. & Ald. 613; *Smith* v. *Surman*, 9 B. & C. 561; *Cooper* v. *Elston*, 7 T. R. 14; *Alexander* v. *Comber*, 1 H. Bl. 20; *Clayton* v. *Andrewe*, 4 Burr. 2101; *Groves* v. *Buck*, 3 M. & S. 178; *Watts* v. *Friend*, 10 B. & C. 446; *Pinner* v. *Arnold*, 2 C. M. & R. 613; *Atkinson* v. *Bell*, 8 B. & C. 277; *Grafton* v. *Armitage*, 2 C. B. 336; *Clay* v. *Yates*, 1 H. & N. 73.

(*g*) See *Elliott* v. *Pybus*, 10 Bing. 512, for remarks of *Tindal*, C. J., on this statute; and *Harman* v. *Reeve*, 18 C. B. 587.

(*h*) See *Lee* v. *Griffin*, 1 B. & S. 272; *Clay* v. *Yates*, 1 H. & N. 73. In the previous editions the following paragraph appeared in the text:—

"We will detain the reader to consider, one by one, the parts of this important section, which, as has been remarked by *Bosanquet*, J., in *Laythoarp* v. *Bryant* (2 Bing. N. C. 747), is stronger than the 4th, for the 4th section does not avoid contracts not signed as the statute directs, but only enacts that no action shall be brought upon them. The 17th section is stronger, and *avoids* contracts not made as the statute prescribes." In *Leroux* v. *Brown*, 12 C. B. 801; 22 L. J. C. P. 1, cited in *Jones* v. *Victoria Graving Dock*, 2 Q. B. D. at p. 323, it was held that a verbal agreement made abroad and good there, cannot be enforced in this country. But Lord *Blackburn*, in *Maddison* v. *Alderson*, 8 App. Cas. 467, at p. 488, in the House of Lords, says: "I think it is now finally settled that the true construction of the Statute of Frauds, both the 4th and the 17th sections, is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract." See, also, *Britain* v. *Rossiter*, 11 Q. B. D. 123, at p. 127, per *Brett*, L. J.; and *Williams* v. *Wheeler*, 8 C. B. N. S. 299, at p. 316, per *Willes*, J.

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contract is that the produce shall be forthwith severed from the land, as in *Marshall* v. *Green* (*i*), where the contract was to sell growing timber, "the trees to be got away as soon as possible," the Court decided that this was a contract for the sale of goods, on the principle stated by *Williams*, J., in the notes to *Duppa* v. *Mayo* (*k*), that "with respect to emblements or *fructus industriales* (*i.e.*, the corn and other growths of the earth which are produced not spontaneously, but by labour and industry), a contract for the sale of them is not a contract for the sale of any interest in land, but merely for the sale of goods."

The rules to be applied are thus summarized from the note to *Duppa* v. *Mayo* (*l*) by *Brett*, J., in *Marshall* v. *Green* (*m*) :—

(1) "Where the subject-matter of the contract is growing in the land at the time of the sale, then, if by the contract the thing sold is to be delivered at once by the seller, the case is not within the section" (*i.e.*, s. 4).

The following rules, it is said, express the effect of *Smith* v. *Surman* (*n*) :—

(2) "Where, although the thing may have to remain in the ground some time, it is to be delivered by the seller finally, and the purchaser is to have nothing to do with it until it is severed, that case is not within the section" (*i.e.*, s. 4).

(3) "Then there comes the class of cases where the purchaser is to take away the thing himself. In such a case, when the things are *fructus industriales* (that is, emblements or corn and other growth of the earth, annually produced not spontaneously, but by labour), then, although they are still to derive from the land after the sale in order to become fit for delivery, nevertheless it is merely a sale of goods, and not within the section" (*i.e.*, s. 4).

These express the effect of *Sainsbury* v. *Matthews* (*o*) :—

(4) "If they (the things produced) are not *fructus industriales*, then the question seems to be whether it can be gathered from the

(*i*) 1 C. P. D. 35. Compare *Lavery* v. *Pursell*, 39 Ch. D. at p. 515.
(*k*) Wms. Saund. 395.
(*l*) Ibid.
(*m*) 1 C. P. D. at p. 42.
(*n*) 9 B. & C. 561.
(*o*) 4 M. & W. 343.

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contract that they are intended to remain in the land for the advantage of the purchaser, and are to derive benefit from so remaining; then part of the subject-matter of the contract is the interest in land, and the case is within the section."

(5) "But if the thing, not being *fructus industriales*, is to be delivered immediately, whether the seller is to deliver it or the buyer is to enter and take it himself, then the buyer is to derive no benefit from the land, and consequently the contract is not for an interest in the land, but relates solely to the thing sold itself."

It is open to doubt whether some of the cases could be sustained on appeal (*p*).

A sale of standing timber to be cut at once is within the 17th, and not within the 4th section of the Statute of Frauds (*q*). A contract for the sale of tenants' fixtures is within neither of them (*r*). A sale of stock is not within the 17th section (*s*); a contract for shares in a canal navigation or similar public undertaking is not so (*t*); nor is a contract to procure goods and carry them (*u*). Sales by auction are (*x*); though that was once doubted (*y*).

When several articles, each of less value than 10*l.*, but collectively of greater, are sold, the statute will apply if there was one contract for all (*z*).

Except the buyer shall accept part of the goods so sold and actually receive the same.—In consequence of these words, there has, ever since the Act, been a great struggle to determine what is a part performance, a receipt, or an acceptance. Upon these points, the inclination of the Courts is, to give the words of the statute full effect, and not to allow, unnecessarily, constructive deliveries and acceptances.

(*p*) See *In re Ainslie*, 30 Ch. D. 485.
(*q*) *Marshall* v. *Green*, 1 C. P. D. 35.
(*r*) *Lee* v. *Gaskell*, 1 Q. B. D. 700.
(*s*) *Humble* v. *Mitchell*, 11 Ad. & E. 205; *Colt* v. *Nettervill*, 2 P. Wms. 307; *Pawle* v. *Gunn*, 4 Bing. N. C. 445.
(*t*) *Latham* v. *Barber*, 6 T. R. 67; *Duncuft* v. *Albrecht*, 12 Sim. 189; *Bowlby* v. *Bell*, 3 C. B. 284; *Watson* v. *Spratley*, 10 Exch. 222. See also *Knight* v. *Barber*, 16 M. & W. 66.
(*u*) *Corbold* v. *Caston*, 1 Bing. 399.
(*x*) *Kenworthy* v. *Schofield*, 2 B. & C. 945.
(*y*) *Simon* v. *Motivos*, 1 W. Bl. 599.
(*z*) *Baldey* v. *Parker*, 2 B. & C. 37.

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The statute requires both acceptance and receipt. Receipt signifies an intention manifested by the buyer to take under and in satisfaction of the contract the goods tendered. Goods may be *received*, and yet nothing may be done to show that they are received under a contract, or to indicate *acceptance* (*a*). One who is authorised and is an agent to receive—a carrier, for example—may not be an agent to accept (*b*). There may be delivery of goods without receipt, though there cannot be receipt without delivery. Whether in any case there has been an acceptance and receipt is generally a question of fact. But a few examples may assist the reader in determining what will or will not amount to acceptance and receipt within the meaning of the section.

First, as to *receipt:* The cases as to this may be placed in the following groups:—

(a) Where the goods are actually removed from the possession of the seller into the possession of the purchaser, his agents, or servants. As to such cases there is no difficulty.

(b) Where the goods are not removed, but remain in the possession of the vendor or his agent; *e.g.*, in his warehouse. In such cases the question is whether the vendor has agreed with the vendee to hold the goods as bailee or warehouseman, and whether he has abandoned his lien; this may be inferred from the vendor doing acts inconsistent with his position as vendor. The cases upon this subject are conflicting. In *Elmore*

(*a*) See *Hunt* v. *Hecht*, 8 Ex. 814. "An acceptance of part of the goods is an assent by the buyer, meant to be final, that this part of the goods is to be taken by him as his property under the contract, and as so far satisfying the contract. The question of acceptance or not, is a question as to what was the intention of the buyer as signified by his outward acts. The receipt of part of the goods is the taking possession of them."—Blackburn on Sale, 2nd ed., pp. 16, 17. In the article already quoted, the following is the suggested definition: "Acceptance of part of the goods sold means an assent by the buyer to a proposal by the seller that certain goods shall be part of the goods sold, whether such assent is, or is not, subject to a right on the part of the buyer to object to the bulk of the goods as not corresponding to the terms of the agreement:" Law Quarterly Review, vol. i. p. 14.

(*b*) *Johnson* v. *Dodgson*, 2 M. & W. at p. 656; *Bushel* v. *Wheeler*, 15 Q. B. 442, n.

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v. *Stone* (1809) (*c*), a transfer of a horse by order of the vendee from the vendor's sale-stable into another of his establishments was held sufficient. But in *Carter* v. *Toussaint* (1822) (*d*), it was held that there was no receipt where a horse was to remain with the vendors for twenty days without any charge to the vendee, at the expiration of which time it was sent to grass by the direction of the vendee, and, at his desire, entered as the horse of one of the vendors. In *Castle* v. *Sworder* (1861) (*e*), the Exchequer Chamber thought there was evidence of receipt where the plaintiffs, the vendors, appropriated to the vendees certain rum puncheons, and put them in their bond warehouse from which they could not be removed.

(c) Where the goods after the contract pass into the possession of a third person. If he be the warehouseman of the vendee, a carrier named by him, or a common carrier, there is *receipt;* though a carrier is not an agent to *accept* (*f*).

(d) Where the goods are at the time of the sale in the possession of an agent or bailee of the vendor, and remain after the sale in the possession of this agent or bailee, who agrees to become bailee of the vendee in place of the vendor, there is receipt as soon as the vendor, the vendee and the bailee agree together that the bailee shall cease to hold for the vendor, and shall hold for the vendee. In *Farina* v. *Home* (*g*) it was held that it was not sufficient, in an action for goods sold and delivered, to prove that the goods were sent to a ship agent of the plaintiff, that the agent warehoused them with a wharfinger, that the latter delivered to the agent a delivery warrant whereby the goods were made deliverable to him or his assigns, and that the agent indorsed it to the plaintiff. There might be acceptance: there was no actual receipt.

(e) Where the buyer holds the goods prior to sale. In this case receipt, or acceptance, may be evidenced by acts of the buyer inconsistent with his former possession (*h*).

(*c*) 1 Taunt. 458.

(*d*) 1 D. & R. 515.

(*e*) 6 H. & N. 828. See also *Marvin* v. *Wallis*, 6 E. & B. 726.

(*f*) *Dawes* v. *Peck*, 8 T. R. 330; *Smith* v. *Hudson*, 34 L. J. Q. B. 145.

(*g*) 16 M. & W. 119. See also *Bentall* v. *Burn*, 3 B. & C. 423. But see *Godts* v. *Rose*, 17 C. B. 229.

(*h*) *Edan* v. *Dudfield*, 1 Q. B. 302.

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To constitute *acceptance*, there must be, to use the words of *Bramwell*, B., in *Bowes* v. *Pontifex* (*i*), "some act or conduct on the part of the buyer indicating an intention to retain the goods, or such as reasonably to lead the seller to suppose so." Often it may be inferred from *acts of ownership* by the vendee; *e. g.*, selling the goods, as in *Morton* v. *Tibbett* (*k*); giving a receipt for them, as in *Kibble* v. *Gough* (*l*); directing alterations to be made in them (*m*). Apparently, dealing with the documents of title to goods will constitute acceptance (*n*). The opinion that there cannot be an actual acceptance such as the statute requires so long as the buyer continued to have a right to object to the quantum or quality, has long been rejected. The "acceptance need not be an absolute acceptance," said *Brett*, M. R., in *Page* v. *Morgan* (*o*), "all that is necessary is an acceptance which could not have been made except upon admission that there was a contract, and that the goods were sent to fulfil that contract." "Having regard to the mischiefs at which the statute was aimed," said *Bowen*, L. J., in the same case, "it would appear a natural conclusion that the acceptance contemplated by the statute was such a dealing with the goods as amounts to a recognition of the contract" (*p*). Acceptance of a sample which is to be accounted part of the commodity is sufficient (*q*), though acceptance of one which is to be no part thereof is not so (*r*). Acceptance may precede receipt or delivery (*s*). Delivery to a carrier named by the vendor, or even to a wharfinger or carrier selected by the vendee, will not generally amount to acceptance (*t*). But in

(*i*) 3 F. & F. 739, at p. 743.

(*k*) 19 L. J. Q. B. 382; 15 Q. B. 428.

(*l*) 38 L. T. N. S. 204.

(*m*) *Beaumont* v. *Brengeri*, 5 C. B. 301.

(*n*) See *Currie* v. *Anderson*, 29 L. J. Q. B. 87; 2 E. & E. 592.

(*o*) 15 Q. B. D. 228, following *Morton* v. *Tibbett*, and *Kibble* v. *Gough*, supra.

(*p*) "Acceptance to let in parol evidence of the contract," said Lord *Campbell*, C. J., in *Morton* v. *Tibbett*, supra, "appears to us to be a different acceptance from that which affords conclusive evidence of the contract having been fulfilled."

(*q*) *Gardner* v. *Grout*, 2 C. B. N. S. 340.

(*r*) *Talver* v. *West*, Holt, N. P. C. 178; *Foster* v. *Frampton*, 6 B. & C. 107.

(*s*) *Cusack* v. *Robinson*, 1 B. & S. 299.

(*t*) *Hart* v. *Bush*, E. B. & E. 494; *Meredith* v. *Meigh*, 2 E. & B. 364; *Hunt* v. *Hecht*, 8 Ex. 814; *Coats* v. *Chaplin*, 3 Q. B. 483.

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the case of goods previously selected, such delivery might constitute acceptance; as in *Bushel* v. *Wheeler* (*u*), where, there being evidence that the purchaser treated the warehouse as his own, and delayed rejecting the goods after delivery there, the Court held that there was evidence of acceptance to go to a jury.

Where two classes of goods are jointly ordered, acceptance of one is an acceptance of both (*x*). It is decided that one person in possession of another's goods may become the purchaser of them by parol, and may do subsequent acts without any writing between the parties which may amount to an acceptance, and the effect of such acts, necessarily to be proved by parol evidence, must be submitted to a jury (*y*). At any time before acceptance and actual receipt the vendor may rescind the bargain (*z*).

The effect of a receipt and acceptance being proved is to allow parol evidence to be given of the terms of the contract (*a*).

Or give something in earnest to bind the bargain, or in part payment.—Earnest is a gift or token, not necessarily money, given by the buyer to the seller to mark the final conclusive assent of both parties to the bargain. It is not a part of the price, but "*something* that binds the bargain," for there can be no part payment until after the bargain is bound (*b*). If a purchaser of goods draw the edge of a shilling over the hand of the vendor, and return the money into his own pocket (which in the North of England is called *striking a bargain*), that will not be sufficient (*c*).

If one of the terms of a bargain is that the seller is to deduct

(*u*) 15 Q. B. 442, n. Compare *Rickard* v. *Moore*, 38 L. T. N. S. 841.

(*x*) *Elliott* v. *Thomas*, 3 M. & W. 170. But see *Hodgson* v. *Le Bret*, 1 Camp. 233, per Lord *Ellenborough*.

(*y*) *Edan* v. *Dudfield*, ante, p. 626. In former editions it was said, "It has also been held that there cannot be such an acceptance and actual receipt of goods as long as the seller retains his lien for the price upon the property accepted;" and reference is made to *Baldey* v. *Parker*, 2 B. & C. 37; *Carter* v. *Toussaint*, 5 B. & Ald. 855; *Tempest* v. *Fitzgerald*, 3 B. & Ald. 680; *Smith* v. *Surnam*, 9 B. & C. 561.

(*z*) *Smith* v. *Hudson*, 6 B. & S. 431.

(*a*) See *Tomkinson* v. *Staight*, 25 L. J. C. P. 85; 17 C. B. 697.

(*b*) Benjamin on Sale, 4th ed., p. 172, citing Bracton, 1, 2, c. 27.

(*c*) *Blenkinsop* v. *Clayton*, 7 Taunt. 597.

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from the price the amount of a debt previously due by him to the purchaser, it is no part payment within the statute, even though the seller afterwards furnish an account giving credit for the agreed amount (*d*). But a *subsequent* agreement that the debt should be deducted from the price, or that the goods delivered should be taken in satisfaction of the debt, might be equivalent to part payment (*e*).

Or that some note or memorandum in writing of the bargain be made.—The note or memorandum must be in existence at the date when the action was commenced (*f*). A mere offer in writing made by one side, and not assented to (*g*) by the other, is not enough to satisfy these words. Where A. wrote to B. that he would buy his mare for twenty guineas, if warranted sound and *quiet in harness;* to which B. writes that he will send her, and warrant her sound and *quiet in double harness;* this is no contract, the proposal of A. never having been completely accepted. "The parties," said *Parke*, B., "never have contracted in writing *ad idem*" (*h*). But if such assent is given verbally to a written proposal containing the terms of the agreement, the statute is satisfied (*i*). If assent be expressed in the usual manner through the post, the bargain is complete at the time of posting, and it matters not that the letter is lost or miscarries (*k*). It is sufficient if the contract can be collected from several different documents, provided they be sufficiently connected in sense (*l*). This connection must

(*d*) *Walker* v. *Nussey*, 16 M. & W. 302.

(*e*) Ibid., per *Parke*, B.; *Maber* v. *Maber*, L. R. 2 Ex. 153; *R.* v. *St. Michael's*, 6 E. & B. at p. 819; *Ex parte Challinor*, 16 Ch. D. 260; Benjamin on Sales, 4th ed. 174.

(*f*) *Lucas* v. *Dixon*, 22 Q. B. D. 357.

(*g*) *Felthouse* v. *Bindley*, 11 C. B. N. S. 869; *Munday* v. *Asprey*, 13 Ch. D. 855.

(*h*) *Jordan* v. *Norton*, 4 M. & W. 155; accord. *Hutchinson* v. *Bowker*, 5 M. & W. 535.

(*i*) *Reuss* v. *Picksley*, L. R. 1 Ex. 342; *Bailey* v. *Sweeting*, 9 C. B. N. S. 843.

(*k*) *Dunlop* v. *Higgins*, 1 H. L. C. 381; *Household Fire Insurance Co.* v. *Grant*, 4 Ex. D. 216.

(*l*) *Phillimore* v. *Barry*, 1 Camp. 513; *Jackson* v. *Lowe*, 1 Bing. 9; *Saunderson* v. *Jackson*, 2 B. & P. 238; *Allen* v. *Bennett*, 3 Taunt. 169. See *Cooper* v. *Smith*, 15 East, 103; *Richards* v. *Porter*, 6 B. & C. 437 (but *quære*); *Archer* v. *Baynes*, 5 Exch. 625; *Buxton* v. *Rust*, L. R. 7 Ex. 1, 279; *Caton* v. *Caton*, L. R. 2 H. L. 127; *Ridgway*

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appear from the documents themselves, and not be introduced by parol evidence; the Statute of Frauds does not modify the principle of the common law as to this (*m*). But such evidence as is admissible to explain a latent ambiguity may be given to connect documents; *e.g.*, to show what are the instructions (*n*) referred to in a certain document. The necessary memorandum may be collected from a letter repudiating liability, and it may be addressed to a third person.

The word "bargain," used in this section, does not, it has been said, render so strict a statement of the transaction necessary as the word "agreement," used in the fourth section, of matters within that section (*o*). The note must express the names or descriptions of both the contracting parties as such, or their agents (*p*), though parol evidence will be admissible to explain words of description, *e.g.*, who is "proprietor" (*q*). The memorandum must also show the price (*r*), if any specific

v. *Wharton*, 6 H. L. Cas. 238; *Buxton* v. *Rust*, L. R. 7 Ex. 1, 279; *Rishton* v. *Whatmore*, 8 Ch. D. 467. See ante, Chapter on Guaranties.

(*m*) *Boydell* v. *Drummond*, 11 East, 142; *Peirce* v. *Corf*, L. R. 9 Q. B. 210; *Elliott* v. *Dean*, 1 C. & E. 283. But see *Studds* v. *Watson*, 28 Ch. D. 305.

(*n*) *Leather Cloth Co.* v. *Hieronimus*, L. R. 10 Q. B. 140; *Bailey* v. *Sweeting*, 9 C. B. N. S. 843; *Elliot* v. *Dean*, 1 C. & E. 283. But see *Studds* v. *Watson*, 28 Ch. D. 305; *Long* v. *Millar*, L. R. 4 C. P. D. 450; *Wilkinson* v. *Evans*, L. R. 1 C. P. 407; *Buxton* v. *Rust*, L. R. 7 Ex. 279; *Reuss* v. *Picksley*, L. R. 1 Ex. 342.

(*o*) *Egerton* v. *Mathews*, 6 East, 307, per Lord *Ellenborough*, C. J. See *Sarl* v. *Bourdillon*, 1 C. B. N. S. 188; *Bailey* v. *Sweeting*, 9 C. B. N. S. 843.

In Mr. Campbell's Treatise on The Sale of Goods and Commercial Agency the rule is thus stated: "The note or memorandum must specify the time or manner of delivery, if an express term of the contract, or anything else which has been expressly made a term of the contract." He refers to *Cooper* v. *Smith*, 15 East, 103. If correct in regard to delivery, this observation would apply to all conditions not implied by law. But *quære*.

(*p*) *Warner* v. *Willington*, 3 Drew. 523; *Williams* v. *Byrnes*, 1 Moore, P. C. Ca. N. S. 154; *Vandenbergh* v. *Spooner*, L. R. 1 Ex. 316; *Newell* v. *Radford*, L. R. 3 C. P. 52; *Sale* v. *Lambert*, L. R. 18 Eq. 1; *Rossiter* v. *Miller*, 3 App. Cas. 1124; *Commins* v. *Scott*, L. R. 20 Eq. 11.

(*q*) *Sale* v. *Lambert*, supra; *Rossiter* v. *Miller*, supra.

(*r*) *Elmore* v. *Kingscote*, 5 B. & C. 583; *Kain* v. *Old*, 2 B. & C. 627; *Champion* v. *Plummer*, 1 B. & P. N. R. 252; *Goodman* v. *Griffiths*, 1 H. & N. 574. See *Laythoarp* v. *Bryant*, 2 Bing. N. C. at p. 744, decided on the 4th section; *Acebal* v. *Levy*, 10 Bing. at p. 383; *Ashcroft* v. *Morrin*, 4 M. & G. 450, where an order for goods, on moderate terms, was held sufficient.

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price was agreed on; if no price be named, the parties must, it seems, be understood to have agreed that such a sum shall be paid as the article is reasonably worth (*s*).

The contract, though it must be evidenced in writing, may be rescinded by parol; an alteration, therefore, by parol of a contract, by substituting, for example, another day for the delivery of the goods, though that fresh contract, not being in writing, could not be enforced, may operate as a rescinding of the original (*t*). But it would be a question for the jury whether it was not a mere indulgence, and whether the parties meant to rescind the contract absolutely, and that that which could not operate according to their intention should affect existing available rights (*u*).

And signed by the parties to be charged.—The signature may be by printing or stamping the name (*x*), or by a mark or initials, if they be intended as a signature (*y*). The signature need not be at the foot of the note or memorandum. It may be at the beginning or in the body of the writing, if it appears to have been intended as a recognition of the contract. Thus, in *Schneider* v. *Norris* (*z*), the appearance of the vendor's name printed in a bill of parcels was held a sufficient signature to bind him. In this case the defendant had written the *plaintiff's* name in the bill of parcels. Lord *Ellenborough*, C. J., there said: "If, indeed, this case had rested merely on the printed name, unrecog-

(*s*) *Hoadley* v. *M'Laine*, 10 Bing. 482; compare *Goodman* v. *Griffiths*, 1 H. & N. 574; *Valpy* v. *Gilson*, 4 C. B. 837.

(*t*) *Goss* v. *Lord Nugent*, 5 B. & Ad. 58; *Stowell* v. *Robinson*, 3 Bing. N. C. 928; *Harvey* v. *Grabham*, 5 Ad. & E. 61; *Stead* v. *Dawber*, 10 Ad. & E. 57; *Marshall* v. *Lynn*, 6 M. & W. 109; *Plevins* v. *Downing*, 1 C. P. D. 220; *Ogle* v. *Earl Vane*, L. R. 3 Q. B. 272. But see *Moore* v. *Campbell*, 10 Ex. 323.

(*u*) *Noble* v. *Ward*, L. R. 1 Ex. 117; 2 Ex. 135; *Ogle* v. *Vane*, L. R. 2 Q. B. 275; 3 Q. B. 272; *Hickman* v. *Haynes*, L. R. 10 C. P. 598. See *Tyers* v. *Rosedale and Ferry Hill Iron Co.*, L. R. 8 Ex. 305; 10 Ex. 195.

(*x*) *Schneider* v. *Norris*, 2 M. & S. 286, per Lord *Ellenborough*, C. J., and *Le Blanc*, J.

(*y*) Ibid., per Lord *Ellenborough*, C. J.; *Baker* v. *Dening*, 8 Ad. & E. 94; *Harrison* v. *Elvin*, 3 Q. B. 117; *Helshaw* v. *Langley*, 11 L. J. Ch. 17 (cases of marks); *Chichester* v. *Cobb*, 14 L. T. N. S. 433 (initials); and *Caton* v. *Caton*, L. R. 2 H. L. 127, at p. 143, per Lord *Westbury*.

(*z*) Supra.

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nized by and not brought home to the party as having been printed by him or by his authority, so that the printed name had been unappropriated to the particular contract, it might have afforded some doubt whether it would not be intrenching upon the statute to have admitted it. But here there is a signing by the party to be charged by words recognizing the printed name as much as if he had subscribed his mark to it, which is strictly the meaning of signing, and by that the party has incorporated and avowed the thing printed to be his. He has by his handwriting in effect said, 'I acknowledge what I have written to be for the purpose of exhibiting my recognition of the within contract'" (*a*). If the note commence with, "*I, A. B., agree to sell*" (*b*), or "*Mr. A. B. agrees to sell*" (*c*), that is a sufficient signature by A. B.; though it is otherwise where a signature at the end of the instrument was manifestly intended in order to its completion, as where it concluded, "As witness our hands" (*d*). And, as the statute only requires the signature of the parties *to be charged*, a memorandum signed by the vendor has been held sufficient to bind him, though it was not signed by the vendee; against whom, therefore, the contract could not have been enforced (*e*). While a person who signs such a

(*a*) *Saunderson* v. *Jackson*, 2 B. & P. 238; *Schneidsr* v. *Norris*, 2 M. & S. 286; *Durrell* v. *Evans*, 1 H. & C. 174; *Tourret* v. *Cripps*, 48 L. J. Ch. 567; *Bennett* v. *Brumfitt*, L. R. 3 C. P. 28; *Stewart* v. *Eddowes*, L. R. 9 C. P. 311. In *Johnson* v. *Dodgson*, 2 M. & W. 653, the following note (all, except the signature "D. Morse," written by the defendant in a sample-book of his own) was held sufficient:

Leeds, 19*th October*, 1836.

Sold *John Dodgson* (*the defendant*) 27 pockets Playsted, 1836, Sussex, at 103*s*.

The bulk to answer the sample.

4 pockets Seline Beckley's at 95*s*.

Samples and invoices to be sent per Rookingham Coach.

Payment in Bankers' at 2 months.

Signed for Johnson, Johnson & Co. (*the plaintiffs*),

D. Morse.

In *Tourret* v. *Cripps*, 48 L. J. Ch. 567, a letter containing terms of a contract between A. B., the writer, and C. B., written on a memorandum paper bearing a printed heading, "From A. B.," was held sufficient to bind A. B.

(*b*) *Knight* v. *Crockford*, 1 Esp. 190, *Eyre*, C. J.

(*c*) *Lobb* v. *Stanley*, 5 Q. B. 574.

(*d*) *Hubert* v. *Treherne*, 3 M. & G. 743; *Caton* v. *Caton*, supra.

(*e*) *Allen* v. *Bennett*, 3 Taunt. 169; *Reuss* v. *Picksley*, L. R. 1 Ex. 342; see *Rowe* v. *Osborn*, 1 Stark. 140; and see *Laythoarp* v. *Bryant*, 2 Bing. N. C. 735; *Smith* v. *Neale*, 2 C. B.

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memorandum cannot escape liability, evidence is admissible to show that a person not named in the memorandum is liable as principal (*f*).

It has been said by Lord *Eldon* (*g*), that "where a party, or principal, or person to be bound, signs as, what he cannot be, a witness, he cannot be understood to sign otherwise than as principal:" in that case the signature was as follows:—

"*Witness, Evan Phillips, for Mr. Smith, agent for the seller.*"

But, where the purchaser affixed his signature to an agreement for the sale of lands, and underneath was written *Witness, Joseph Newman*, in the usual place for a witness's signature, *Joseph Newman* being the clerk of the auctioneer employed to sell the premises, it was urged that *Newman* must be taken to have signed as agent for the vendor, and it was attempted to show a ratification of his agency. But the Court were of opinion that he signed simply as a witness; and Lord *Dennan*, C. J., said, he thought Lord *Eldon's* remark open to much observation (*h*). In *Eley* v. *Positive Assurance Co.* (*i*), the Court of Exchequer decided that the signature of directors of a company to articles of association, declaring that the plaintiff should be solicitor to the company, was not a signature within the statute, because it was affixed *alio intuitu*. This case was affirmed in the Court of Appeal, but on other grounds irrespective of the Statute of Frauds. In *Jones* v. *Victoria Dock Co.* (*k*), the same contention was thus dealt with: "We think," says *Lush*, J., "there is more ingenuity than force in this argument. The signature is matter of procedure only, and is required as evidence of the contract. It matters not that the memorandum was not made at the time, or for what purpose the signature was put, if only it was put to attest the document as that which contains the terms of the contract" (*l*).

N. S. 67, decided on the 4th section; *Watts* v. *Ainsworth*, 1 H. & C. 83.

(*f*) *Higgins* v. *Senior*, 8 M. & W. 834.

(*g*) In *Coles* v. *Trecothick*, 9 Ves. at p. 251.

(*h*) *Gosbell* v. *Archer*, 2 Ad. & E. 500. See *Bult* v. *Morrell*, 12 Ad. & E. 745.

(*i*) 1 Ex. D. 20, 88 (1875).

(*k*) 2 Q. B. D. 314, at p. 323 (1877).

(*l*) See *Hussey* v. *Horne-Payne*, 4

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Or their agents, thereunto lawfully authorised.—The authority need not be in writing (*m*); and a subsequent recognition by the principal is sufficient evidence of its having been given (*n*). But it has been held that one of the contracting parties cannot be the agent of the other for this purpose (*o*). This decision seems to be somewhat regretted. What was the motive for signing the memorandum seems immaterial. Though it has been held that an auctioneer's signature of the defendant's name, by his authority, is insufficient to entitle the auctioneer to sue upon the contract in his own name, it is settled that a signature by the auctioneer's clerk is sufficient for that purpose (*p*).

Though the auctioneer, suing in his own name on the contract of sale, cannot avail himself of his character of agent for the defendant, yet, in other cases, he is looked on at a public sale as the lawfully authorised agent of both parties (*q*), the seller communicating his authority by giving him directions to sell; and the buyer, to whom the conditions of sale, pasted on the auctioneer's box, are sufficient notice of the terms thereof (*r*), by bidding aloud. And, if the auctioneer, or auctioneer's clerk (*s*), write down the purchaser's name in the sale book opposite the lot for which he is the highest bidder, that is a sufficient signature within the statute, and binds the purchaser (*t*), who perhaps may, at any time before the entry,

App. Cas. 311, at p. 323, per Lord *Selborne*.

(*m*) *Rucker* v. *Cammeyer*, 1 Esp. 105; *Chapman* v. *Partridge*, 5 Esp. 256.

(*n*) *Maclean* v. *Dunn*, 4 Bing. 722; *Kinnitz* v. *Surry*, Paley, 171, n., 3rd ed.; *Soames* v. *Spencer*, 1 D. & R. 32.

(*o*) *Wright* v. *Dannah*, 2 Camp. 203; *Sharman* v. *Brandt*, L. R. 6 Q. B. 720. See ante, Bk. I., Ch. 5, s. 1.

(*p*) *Bird* v. *Boulter*, 4 B. & Ad. 443.

(*q*) See *Bird* v. *Boulter*, ubi supra; *Hinde* v. *Whitehouse*, 7 East, 558; *Durrell* v. *Evans*, 31 L. J. Ex. 337; *Beer* v. *London and Paris Hotel Co.*, 20 Eq. 412, at p. 426. But aliter, where the sale is after the auction: *Mews* v. *Carr*, 1 H. & N. 484.

(*r*) *Mesnard* v. *Aldridge*, 3 Esp. 271.

(*s*) *Bird* v. *Boulter*, supra. Where this is done by the clerk, he does not, it would seem, act as a mere automaton in the auctioneer's hand, but as a distinct agent, authorised by the parties to make entries. In that case the signature by the clerk takes place *contemporaneously with the sale*, when it could not conveniently be performed by the auctioneer, who is otherwise engaged. Generally speaking, the clerk of an agent has no authority to sign for the principal. See *Gosbell* v. *Archer*, 2 Ad. & E. 500; *Peirce* v. *Corf*, L. R. 9 Q. B. 210.

(*t*) *Emmerson* v. *Heelis*, 2 Taunt. 38; *Hinde* v. *Whitehouse*, 7 East, 558; *Bird* v. *Boulter*, 4 B. & Ad. 443; *Shelton* v. *Livius*, 2 C. & J. 411.

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retract his authority, as he certainly may before the fall of the hammer (*u*). But if the signature be in a book or on a mere catalogue of the articles, neither connected with nor referring to the conditions of the sale, it will not be a memorandum of a sale on those conditions, unless it can be connected with them by some other written document (*x*). Though *primâ facie* the auctioneer is the agent of both parties, yet he is not so necessarily and *ex vi termini*. Thus, where P. bought goods at an auction, having previously agreed with their owner that he was not to pay cash, but to set off a debt due to himself against the price, he was held to have a right to do so, though the conditions of sale required payment in cash; for the previous agreement between himself and the seller rebutted the presumption of the auctioneer's authority to bind him to those conditions (*y*).

A *broker* also is generally (*z*), though not invariably, the agent of both parties within the section (*a*). The usual and proper mode in which he binds his principals *inter se* is by making an entry of the contract in his book, which he signs as their common agent, and he sends the bought and sold notes (which ought, according to the bond formerly required of brokers (*b*), to be copies of this entry) to them for their information, the bought note being sent to the buyer and the sold note to the seller (*c*). It has been held (*d*), and the better opinion (*e*) seems to be, that, in the absence of any custom to the contrary, the entry thus made in his book is the original contract, and the bought and sold notes are merely copies of it, though this doctrine was

(*u*) *Payne* v. *Cave*, 3 T. R. 148; and see *Warlow* v. *Harrison*, 1 E. & E. 295.

(*x*) *Peirce* v. *Corf*, L. R. 9 Q. B. 210; *Phillimore* v. *Barry*, 1 Camp. 513.

(*y*) *Bartlett* v. *Purnell*, 4 Ad. & E. 792; and as to private sales, *Mews* v. *Carr*, 1 H. & N. 484.

(*z*) *Thompson* v. *Gardiner*, 1 C. P. D. 777.

(*a*) See ante, Book I., Ch. 4, pp. 118 *et seq.*; *Simon* v. *Motivos*, 1 W. Bl. 599; *Rucker* v. *Cammeyer*, 1 Esp. 105; *Hinde* v. *Whitehouse*, 7 East, 558; *Durrell* v. *Evans*, 1 H. & C. 174; *Fairlie* v. *Fenton*, L. R. 5 Ex. 169. But in general the broker is such agent with a limited special authority only to sign a contract containing the terms verbally agreed upon; and if he omit a material term in drawing it up, a party who has not recognised or adopted the contract as drawn up will not be bound: *Pitts* v. *Beckett*, 13 M. & W. 743.

(*b*) Blackburn on Sale, 2nd ed. 81.

(*c*) *Sievewright* v. *Archibald*, 17 Q. B. 103.

(*d*) *Heyman* v. *Neale*, 2 Camp. 337.

(*e*) *Sievewright* v. *Archibald*, ubi sup.

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at one time thought to be overruled (*f*). Still the notes seem to be the proper evidence of the bargain (*g*), provided always, that they correspond with each other (*h*). If there be no bought and sold notes (*i*), or if they be not signed (*k*), or if those notes materially differ from each other (*l*), the original signed entry must be resorted to, and will bind the parties. But if the notes correspond with each other, yet vary from the entry, it seems that, in the absence of any custom by which they are regarded as the contract (*m*), all the parties, by accepting and acquiescing in them, have ratified the bargain they express and adopted it in lieu of the original (*n*). If there be no entry signed by the broker, it seems the bought and sold notes constitute the contract (*o*). It has been held that if they do not correspond, the intended contract will not be affected (*p*), and that if they be altered in any material

(*f*) *Thornton* v. *Meux*, 1 M. & M. 43; *Cumming* v. *Roebuck*, 1 Holt, 172; *Goom* v. *Aflalo*, 6 B. & C. 117. See *Short* v. *Spackman*, 2 B. & Ad. 962; *Hawes* v. *Foster*, 1 M. & Rob. 368. At the first trial of this last case, it was ruled that the bought and sold notes were the contract; and it was held sufficient for the vendee to produce the *bought note*, leaving it to the vendor to produce the *sold note*, if he relied on a varisnce between the two. This the Court thought wrong. At the second trial it was left to the jury as a question of fact, whether, according to the usage of trade in the city, the bought and sold notes or the broker's book constituted the contract; *Denman*, C. J., still retaining his opinion as expressed at the former trial upon the point of law. The jury found the bought and sold notes to be the contract.

(*g*) *Thornton* v. *Meux*, 1 M. & M. 43; *Cumming* v. *Roebuck*, 1 Holt, 172; *Goom* v. *Aflalo*, 6 B. & C. 117; *Short* v. *Spackman*, 2 B. & Ad. 962; *Hinde* v. *Whitehouse*, 7 East, 558; *Blagden* v. *Bradbear*, 12 Ves. 466, 472; *Buckmaster* v. *Harrop*, 13 Ves. 456; *Dickenson* v. *Lilwal*, 1 Stark. 128.

(*h*) *Thornton* v. *Meux*, ubi sup.; *Grant* v. *Fletcher*, 5 B. & C. 436; *Thornton* v. *Kempster*, 5 Taunt. 786; *Cumming* v. *Roebuck*, ubi sup.; *Kempson* v. *Boyle*, 3 H. & C. 763.

(*i*) *Grant* v. *Fletcher*, supra, per *Parke*, B.; *Pitts* v. *Beckett*, 13 M. & W. at p. 746; *Sievewright* v. *Archibald*, 17 Q. B. 103.

(*k*) *Thompson* v. *Gardiner*, 1 C. P. D. 777.

(*l*) *Thornton* v. *Charles*, 9 M. & W. 802.

(*m*) *Hawes* v. *Foster*, ubi sup.

(*n*) *Hawes* v. *Foster*, and *Sievewright* v. *Archibald*, ubi sup.

(*o*) *Goom* v. *Aflalo*, 6 B. & C. 117; *Short* v. *Spackman*, 2 B. & Ad. 962.

(*p*) *Thornton* v. *Kempster*, 5 Taunt. 786; 1 Marsh. 355; *Thornton* v. *Meux*, 1 M. & M. 43; *Grant* v. *Fletcher*, 5 B. & C. 436; *Gregson* v. *Ruck*, 4 Q. B. 737; *Cumming* v. *Roebuck*, Holt, 172; per *Gibbs*, C. J., *Cowie* v. *Remfry*, 5 Moore, P. C. Ca. 232; but see remarks on this case in *Heyworth* v. *Knight*, 17 C. B. N. S. 298; *Sievewright* v. *Archibald*, ubi sup. But quære, whether the defendant, by recognising one of the notes as contain-

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point without the consent of the party sought to be charged, it will, as against him, be avoided (*q*). But a mistake in both notes as to the seller's name was considered not to vitiate the contract, if it were not shown that anyone was prejudiced thereby (*r*); and it has been held that a vendee was bound by a note signed by him and delivered to the vendor by the broker, though containing a provision not to be found in the note sent to the vendee (*s*). Where the vendee desired the

ing the terms of the bargain, may not be considered to have adopted and ratified it. See per *Erle*, J., *Sievewright* v. *Archibald;* and see *Moore* v. *Campbell*, 10 Ex. 323.

(*q*) *Powell* v. *Divett*, 15 East, 29; *Mollett* v. *Wackerbarth*, 5 C. B. 181. If there be a material omission or mistake in the contract the Court will relieve in some instances. See *Borrowman* v. *Rossel*, 16 C. B. N. S. 58.

(*r*) *Mitchell* v. *Lapage*, Holt, 253.

(*s*) *Rowe* v. *Osborne*, 1 Stark. 140. See the ground for this, *Cowie* v. *Remfry*, 5 Moore, P. C. Ca. at p. 249; and see *Allen* v. *Bennett*, 3 Taunt. 169.

The text has been retained. From the cases Mr. Benjamin deduced the following rules:—

(1) The broker's signed entry in the book constitutes the contract between the parties, and is binding on both;

(2) The bought and sold notes do not *constitute* the contract;

(3) But the bought and sold notes, when they correspond, or state all the terms of the bargain, are complete and satisfactory evidence to satisfy the statute; even though there be no entry in the broker's book, or, what is equivalent, only an unsigned entry;

(4) Either the bought or sold note alone will satisfy the statute, provided no variance be shown between it and the other note, or between it and the signed entry in the book;

(5) Where one note only is offered in evidence, the defendant has the right to offer the other note, or the signed entry in the book, to prove a variance;

(6) As to variance between bought and sold notes—(a) when there is an entry; (b) when there is not. In the former case "this entry will in general control the case"; in the latter, it is a question of fact whether the acceptance by the parties of the bought and sold notes constitutes evidence of a new contract;

(7) Variance between correspondence and the bought and sold notes, the same rule as in case (6);

(8) If the bought and sold notes vary, and there is no signed entry in the broker's book, nor other writing showing the terms of the bargain, there is no valid contract;

(9) In sale by a broker on credit, evidence of usage is admissible that the vendor is not bound until he has had a reasonable time, after receiving the sold note, to inquire into the sufficiency of the purchaser, and to withdraw if he disapproves: Benjamin on Sals, 4th ed. p. 268.

As to these rules, it may be said that neither the notes nor entry are in strictness *the* contract; they are evidence of it, and the question in each case is, which document is the evidence. There may be, and often are, several memoranda of the same con-

vendor's agent to enter a note of the contract in the vendor's book, it was held that this did not authorise the agent to bind the vendee by his *signature* to such entry so as to satisfy the statute (*t*).

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Section III.—*Duties of Vendor.*

Duties of vendor.

We have now discussed the form and requisites of a contract of sale. Next in order is the consideration of the duties it imposes. It may at the outset be stated that neither the vendor nor vendee can excuse himself from performing his side of the contract by breaking a condition which it is incumbent on himself to fulfil, although it may have been stipulated, or even enacted, that the sale on breach of such condition shall be null and void, for that means *void at the election of the other party* (*u*).

The duties of the seller arise out of—(a) conditions precedent, (b) conditions concurrent, (c) conditions subsequent, (d) warranties, and (e) representations.

When a promise is wholly dependent on the fulfilment of another, the latter is a condition precedent (*x*). When a promise must be fulfilled concurrently with another, they are concurrent conditions. When it is a term in a contract that the parties will be relieved from all or some of the duties under it, upon the happening of a certain event, it is a condition subsequent. A warranty is a promise forming part of the contract, the breach of which gives a right to compensation, but not to a rescission of the contract (*y*). It is usually said to be collateral and subsidiary to the agreement; but this appears to mean no more

tract: *Erle*, J., in *Sievewright* v. *Archibald*, 17 Q. B. at p. 107. If they agree, they are all equally evidence of the contract; if one were lost, the other would be sufficient to satisfy the statute. If they differ it would seem to be a question of fact which is the true memorandum.

(*t*) *Graham* v. *Musson*, 5 Bing. N. C. 603; *Graham* v. *Fretwell*, 3 M. & G. 368; *Durrell* v. *Evans*, 1 H. & C. 174.

(*u*) *Malins* v. *Freeman*, 4 Bing. N. C. 395; *Holme* v. *Guppy*, 3 M. & W. 387; *Thornhill* v. *Neats*, 8 C. B. N. S. 831. Compare *Neill* v. *Whitworth*, L. R. 1 C. P. 684.

(*x*) *Behn* v. *Burness*, 3 B. & S. 751; Anson on Contracts, 5th ed. 301; *Roberts* v. *Berry*, 3 D. M. & G. 284; *Alexander* v. *Gardner*, 1 Bing. N. C. 671; *Fragano* v. *Long*, 4 B. & C. 219; *Gower* v. *Von Dedalzen*, 3 Bing. N. C. 717; *Staunton* v. *Wood*, 16 Q. B. 638.

(*y*) *Hinchcliffe* v. *Barwick*, 5 Ex. D. 177.

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than the above definition (*z*). A representation is a statement, made before or at the time of the agreement, but not forming part of it, with respect to the subject-matter of it.

Delivery of Goods (*a*).—The vendor must deliver the goods as soon as the vendee has performed all conditions precedent on his part (*b*), and may, if he refuse to do so, be sued either specially for non-performance of his contract (*c*), or in trover or detinue (*d*) for the goods themselves. He may, however, stipulate to the contrary, and may sometimes be excused by causes over which he has no control, in circumstances explained below (*e*).

In the absence of any contract, express or implied, to the contrary, delivery means delivery at the place where the goods are at the time of sale (*ee*). Goods are *delivered*, in the sense of complying with the contract of sale, when they are placed in the vendee's power, so that he may immediately remove them, and cannot be rightfully prevented from so doing (*f*). Thus, if the goods be in a stranger's close, and that stranger have, before the sale, licensed the vendee to take them (as, for example, where an auctioneer sells goods on the close of a stranger), that is a *delivery* (*g*), for the auctioneer had made the only delivery possible in the circumstances. The handing of a delivery order giving the buyer an immediate right to

(*z*) *Chanter* v. *Hopkins*, 4 M. & W. at p. 404.

(*a*) See the various meanings of "delivery" stated in Benjamin on Sale, 4th ed. p. 677.

(*b*) See *Wilmshurst* v. *Bowker*, 5 Bing. N. C. 451; 7 M. & G. 882 (Ex. Ch.)

(*c*) In some instances this is the only remedy: see *East India Co.* v. *Paul*, 7 Moore, P. C. Ca. 85; *Logan* v. *Le Mesurier*, 6 Moore, P. C. Ca. 116. In this action now, if the contract be for specific goods, the plaintiff may recover and have execution for them, as well as damages for their non-delivery: 19 & 20 Vict. c. 97, s. 2. As to the measure of damages, see *infra*, p. 655.

(*d*) See *Eberle's Hotels Co.* v. *Jonas*, 56 L. J. Q. B. at p. 283, per *Bowen*, L. J.

(*e*) *Taylor* v. *Caldwell*, 3 B. & S. 826; *Howell* v. *Coupland*, 1 Q. B. D. 258.

(*ee*) Benjamin on Sale, 4th ed. 684; *Hatch* v. *Oil Co.*, 10 Otto, 134.

(*f*) *Wood* v. *Tassell*, 6 Q. B. 234.

(*g*) *Salter* v. *Woollams*, 2 M. & G. 650 (for an attempt to reconcile this case with *Burn* v. *Bentall*, 3 B. & C. 423, see Benjamin on Sale, 4th ed. 683); *Wood* v. *Manley*, 11 Ad. & E. 34; and see *Davies* v. *McLean*, 28 L. T. N. S. 113; *Stanton* v. *Austin*, L. R. 7 C. P. 651.

require the warehouse-keeper to deliver or attorn to him, is delivery (*h*). Duties of vendor.

Where the seller has the option of delivering, or the buyer has the option of taking delivery, at more than one place, notice must be given of the particular place at which delivery is desired (*k*).

If it be generally mentioned that the vendor shall not merely deliver but send the goods, that means *within a reasonable time*, and what time is, under the circumstances, reasonable, is a question of evidence (*l*). If the goods be beyond sea he ought to send the bill of lading in a reasonable time, in order that the vendee may have it in his power to go to market (*m*). It was once considered that, whether the time of delivery be specified or left at large, the delivery should be made at a *reasonable hour*, in order to discharge the vendor's duty. But it has since been held that an actual tender of the goods to the purchaser, if he be at his warehouse, at any hour of the last day which will allow him time before midnight to examine, weigh and receive them, in the absence of any special custom, will be good; but that the purchaser is not bound to remain at his warehouse after a reasonable time before sunset to allow of the examination (*n*).

The words in contracts as to the quantity may be a condition precedent, non-observance of which will entitle the buyer to refuse to comply with the contract; or they may be a mere estimate. When the contract is to deliver "about" a certain quantity, or a certain quantity "more or less," and the quantity actually delivered differs from that specified, the seller will fulfil his duties even if there be a slight deficiency. In the case of a contract for a specific lot of goods in any way identified, *e. g.*, the goods in a particular warehouse, or ship, or mill—the word "about" is regarded as indicative only of an estimate; if there be good

(*h*) *Lorymer* v. *Smith*, 1 B. & C. 1; *Sanders* v. *Maclean*, 11 Q. B. D. 327 (delivery of bill of lading).

(*k*) *Davies* v. *McLean*, 28 L. T. N. S. 113; *Armitage* v. *Insole*, 14 Q. B. 728.

(*l*) *Ellis* v. *Thompson*, 3 M. & W. 445.

(*m*) *Barber* v. *Taylor*, 5 M. & W. at p. 533, where a refusal to deliver the bill of lading was held to entitle the vendee to rescind.

(*n*) *Startup* v. *M'Donald*, 2 M. & G. 395; but reversed in Exch. Ch., 6 M. & G. 593.

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faith on the part of the seller, the contract is binding, notwithstanding a slight deficiency. In *Gwillim* v. *Daniell* (*o*), the agreement was that A. should sell and B. buy "all the naphtha that A. might make from the 1st of June for two years, *say from* 1,000 *to* 1,200 *gallons a month;*" the words in italics were held only a representation. In *Leeming* v. *Snaith* (*p*), on the other hand, where a contract for wool was, "John Snaith, of B., sold to John Leeming & Co., what he may pull up to the 16th of January, *say not less than* 100 *packs of combing skin* at 7½ per pound." Three judges held this to be a positive contract for 100 packs at least. Where no independent circumstances indicative of the quantity sold exist, the amount named in the contract is material, and the word "about" provides merely for slight variations. The general rule is that, subject to a moderate margin, the seller cannot call upon the buyer to accept any greater or less quantity than that specified (*q*).

Where the contract of sale is to deliver a certain quantity of goods in monthly or other periodical instalments, failure to deliver or accept one or more of them may, in certain circumstances, be treated as a rescission of the contract, justifying the other party in refusing to accept or deliver future instalments. The point arose in *Hoare* v. *Rennie* (*r*). The defendant agreed to buy of the plaintiff 667 tons of Swedish iron, to be shipped by the seller in the months of June, July, August, and September, in about equal monthly portions. In June, only 21 tons were shipped. The defendant having refused to accept this quantity, or any other instalments, the seller brought an action for non-acceptance. The defendant pleaded the non-acceptance of the quantity specified in the contract, and this was held to be an answer. In *Simpson* v. *Crippin* (*s*), the contract was that the defendant should deliver from 6,000 to 8,000 tons

(*o*) 2 C. M. & R. 61.

(*p*) 16 Q. B. 275; *McConnel* v. *Murphy*, L. R. 5 P. C. 203; *McLay* v. *Perry*, 44 L. T. 152; *Norrington* v. *Wright*, 8 Davis (S. C. U. S.), at p. 204; *Brawle* v. *United States*, 6 Otto, 168. Compare *McConnel* v. *Murphy*, where "say about" were held to be words of expectancy, with *Morris* v. *Levison*, 1 C. P. D. 155, where the same words were held to be a contract to deliver the quantity.

(*q*) *Reuter* v. *Sala*, 4 C. P. D. 239, at p. 244, per *Thesiger*, L. J.

(*r*) 5 H. & N. 19 (1859).

(*s*) L. R. 8 Q. B. 14 (1872). See also *Brandt* v. *Lawrence*, 1 Q. B. D. 344.

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of coal in equal monthly deliveries into the plaintiff's waggons, during twelve months from the 1st of July. During the first month, viz., July, the plaintiff sent waggons to receive only 158 tons, and the defendants, on the 12th of August, gave notice that the contract was cancelled. The Court of Queen's Bench, *Blackburn* and *Lush*, JJ. (*Mellor*, J., dissenting on the ground that he was bound by the decision in *Hoare* v. *Rennie* (*t*)), held that the defendants were not entitled to refuse to carry out their contract. Which of these cases is right has been a matter of doubt. In *Honck* v. *Muller* (*u*), there was a contract by the defendant to deliver to the plaintiff 2,000 tons of iron to be delivered in November, or equally over November, December, and January. The plaintiff did not take delivery of any iron in November, but asked to be allowed to take delivery of one-third in December and one-third in January. It was held by the Court of Appeal (*Bramwell* and *Baggallay*, L. JJ., *Brett*, L. J., dissenting), on the authority of *Hoare* v. *Rennie* (*x*), that the defendant was entitled to refuse to deliver any of the iron to the plaintiff. The Court thought that the plaintiff not having taken the whole in November, the contract must, under the circumstances, be taken to have been for delivery by equal portions during November, December, and January, and that the plaintiff, having failed to take any delivery in November, could not claim delivery during December and January of two-thirds of the whole amount bargained for. In the *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (*y*), the facts were as follows: The plaintiffs agreed to deliver to the defendants 5,000 tons of steel, to be delivered 1,000 tons monthly, commencing January, 1881, payment to be within three days after receipt of shipping documents. The defendants took delivery in January and February of the January instalment. On the 2nd of February, before payment for the instalment became due, a petition was presented to wind up the plaintiff company. The defendants objected to make the payment then due, unless the sanction of

(*t*) 5 H. & N. 19.

(*u*) 7 Q. B. D. 92 (1881). See also *Brandt* v. *Lawrence*, 1 Q. B. D. 344 (1876); and *Reuter* v. *Sala*, 4 C. P. D. 239 (1879).

(*x*) 5 H. & N. 19.

(*y*) 9 App. Cas. 434 (1884).

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the Court was obtained. The plaintiffs thereupon refused to deliver. The House of Lords decided that payment of the instalment due was not a condition precedent to the right to claim the next delivery, and that the plaintiffs were bound to perform the contract.

In cases of this kind two questions are involved. First, whether the payment for the goods already delivered is a condition precedent, and, secondly, whether the conduct of the party refusing to pay amounts to a renunciation of the contract (z). The answer to the first question depends upon the construction of the contract between the parties. "The contract," said Lord Selborne, speaking of the contract in *The Mersey Steel, &c. Co.* v. *Naylor, Benzon & Co.* (a), "is for the purchase of 5,000 tons of steel blooms of the company's manufacture; therefore it is one contract for the purchase of that quantity of steel blooms. No doubt there are subsidiary terms in the contract as to the time of delivery and as to the time of payment, but that does not split up the contract into as many contracts as there shall be deliveries for the purpose of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract, that it is to be *one contract* for the purchase of that quantity of iron, to be delivered at those times and in that manner, and for which payment is so to be made. It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment." Of course it may be, and sometimes is, a condition precedent; but inasmuch as the failure to deliver can generally be satisfied by damages, it is, as a rule, not such. In order to answer the second question, whether the failure of the one party to comply with the contract amounts to a renunciation or repudiation of it, "You must examine what that conduct is, so as to see whether it amounts to a renunciation, or to an absolute refusal to perform the contract such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a

(z) See *Pordage* v. *Cole*, 1 Wms. Saund. 548; 2 Sm. L. C. 9th ed. pp. 11, 12.

(a) 9 App. Cas. 434, at p. 439, citing the rule by Lord *Coleridge*, C. J., in *Freeth* v. *Burr*, L. R. 9 C. P. 208.

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reason for rescinding" (*b*). When, as in *Hochster* v. *De la Tour* (*c*), one of the parties gives clear indication that he will not perform the contract, there is no difficulty; the other party need not wait for the breach, but may at once sue for damages. But what is meant by conduct amounting "to a renunciation or to an absolute refusal," when nothing to that effect is expressed, or there is an expression to the contrary? Some of the cases suggest that the existence of an intention to repudiate the contract is necessary. Obviously, however, an intention does not amount to a rescission, which requires the concurrence of all parties to the contract. The existence of intention would be no defence to an action unless there was a failure to comply with a condition precedent; and if there was a non-compliance with a condition precedent, the non-existence of the intention would be, it is submitted, immaterial. It is conceived that the test is (a) whether one of the parties has said, or by his conduct indicated, that he will not perform the contract; in other words, whether the principle of *Hochster* v. *De la Tour* (*d*) applies; and (b) if there has been a failure to perform the contract, whether the breach is of a condition precedent (*e*). Where the contract has been partly fulfilled, as it is impossible to put the parties in their original position, a breach which might justify a rescission of the contract if it were unfulfilled, may not have that effect (*f*).

(*b*) Lord Selborne in *Mersey Steel, &c. Co.* v. *Naylor, Benzon & Co., ubi supra.*

(*c*) 2 El. & Bl. 678.

(*d*) Ibid.

(*e*) *Mersey Steel and Iron Co.* v. *Naylor, &c. Co.*, 9 App. Cas. 434, at p. 444, per Lord *Blackburn*.

(*f*) The following are the chief cases on the subject in order of date. *Hoare* v. *Rennie*, 5 H. & N. 19; *Jonassohn* v. *Young*, 4 B. & S. 296; *Simpson* v. *Crippin*, L. R. 8 Q. B. 14 (which conflicts with *Hoare* v. *Rennie*); *Freeth* v. *Burr*, L. R. 9 C. P. 208; *Honck* v. *Muller*, 7 Q. B. D. 92; *Mersey Steel Co.* v. *Naylor*, 9 App. Cas. 434; *Johnstone* v. *Milling*, 16 Q. B. D. 460. Such cases as *Bloomer* v. *Bernstein*, L. R. 9 C. P. 588; *Morgan* v. *Bain*, L. R. 10 C. P. 15; *Ex parte Chalmers*, L. R. 8 Ch. 289, seem open to grave doubt. Mr. Justice *Gray*, delivering the judgment of the United States Supreme Court in *Norrington* v. *Wright*, 8 Davis, at p. 211, says, "upon a review of the English decisions, the rule laid down in the earlier cases of *Hoare* v. *Rennie* and *Coddington* v. *Paleologo*, as well as in the later cases of *Reuter* v. *Sala* and *Honck* v. *Muller*, appears to us to be supported by a greater weight of authority than the rule stated in the intermediate cases of *Simpson* v. *Crippin* and *Brandt* v. *Lawrence*, and to accord better with the general principles affirmed by the House of Lords

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When the contract specifies a particular time of delivery or shipment, the question in each case is whether this is a warranty or condition precedent; and, speaking generally, in mercantile contracts such conditions are of the essence of the contract, upon the failure or non-performance of which the party aggrieved may repudiate the contract (*g*).

If no time is fixed upon for payment of the price, or if the parties have not embodied any usage as to the time, payment is to be concurrent with delivery (*h*).

In the absence of special stipulation, the condition precedent upon the vendee's part is *readiness to pay the price* (*i*). If the goods were to be paid for by a bill, the vendee ought to tender one (*k*); but the word *bill* will not be held to mean *approved bill* (*l*). If an *approved bill* be stipulated for, that means a bill to which no reasonable objection can be made (*m*).

There are some cases indeed in which the vendor may be obliged to deliver the goods without payment or tender of the price: these are—

First, where by special agreement between the parties the day of payment is to be subsequent to that of delivery; in other words, where the goods are sold on credit. Yet, even in such case, though the vendee has the title to the property and a right to possession (*n*) without payment or tender of the price, yet that

in *Bowes* v. *Shand*, 2 App. Cas. 455, while it nowise contravenes the decision of that tribunal in *Mersey Co.* v. *Naylor*."

(*g*) See the remarks of Lord *Cairns* in *Bowes* v. *Shand*, 2 App. Cas. 455, at p. 463.

(*h*) *Bloxam* v. *Sanders*, 4 B. & C. at p. 948; *Simmons* v. *Swift*, 5 B. & C. at p. 862.

(*i*) *Rawson* v. *Johnson*, 1 East, 203. See *Peeters* v. *Opie*, 2 Wms. Saund. 352*a*, notes; and *Jackson* v. *Jacob*, 3 Bing. N. C. 869; *Bordenave* v. *Gregory*, 5 East, 107; *Lawrence* v. *Knowles*, 5 Bing. N. C. 399; *Ex parte Chalmers*, L. R. 8 Ch. 289; *Morgan* v. *Bain*, L. R. 10 C. P. 15. In *Squier* v. *Hunt*, 3 Price, 68, a demand of the goods by a servant was held primâ facie evidence of readiness to pay. But quære.

(*k*) *Hodgson* v. *Davies*, 2 Camp. 500. On the effect of payment by bill, see post, Chap. 13, on Contracts of Debt; and see *Bunney* v. *Poyntz*, 4 B. & Ad. 568; *Miles* v. *Gorton*, 2 C. & M. 504. See *Horncastle* v. *Farran*, 3 B. & Ald. 497.

(*l*) Ibid. But probably evidence that such was the meaning of "bill" would be admissible.

(*m*) Ibid. *Smith* v. *Mercer*, L. R. 3 Ex. 51. See *Adam* v. *Richards*, 2 H. Bl. 573; *Thirsby* v. *Helbot*, 3 Mod. 272. As to payment "at convenience" of buyer, see *Crawshaw* v. *Hornstedt*, 3 Times Law Rep. 426.

(*n*) Shepp. Touchstone, 224. See *New* v. *Swain*, 1 Dans. & Lloyd, 193;

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right is not indefeasible, and will be defeated if he become insolvent before he has actually taken possession (*o*). The vendor may also refuse delivery if he has received distinct notice of the vendee's insolvency (*p*). Frequently there is an express or implied condition that possession shall not be given until a draft is accepted or remitted. Where goods were to be paid for *by a banker's draft at two months* (which is a sale at two months' credit), but *by the express terms of the contract* the draft was to be remitted *on receipt of the invoice and bill of lading*, the vendee having failed to remit a banker's draft accordingly was held not to be entitled to the possession of the goods, and consequently to have no right to maintain trover (*q*). In this case it will be observed that though the sale was upon credit, the vendee's right to the possession of the goods was hindered from accruing by the express stipulation of the parties, who made the delivery of the goods dependent upon that of the draft. In *Ex parte Chalmers* (*r*) this principle was applied to a contract to sell goods by instalments. H. contracted to sell to E. goods by instalments, payment to be made in cash in fourteen days from the date of each delivery; after several deliveries had been made E. became insolvent; one instalment was still unpaid for, and

Crawshay v. *Homfray*, 4 B. & Ald. 50; *Spartali* v. *Benecke*, 10 C. B. 212. In the judgment of the Court, in *Martindale* v. *Smith*, 1 Q. B. at p. 395, is a passage which at first seems at variance with this; but I think it refers to the vendor's right to retain possession *after* the expiration of the time of credit, if the goods be in his hands and the price still unpaid, a right which seems to have been doubted in *Bloxam* v. *Sanders*, 4 B. & C. 941.

(*o*) *Bloxam* v. *Sanders*, 4 B. & C. 941; *Dixon* v. *Yates*, 5 B. & Ad. 313; *Miles* v. *Gorton*, 2 C. & M. 504; *Townley* v. *Crump*, 4 Ad. & E. 58; *M'Ewan* v. *Smith*, 2 H. L. Ca. 309; *Gunn* v. *Bolckow*, L. R. 10 Ch. 491; *Ex parte Chalmers*, L. R. 8 Ch. 289; *Morgan* v. *Bain*, L. R. 10 C. P. 15; and Book IV., Chap. 1, *Stoppage in Transitu*.

(*p*) *In Re Phœnix Bessemer Co.*, 4 Ch. D. at p. 113.

(*q*) *Wilmshurst* v. *Bowker*, 5 Bing. N. C. 541. But see this case on writ of error, 7 M. & G. 882, where the Court held, that, from these circumstances, the jury might have inferred that the delivery of the banker's draft was a condition precedent to the vesting of the property; but that the Court could not draw such an inference; and, on the bare statement of these facts, the plaintiff was entitled to the possession. And see *Barber* v. *Taylor*, 5 M. & W. 527; *Dodsley* v. *Varley*, 12 Ad. & E. 632; *Lord* v. *Price*, L. R. 9 Ex. 54.

(*r*) L. R. 8 Ch. 289; *Grice* v. *Richardson*, 3 App. Cas. 319.

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one delivery not yet made. It was held that H. was entitled to refuse delivery of the undelivered instalment until it and the unpaid instalment were paid for.

Secondly, where the vendor has done that which amounts to a delivery of the goods, and has thereby lost his lien (*s*), e. g., where he has made a *symbolical* transfer of property, which is by its nature (*t*) unfit to be delivered otherwise, as, for instance, by giving up to the vendee the key of the warehouse where it is deposited (*u*), or giving a delivery order to the wharfinger in whose possession it is, to which order the wharfinger has signified his assent (*x*), or where he has done any act which would determine his right to stop *in transitu* (*y*). But it must be observed that the converse of this last proposition is not true, for many acts will be sufficient to divest the vendor's lien for his price, which will not be sufficient to hinder him from stopping the goods *in transitu* if the vendee should become insolvent. For instance, delivery of goods to an agent of the vendee appointed to convey them to him, deprives the vendor of his lien for the price, but not of his right to stop the goods *in transitu* in case of the vendee's failure before they have reached him (*z*).

"If there has been a delivery of goods to the vendee and an appropriation of them to his own use, the right of stoppage does not exist; in a case of that kind the property in, and the possession of, the goods have passed to the vendee; but where the goods are in the course of transit from the vendor to the vendee, although the

(*s*) *Slubey* v. *Heyward*, 2 H. Bl. 504; *Hammond* v. *Anderson*, 1 B. & P. N. R. 69; *Green* v. *Haythorne*, 1 Stark. 447; *Swanwick* v. *Sothern*, 9 Ad. & E. 895.

(*t*) *Manton* v. *Moore*, 7 T. R. 67. See *Hibbert* v. *Carter*, 1 T. R. 745; *Lempriere* v. *Pasley*, 2 T. R. 485; *Zwinger* v. *Samuda*, 7 Taunt. 265; *Lucas* v. *Dorrien*, 7 Taunt. 278.

(*u*) *Ellis* v. *Hunt*, 3 T. R. 464; *Copland* v. *Stein*, 8 T. R. 199. See *Spear* v. *Travers*, 4 Camp. 251; *Greaves* v. *Hepke*, 2 B. & Ald. 131.

(*x*) *Lucas* v. *Dorrien*, 7 Taunt. 278; *Hawes* v. *Watson*, 2 B. & C. 540; *Woodley* v. *Coventry*, 2 H. & C. 164; *Harman* v. *Anderson*, 2 Camp. 243; *M'Ewan* v. *Smith*, 2 H. L. Ca. 309. See *Stoveld* v. *Hughes*, 14 East, 308; *Stonard* v. *Dunkin*, 2 Camp. 344; *Cuming* v. *Brown*, 9 East, 506; *Pearson* v. *Dawson*, E. B. & E. 448. And see *Swanwick* v. *Sothern*, ubi supra; also *Lackington* v. *Atherton*, 7 M. & G. 360.

(*y*) See post, Book IV., Chap. 1.

(*z*) *Dunlop* v. *Lambert*, 6 Cl. & F. 600, at p. 620. See a learned note by Mr. Starkie, Law of Evidence, 2nd ed. p. 892. And as to the distinction between a lien for the price of goods and the right to stop *in transitu*, see *Cooper* v. *Bill*, 3 H. & C. 722.

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property has passed to the vendee, and although he has the constructive possession of them, the right to stop prevails" (*a*).

A delivery of part of the goods, where there is no intention of separating that part from the whole, divests both the lien and the right to stop *in transitu* (*b*). But it is otherwise where there is such an intention (*c*). It has been said that *primâ facie* a delivery of part imports an intention to deliver the whole (*d*). But the question in each case appears to be one of intention (*e*). The vendor's lien could not at common law be determined by a second sale of the same goods, for the ordinary rule of law is, that the second vendee of a chattel cannot stand in a better situation than his own immediate vendor (*f*). But this is modified by the Factors Act, 1889 (52 & 53 Vict. c. 45), ss. 9, 10 (*g*). Where the goods are in the vendor's own warehouse, he does not lose his lien by giving a delivery order (*h*). Nay, even a charge made by the vendor against the vendee for warehouse rent does not destroy his lien, at all events not where the charge is pursuant to the terms of the original contract of sale, for then the rent is only, as it were, an

(*a*) *Kendal* v. *Marshall & Co.*, 11 Q. B. D. 356, at p. 364, per *Brett*, L. J.

(*b*) *Slubey* v. *Heyward*, 2 H. Bl. 504.

(*c*) *Bunney* v. *Poyntz*, 4 B. & Ad. 568; *Simmons* v. *Swift*, 5 B. & C. 857; *Dixon* v. *Yates*, 5 B. & Ad. 313; *Miles* v. *Gorton*, 2 C. & M. 504; *Tanner* v. *Scovell*, 14 M. & W. 28; *Ex parte Cooper*, 11 Ch. D. 68; *Kemp* v. *Falk*, 7 App. Cas. 573, at p. 586.

(*d*) Per *Taunton*, J., in *Betts* v. *Gibbins*, 4 N. & M. at p. 76; 2 Ad. & E. at p. 73: sed quære. *Pollock*, C. B., in *Tanner* v. *Scovell*, ubi sup., with reference to this dictum, says, "I may observe that *Taunton*, J., in the case of *Betts* v. *Gibbins*, made an observation which is very justly questioned by Mr. Smith in his book on Mercantile Law, viz.: That 'a partial delivery is a delivery of the whole, unless circumstances show that it is not so meant.' Mr. Smith appends a quære to that dictum, with very great reason."

(*e*) *Ex parte Cooper*, 11 Ch. D. pp. 72, 74; *Ex parte Falk*, 14 Ch. D. p. 455.

(*f*) *Dixon* v. *Yates*, 5 B. & Ad. 313. See *Small* v. *Moates*, 9 Bing. 574; and *Kemp* v. *Falk*, 7 App. Cas. 573. Where a bill of lading of goods shipped by the vendor has been indorsed by the purchaser by way of security for an advance, the vendor has still the right to stop the goods *in transitu*, but this right is subject to the charge of the indorsee of the bill of lading (*Kemp* v. *Falk*, supra); unless the original vendor has induced the second vendee to believe that they will be at his disposal: *Knights* v. *Wiffen*, L. R. 5 Q. B. 660. Compare *Gillman* v. *Carbutt*, 37 W. R. 437.

(*g*) In Appendix, post.

(*h*) *Townley* v. *Crump*, 4 Ad. & E. 58; *Miles* v. *Gorton*, 2 C. & M. 504; but see *Pearson* v. *Dawson*, E. B. & E. 448; and Factors Act, 1889, in Appendix.

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additional price (*h*). But it would perhaps be otherwise if the charge for warehouse rent were founded on a subsequent distinct contract; for that might have the effect of making the seller's warehouse that of the buyer (*i*). The vendor may of course avoid the sale by showing fraud in the vendee; for example, that he deterred others from bidding by his representations, or that he bought the goods with the fraudulent intention of never paying for them (*k*); and if the goods have been delivered in ignorance of the fraud, the vendor may recover them (*l*). But as the contract was voidable at his option, and not void, he cannot recover them from a *bonâ fide* purchaser to whom they have been sold before he elected to repudiate the contract (*m*).

Compliance with conditions and warranties. The vendor must strictly comply with any warranty he may have given. Such warranties or conditions may be either implied or expressed.

Implied Warranties.

(1.) First, as to cases in which the maxim *caveat emptor* applies.

"Where goods are *in esse*, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect which exists in them is latent, and not discoverable on examination, at least where the seller is neither the grower nor the manufacturer" (*n*).

"Where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty" (*o*).

(*h*) *Miles* v. *Gorton*, 2 C. & M. 504; *Grice* v. *Richardson*, 3 App. Cas. 319.

(*i*) *Hurry* v. *Mangles*, 1 Camp. 452. See *Winks* v. *Hassall*, 9 B. & C. 372.

(*k*) *Fuller* v. *Abrahams*, 3 B. & B. 116; *Earl of Bristol* v. *Wilsmore*, 1 B. & C. 514. See *White* v. *Garden*, 10 C. B. 919; *Noble* v. *Adams*, 7 Taunt. 59; *Gladstone* v. *Hadwen*, 1 M. & S. 517. But see *Vernon* v. *Keys*, 12 East, 632; 4 Taunt. 488.

(*l*) *Load* v. *Green*, 15 M. & W. 216; *Parker* v. *Patrick*, 5 T. R. 175.

(*m*) *Load* v. *Green*, 15 M. & W. at p. 219, per *Parke*, B.; *White* v. *Garden*, supra; *Kingsford* v. *Merry*, 1 H. & N. 503; see *Cundy* v. *Lindsay*, 3 App. Cas. 459; and *Babcock* v. *Lawson*, 5 Q. B. D. 284.

(*n*) *Jones* v. *Just*, L. R. 3 Q. B. 197, at p. 202.

(*o*) *Jones* v. *Just*, L. R. 3 Q. B. 197, at p. 202; *Smith* v. *Hughes*, L. R. 6 Q. B. at p. 603; *Smith* v. *Baker*, 40 L. T. N. S. 261.

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(2.) *As to Quality.*—The law on this subject is thus clearly stated by *Brett*, J. A., delivering the judgment of the Court of Appeal in *Randall* v. *Newson* (*p*).

"In all (contracts) it is either assumed or expressly stated, that the fundamental undertaking is that *the article offered or delivered shall answer the description of it contained in the contract.* That rule comprises all the others; they are adaptations of it to particular kinds of contracts of purchase and sale. You must, therefore, first determine from the words used or the circumstances, what, in or according to the contract, is the real mercantile or business description of the thing which is the subject-matter of the bargain of purchase or sale, or, in other words, the contract."

The sale of an existing chattel, as being of a particular description, implies a contract that it exists, and is of that description (*q*). Yet, in such case, no contract is, in the absence of fraud, implied of the good quality (*r*) or condition of the chattel so sold. Therefore, where the chattel sold was a ship (*s*), and the vendor covenanted that he had power to make the sale, no contract was implied that she was seaworthy; and the Court of Exchequer considered that the property in her might pass by the sale, though she was cast aground in such a manner as to be totally lost within the meaning of a policy. "Where a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, described, and defined article be actually supplied, there is no warranty that it shall answer the particular purpose" (*t*).

The following are some further applications of this principle:—

(a) On a sale of goods by description it is an implied term of

(*p*) 2 Q. B. D. 102, at p. 109.

(*q*) *Couturier* v. *Hastie*, 8 Exch. 40; 9 Exch. 102; 5 H. L. Ca. 673; *Strickland* v. *Turner*, 7 Exch. 208; *Gompertz* v. *Bartlett*, 2 E. & B. 849.

(*r*) *Emmerton* v. *Mathews*, 7 H. & N. 586. But see *Wieler* v. *Schilizzi*, 17 C. B. 619.

(*s*) *Barr* v. *Gibson*, 3 M. & W. 390. But see *Bigge* v. *Parkinson*, 7 H. & N. 955; *Robertson* v. *Amazon Tug Co.*, 7 Q. B. D. 598.

(*t*) *Jones* v. *Just*, L. R. 3 Q. B. 197, at p. 202, referring to *Chanter* v. *Hopkins*, 4 M. & W. 399; *Ollivant* v. *Bayley*, 5 Q. B. 288; *Dickson* v. *Zizinia*, 10 C. B. 602. But see as to latent defects, *Drummond* v. *Van Ingen*, 12 App. Cas. 284.

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the contract that they shall reasonably answer such description (*u*).

In *Bowes* v. *Shand* (*x*), in which the contract was for the sale of "three hundred tons of Madras rice, to be shipped at Madras, or coast, during the months of March $\frac{\text{and}}{\text{or}}$ April, 1874, per *Rajah* of Cochin," and rice shipped in February was tendered, the House of Lords, reversing the judgment of the Court of Appeal, held that the contract was not fulfilled, and that the buyer was not obliged to take delivery. Lord Blackburn thus explained the law (*y*):—

"If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board *The Rajah* of Cochin. But the parties have chosen, for reasons best known to themselves, to say: 'We bargain to take rice, shipped in this particular region, at that particular time, on board that particular ship;' and before the defendants can be compelled to take anything in fulfilment of that contract, it must be shown not merely that it is equally good, but that it is the same article as they have bargained for—otherwise they are not bound to take it."

In *Allan* v. *Lake* (*z*), the contract was to sell fourteen quarters of seed described as "Skirving's Swedes." Though the evidence was that the seed was of the crop which the purchaser actually saw, the vendor was bound to deliver "Skirving's Swedes."

(b) If the goods be sold to be used for a particular purpose mentioned to the seller, and the purchaser trusts to the judg-

(*u*) See *Jones* v. *Just*, L. R. 3 Q. B. 197.

(*x*) 2 App. Cas. 455.

(*y*) *Ibid.* at p. 480.

(*z*) 18 Q. B. 560; *Josling* v. *Kingsford*, 13 C. B. N. S. 447. Compare *Hopkins* v. *Hitchcock*, 14 C. B. N. S. 65.

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ment or skill of the seller, it is a term of the contract that the goods shall be reasonably fit for the purpose (*a*). The rule is sometimes stated in wider terms than these. But, having regard to the leading case of *Jones* v. *Just* (*b*), the above, it is conceived, is an accurate description of the rule. That the purchaser trusted to the seller may be inferred from the fact that the seller is the manufacturer who made them, or that the seller did not describe the nature of the goods, but merely the purpose for which they were used.

If the article be bought for a particular purpose—as in *Randall* v. *Newson* (*c*), where the plaintiff bought a pole for his carriage—there is no exception as to latent or undiscovered defects. The purchaser is bound to supply an article in fact reasonably fit for the purpose.

(c) In the sale of goods by sample, it is an implied condition that the bulk of the goods is equal to the sample. The implied condition that goods sold are merchantable and reasonably fit for the purposes for which they are to be used, will not be necessarily excluded by the fact that the goods were sold by sample, and that the bulk corresponds with the sample. This appears from *Drummond* v. *Van Ingen* (*d*), in which the goods ordered were described as worsted coatings. Those supplied corresponded in quality and weight with the patterns. The work had, however, a tendency to slip, and the purchaser, to whom patterns had been shown, contended there was an implied warranty of the goods being merchantable and suitable for the purpose for which they were ordered. The House of Lords, adopting the decision of the Exchequer Chamber in *Mody* v. *Gregson* (*e*), held that the purchaser was entitled to reject the goods. "A purchaser," said Lord *Herschell*, "has a right to rely on the samples supplied representing a manufactured article, which will be fit for the purposes for which such an article is ordinarily used, just as much as he has a right to rely on manufactured goods supplied on an order without

(*a*) *Randall* v. *Newson*, 2 Q. B. D. 102, at p. 109. See the statement of the doctrine in *Drummond* v. *Van Ingen*, 12 App. Cas. at p. 288.

(*b*) L. R. 3 Q. B. 197.

(*c*) 2 Q. B. D. 102.

(*d*) 12 App. Cas. 284.

(*e*) L. R. 4 Ex. 49.

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samples complying with such a warranty. . . . . There is no doubt that the implied warranty will be excluded as regards any defects which the sample would disclose to a buyer of ordinary diligence and experience" (*f*).

(3) *As to Manufacture.*—The Court of Appeal has decided, in *Johnson* v. *Raylton* (*g*), that under a contract for the sale of goods by a manufacturer of such goods, who is not otherwise a dealer in them, the latter is bound to supply goods of his own manufacture. The plaintiffs, who were manufacturers of, and not dealers in, iron plates, contracted to sell to the defendants 2,000 tons of ship plates of a certain quality. They tendered plates which, it was admitted, were substantially as good as if manufactured by the plaintiffs themselves. Nevertheless the Court held (*Bramwell*, L. J., dissenting) that the defendants were not bound to take delivery. "I am of opinion," said *Cotton*, L. J., "that when a purchaser orders goods from a firm which is a manufacturer only of such goods, not a dealer in them, then, unless it is shown that in the particular trade, or as regards the particular goods, there is a practice or usage for the manufacturer to supply the goods of other makers, the purchaser must be assumed to have contracted with the particular manufacturers, in reliance on the general excellence of the work of their firm, and is entitled, in the absence of any express stipulation to the contrary, to have, in performance of the contract, goods of the manufacturer's own make" (*h*).

The Merchandise Marks Act, 1887 (*i*), s. 17, enacts as follows:—

"On the sale, or in the contract for the sale, of any goods to which a trade mark, or mark or trade description, has been applied, the vendor shall be deemed to warrant that the mark is a genuine trade mark, and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of this Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor, and delivered at the time of the sale or contract to, and accepted by, the vendee."

(*f*) *Drummond* v. *Van Ingen*, 12 App. Cas. 284, at p. 294.

(*g*) 7 Q. B. D. 438.

(*h*) *Johnson* v. *Raylton*, 7 Q. B. D. 438, at p. 445.

(*i*) 50 & 51 Vict. c. 28. As to watches, see ss. 7, 8.

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(4) *As to Title.*—In contracts of sale there appears to be, though the question has been much controverted, an implied warranty of title, not only in the case of executory contracts of sale, but also in the case of sales of specific articles. In *Morley* v. *Attenborough* (*k*), *Parke*, B., stated that the old authorities seem to show that there is no such condition. This view is, however, open to doubt, and Mr. Benjamin appears to be justified in saying (*l*), that "a sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold." In *Raphael & Sons* v. *Burt & Co.* (*m*), *Stephen*, J., expressed approval of the rule as thus laid down. The rule obviously does not extend to cases where the sale of goods is not by the vendor as *owner;* as where a pawnbroker sells unredeemed pledges, or a sheriff sells under an execution (*n*).

Express Warranties.

Every affirmation at the time (*o*) of sale *of personal chattels* is a warranty, *provided it appear to have been so intended* (*p*). But a warranty *after* the sale is void, unless supported by a fresh consideration (*q*). If the vendor affirm at the time of sale that the goods are his, that amounts to a warranty of his title (*r*); but no oral allegation previously to a sale by written

(*k*) 3 Exch. 500; *Ormrod* v. *Huth*, 14 M. & W. 651.

(*l*) Benjamin on Sales, 4th ed., p. 634.

(*m*) 1 C. & E. 325.

(*n*) *Chapman* v. *Speller*, 14 Q. B. 621; *Bagueley* v. *Hawley*, L. R. 2 C. P. 625.

(*o*) See *Hopkins* v. *Tanqueray*, 15 C. B. 130.

(*p*) See *Pasley* v. *Freeman*, 3 T. R. at p. 57, per *Buller*, J., *Helyear* v. *Hawke*, 5 Esp. 72; *Richardson* v. *Brown*, 1 Bing. 344; *Dunlop* v. *Waugh*, Peake, 123; *Button* v. *Corder*, 7 Taunt. 405; *Liddard* v. *Kain*, 2 Bing. 183; *Shepherd* v. *Kain*, 5 B. & Ald. 240; *Taylor* v. *Bullen*, 5 Exch. 779; *Freeman* v. *Baker*, 2 N. & M. 446; *Powell* v. *Horton*, 2 Bing. N. C. 668; *Power* v. *Barham*, 4 Ad. & E. 473; *Allan* v. *Lake*, 18 Q. B. 560; *Simond* v. *Braddon*, 2 C. B. N. S. 324; *Hopkins* v. *Hitchcock*, 14 C. B. N. S. 65; *Studley* v. *Baily*, 1 H. & C. 405; *Percival* v. *Oldacre*, 18 C. B. N. S. 398.

(*q*) 3 Bl. Com. 166; Finch, L. 189.

(*r*) *Medina* v. *Stoughton*, 1 Salk. 210; *Pasley* v. *Freeman*, 3 T. R. 57, 58, per

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contract can possibly operate as a warranty, for the writing is the only evidence of the contract (*s*).

A distinction exists between a *breach of warranty* and a *failure to perform a condition*, or a total *failure of consideration* by the delivery of an entirely different and worthless article instead of that contracted for, in which latter case the consideration money may be recovered back again (*t*). Thus, in *Azémar* v. *Casella* (*u*), the contract was to supply cotton warranted equal to a sample of "long-staple Salem" cotton. The cotton actually tendered was Western Madras cotton, inferior in quality to "long-staple Salem," and requiring different machinery for its manufacture. It was held, that the purchasers were not bound to accept the cotton tendered, though the contract provided for an allowance in price if the cotton proved inferior in quality to the sample.

Where the vendor of specific goods has bound himself by a warranty, either express or implied, the vendee may use the breach of that warranty as evidence in reduction of the vendor's claim for compensation, or may bring an action thereon against him (*x*). But he cannot, if he have accepted the article, return it and recover the price as money paid on a consideration which has failed, unless there were a condition in the contract authorising such return, or the vendor have received back the chattel, and thereby consented to rescind the contract, or been guilty of a fraud, which destroys the contract altogether (*y*). The vendee cannot by his own act alone, unless in the excepted cases above men-

Buller, J.; 2 Bl. Com. 451; Cro. Jac. 474; 1 Roll. Abr. 90; *Sims* v. *Marryat*, 17 Q. B. 281.

(*s*) *Pickering* v. *Dowson*, 4 Taunt. 779; *Meyer* v. *Everth*, 4 Camp. 22; *Kain* v. *Old*, 2 B. & C. 627. See *Allen* v. *Pink*, 4 M. & W. 140, where a paper was signed by the vendor and given to the vendee, containing "Bought of G. Pink, a horse for the sum of 7*l.* 2*s.* 6*d.*" Held, that this was an informal receipt, and that evidence might, nevertheless, be given of a contemporaneous warranty.

(*t*) *Young* v. *Cole*, 3 Bing. N. C. 724; and see *Westropp* v. *Solomon*, 8 C. B. 345.

(*u*) L. R. 2 C. P. 431, 677.

(*x*) *Street* v. *Blay*, 2 B. & Ad. 456; *Gompertz* v. *Denton*, 1 C. & M. 207. See *Weston* v. *Downes*, 1 Dougl. 23; *Towers* v. *Barrett*, 1 T. R. 133; *Payne* v. *Whale*, 7 East, 274; *Power* v. *Wells*, Dougl. 24, n.; *Emanuel* v. *Dane*, 3 Camp. 299; *Parson* v. *Sexton*, 4 C. B. 899. As to the measure of damages, see *Hammond & Co.* v. *Bussey*, 20 Q. B. D. 79.

(*y*) *Heyworth* v. *Hutchinson*, L. R. 2 Q. B. 447.

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tioned, re-vest the property in the seller and recover the price when paid on the ground of total failure of consideration; and it follows that he cannot by the same means protect himself from payment of the price on the same ground (*z*).

Though the vendee of a specific chattel delivered with a warranty has no right to return it in case of non-compliance with the warranty, the same reason does not apply to cases of executory contracts; where an article, for instance, is ordered from a manufacturer, who engages that it shall be of a certain quality or fit for a certain purpose, and the article sent as such is never completely accepted by the party ordering it. In this and similar cases the vendor's obligation is a condition precedent to any obligation by the vendee under the contract (*a*). The latter may return the article as soon as he discovers the defect, provided he has done nothing more in the meantime than was necessary to give it a fair trial (*b*), or has returned it within the time provided for in the contract (*c*); nor would the purchaser of a commodity to be afterwards delivered according to sample be precluded from returning the bulk, if not in accordance with the sample, within a reasonable time for examination and comparison (*d*). But in no case can a purchaser return a chattel where he has done more than is consistent with the purpose of trial, *e. g.*, where he has re-sold it at a profit, and delayed his offer to return it till it has come for a second time into his possession (*e*).

(*z*) *Street* v. *Blay*, supra; *Dawson* v. *Collis*, 10 C. B. 523; *Foster* v. *Smith*, 18 C. B. 156; *Heyworth* v. *Hutchinson*, L. R. 2 Q. B. 447.

(*a*) Compare *Heyworth* v. *Hutchinson*, L. R. 2 Q. B. 447, with *Azémar* v. *Casella*, L. R. 2 C. P. 431, 677.

(*b*) *Okell* v. *Smith*, 1 Stark. 107. See *Oxendale* v. *Wetherell*, 9 B. & C. 386; *Curtis* v. *Pugh*, 10 Q. B. 111; *Heilbutt* v. *Hickson*, L. R. 7 C. P. 438; *Jordan* v. *Norton*, 4 M. & W. 155; *Head* v. *Tattersall*, L. R. 7 Ex. 7.

(*c*) *Hincheliffe* v. *Barwick*, 5 Ex. D. 177. Compliance with a condition as to the return of goods not in accordance with a warranty is excused if, without the purchaser's fault, they are actually or constructively destroyed before the expiration of the time limited for the return: *Chapman* v. *Withers*, 20 Q. B. D. 824; *Elphick* v. *Barnes*, 5 C. P. D. 321.

(*d*) *Couston* v. *Chapman*, L. R. 2 H. L. Sc. 250; *Grimoldby* v. *Wells*, L. R. 10 C. P. 391; *Rickard* v. *Moore*, 38 L. T. N. S. 841; *Elphick* v. *Barnes*, 5 C. P. D. 321.

(*e*) *Street* v. *Blay*, supra. See *Shipton* v. *Casson*, 5 B. & C. 378; *Coleman* v. *Gibson*, 1 M. & Rob. 168; *Campbell* v. *Fleming*, 1 Ad. & E. 40; *Couston* v. *Chapman*, supra.

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It has been laid down by some writers of authority that a future event cannot be warranted, as that a horse shall be sound two years hence (*f*). This doctrine is, however, overruled (*g*). It is also laid down by the older books that defects apparent at the time of a bargain are not included in a warranty however general, because they can form no subject of deceit and fraud, *haud enim decipitur qui scit se decipi;* and originally the mode of proceeding on a breach of warranty was by an action of deceit grounded on a supposed fraud. A party, therefore, who should buy a horse knowing it to be blind of both eyes, could not sue for that defect on a general warranty of soundness. Thus, where the horse had a splint, which was known to both parties, in an action on a warranty of soundness, wind and limb, it was held that the proper direction to the jury would be to consider whether the horse was at the time of the bargain sound, wind and limb, *saving those manifest defects contemplated by the parties* (*h*). On a new trial of the same cause, it appeared that some splints cause lameness and others not, and the Court then thought that as the consequences of a splint cannot be apparent at the time of sale, like the loss of an eye, or any visible blemish or defect, the vendor must have meant to warrant that this was not such a splint as would occasion subsequent unsoundness, and the horse having gone lame in consequence of it, the vendee was held entitled to recover (*i*).

A warranty, like any other contract, may of course be limited and moulded according to the intention of the parties. Thus, it may be confined in point of duration, as where a board was fixed upon the wall of a repository containing certain rules, one of which was, that warranties given with horses sold by auction there should remain in force only till twelve the next day, and then terminate unless a surgeon's certificate of the horse's

(*f*) 3 Bl. Com. 166.

(*g*) See *Liddard* v. *Kain*, 2 Bing. 183; *Eden* v. *Parkison*, Dougl. 732; and see a learned note by Mr. Justice *Coleridge*, in his edition of the Commentaries, Vol. iii. p. 166; and Benjamin on Sale, 4th ed. p. 619.

(*h*) *Margetson* v. *Wright*, 7 Bing. 603. See 3 Bl. Com. 166; *Bayly* v. *Merrel*, Cro. Jac. 387; *Dyer* v. *Hargrave*, 10 Ves. 505; *Holliday* v. *Morgan*, 1 E. & E. 1.

(*i*) *Margetson* v. *Wright*, 8 Bing. 454. But see *Tye* v. *Fynmore*, 3 Camp. 462.

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unsoundness were in the meantime given. It was held that this regulation was binding upon purchasers (*k*). In *Hinchcliffe* v. *Barwick* (*l*), a horse was sold with a warranty that it was a "good worker," and subject to a condition that "horses not answering such warranty must be returned before 5 o'clock of the day of the sale." The plaintiff brought an action for breach of warranty, and it was held that, in the absence of fraud, the purchaser could not maintain the action; his only remedy was to return the horse within the specified time.

We have seen that every affirmation at the time of sale of a personal chattel is a warranty, *provided it appear to have been so intended*, and provided the contract be not written and the affirmation merely oral. Where the article is sold *by description merely* (*m*), and the allegations of the vendor, whether oral or contained in a written document (*n*), do not amount to a warranty, but merely to representations, which afterwards turn out not to be consistent with fact, if such representations were made honestly according to his belief at the time, no action lies against him (*o*). But it is otherwise if he knows that he is representing a falsehood (*p*): in such case the vendee (*q*) may

(*k*) *Bywater* v. *Richardson*, 1 Ad. & E. 508; *Chapman* v. *Gwyther*, L. R. 1 Q. B. 463; *Moore* v. *Harris*, 1 App. Cas. 318.

(*l*) 5 Ex. D. 177.

(*m*) But they must answer that description: *Nichol* v. *Godts*, 10 Exch. 191; *Josling* v. *Kingsford*, 13 C. B. N. S. 447; and see note (*c*), post, p. 655.

(*n*) As in *Budd* v. *Fairmaner*, 8 Bing. 48, where a receipt was produced, containing as follows:—

"Received of Mr. Budd, 10*l.* for a grey four year old colt, warranted sound in every respect."

Held, that the warranty was confined to soundness, and the age mere matter of description. See *Dickenson* v. *Gapp*, cited *Budd* v. *Fairmaner*, 8 Bing. at p. 50; *Freeman* v. *Baker*, 2 N. & M. 446; 5 B. & Ad. 797; *Nichol* v. *Godts*, 10 Exch. 191; and *Power* v. *Barham*, 4 Ad. & E. 473; *Anthony* v. *Halstead*, 37 L. T. N. S. 433. In *Power* v. *Barham*, supra, the vendor of pictures gave the following bill of parcels:

"Mr. N. Power,

"Bought of J. Barham,

"Four pictures, Views in Venice, Canaletti, 160*l.*

"Settled, J. Barham."

This document was held to justify the jury in finding that the pictures were warranted to be by Canaletti.

(*o*) *Ormrod* v. *Huth*, 14 M. & W. 651. And see *Morley* v. *Attenborough*, 3 Exch. 500.

(*p*) *Dunlop* v. *Waugh*, Peake, 123; *Jendwine* v. *Slade*, 2 Esp. 572; *Pickering* v. *Dowson*, 4 Taunt. 779; *Kain* v. *Old*, 2 B. & C. 627; *Dobell* v. *Stevens*, 3 B. & C. 623; *Fletcher* v. *Bowsher*, 2 Stark. 561; *Weir* v. *Bell*, 3 Ex. D. 238.

(*q*) And in some cases a third person, see *Langridge* v. *Levy*, 4 M. & W.

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maintain an action for the deceit, in which he must allege a *scienter* and show that the description was false within the knowledge of the seller (*r*), or made without knowledge whether it was true or false (*s*). In equity—the rules of which are, in case of difference, binding—"it was not necessary, in order to *set aside* a contract obtained by material false represensation, to prove that the party who obtained it knew at the time when the representation was made that it was false. It was put in two ways, either of which was sufficient. One way of putting the case was: 'A man is not allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say, for the purpose of civil jurisdiction, that when he made it he did not know it to be false; he ought to have found out that before he made it.' The other way of putting it was this: 'Even assuming that moral fraud must be shown in order to set aside a contract, you have it where a man having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency; no man ought to seek to take advantage of his own false statements'" (*t*).

Section IV.—*Duties of Vendee.*

Duties of vendee.

The duties incumbent on the vendee are, *first*, to accept the goods; and, *secondly*, to pay for them.

If he refuse to accept them, the vendor, having performed all conditions precedent on his part, may sue him, either

337; *George* v. *Skivington*, L. R. 5 Ex. 1. But see *Longmeid* v. *Holliday*, 6 Exch. 761.

(*r*) See judgment of *Tindal*, C. J., in *Budd* v. *Fairmaner*, 8 Bing. 53; and *Freeman* v. *Baker*, 2 N. & M. 446; 5 B. & Ad. 797; *Evans* v. *Collins*, 5 Q. B. 804. But see *Ormrod* v. *Huth*, supra; and under some circumstances the vendor may be proceeded against criminally for obtaining money under false pretences: *Regina* v. *Kenrick*, 5 Q. B. 49.

(*s*) *Reese* v. *Silver Mining Co.*, L. R. 4 H. L. at p. 79, Lord *Cairns'* judgment.

(*t*) *Redgrave* v. *Hurd*, 20 Ch. D. 1, at p. 12, per *Jessel*, M. R., in C. A.; and *Cotton*, L. J., in *Peek* v. *Derry*, 37 Ch. D. at p. 567.

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specially on his contract (*x*) or (if the property have passed to the vendee) for goods bargained and sold; in which latter form of action he will recover his entire price, while in the special form he will recover but the amount of damage actually sustained by him (*y*).

If the goods are to be delivered at a stipulated place, the vendor before suing for the price must tender them there (*z*), unless indeed the vendee has refused or put it out of his own power to complete his contract. If there be no stipulated place, it is the vendee's business to fetch them (*a*). Where the goods are to be forwarded by a carrier, the vendor must enter them, so that the carrier may be responsible for their value if lost (*b*).

If the goods were to be of a particular description, they must be, as has been stated, such as correspond with that description (*c*), *e. g.*, with the sample, if they were sold by sample (*d*), in which case the vendee has a right to inspect and compare before accepting them, and may, if prevented from doing so, rescind the contract (*e*). If they do not correspond

(*x*) See *Boorman* v. *Nash*, 9 B. & C. 145.

(*y*) *Hankey* v. *Smith*, Peake, 42 n.; but see *Dunlop* v. *Grote*, 2 C. & K. 153. The measure of this damage is the difference between the contract price and the market price on the day of tendering the goods for acceptance: *Phillpotts* v. *Evans*, 5 M. & W. 475. Per *Tindal*, C. J., in *Barrow* v. *Arnaud*, 8 Q. B. at p. 610; or (where the vendee has refused to receive them) on the days agreed for delivery: *Ogle* v. *Vane*, L. R. 3 Q. B. 272; *Brown* v. *Muller*, L. R. 7 Ex. 319; *Roper* v. *Johnson*, L. R. 8 C. P. 167; *Grébert-Borgnis* v. *Nugent*, 15 Q. B. D. 85.

(*z*) In some cases this is merely for the benefit of the vendor, and then it forms no condition precedent: *Neill* v. *Whitworth* (cotton to be taken from the quay), 18 C. B. N. S. 435; L. R. 1 C. P. 684.

(*a*) *Glazebrook* v. *Woodrow*, 8 T. R. 366; *Jones* v. *Barkley*, Dougl. 684. See *Rawson* v. *Johnson*, 1 East, 203; *Callonel* v. *Briggs*, Salk. 112.

(*b*) *Clarke* v. *Hutchins*, 14 East, 475.

(*c*) *Azémar* v. *Casella*, L. R. 2 C. P. 431, 677; *Tye* v. *Fynmore*, 3 Camp. 462, where it was held, that, in a case of written contract, it is not enough that there be a correspondence with the sample, if there be a variance from the written description.

(*d*) *Hibbert* v. *Shee*, 1 Camp. 113.

(*e*) *Lorymer* v. *Smith*, 1 B. & C. 1. See *supra*. As to specific goods warranted equal to sample, *Dawson* v. *Collis*, 10 C. B. 523; and as to goods not sold by sample, *Pettitt* v. *Mitchell*, 4 M. & G. 819, where the defendant was held not *entitled* to measure goods sold by auction before payment of the price.

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with the sample, he has the right promptly to reject and require the vendor to remove them (*f*); but he must exercise this right within a reasonable time, and without dealing with the property as his own, which would amount to an acceptance (*g*). In order to prevent the danger arising from variance between the article and the description given of it in the conditions of sale, it is usual in sales by auction of important matters, such as real property, to insert a clause, that mistakes in description shall not vitiate the sale, but only entitle the vendee to a compensation. But even this clause will not help if there be a variance in any *essential* particular (*h*).

It is said that if a purchaser order *several things at the same time* he may consider the contract as entire, and object to receive some of them without the rest (*i*); but that if he accept one singly, he severs the contract and cannot object to receiving another singly (*k*). Where different lots are bought by the same person at the same auction, the purchase of each is a distinct contract (*l*).

As fraud renders voidable every contract, it will be a sufficient excuse for the vendee's non-performance of his, that the vendor was guilty of fraud (*m*); as, *e.g.*, by employing puffers at an

(*f*) *Grimoldby* v. *Wells*, L. R. 10 C. P. 391; *Mody* v. *Gregson*, L. R. 4 Ex. 49.

(*g*) *Chapman* v. *Morton*, 11 M. & W. 534. See also *Curtis* v. *Pugh*, 10 Q. B. 111.

(*h*) *Dobell* v. *Hutchinson*, 3 Ad. & E. 355; *Flight* v. *Booth*, 1 Bing. N. C. 370.

(*i*) *Champion* v. *Short*, 1 Camp. 53; or if more be sent than be ordered he may reject the whole: *Hart* v. *Mills*, 15 M. & W. 85; *Neal* v. *Viney*, 1 Camp. 471. See *Chambers* v. *Griffiths*, 1 Esp. 150; but quære, if that case be law: and see *James* v. *Shore*, 1 Stark. 426; *Poole* v. *Shergold*, 2 Bro. C. C. 118; 1 Cox, 273. See on this subject *Symonds* v. *Carr*, 1 Camp. 361; *Hort* v. *Dixon*, Selw. N. P. 8th ed. 109. Whether a person who has ordered particular goods is bound to accept them if tendered or mixed with other goods, see *Levy* v. *Green*, 8 E. & B. 575; 1 E. & E. 969; *Ryland* v. *Kreitman*, 19 C. B. N. S. 351; *Kreuger* v. *Blank*, L. R. 5 Ex. 179; *Borrowman* v. *Drayton*, 2 Ex. D. 15; *Reuter* v. *Sala*, 4 C. P. D. 239.

(*k*) Gilb. Ev. 119, 4; *Bragg* v. *Cole*, 6 Moore, 114. See *Walker* v. *Dixon*, 2 Stark. 281; but said to have been reversed in banc, in note to Stark. on Evidence, vol. ii., p. 872; *Boone* v. *Eyre*, 1 H. Bl. 273 n.

(*l*) *Roots* v. *Lord Dormer*, 4 B. & Ad. 77; *Couston* v. *Chapman*, L. R. 2 H. L. Sc. 250; *Poole* v. *Shergold*, and *James* v. *Shore*, supra.

(*m*) As to penalties on persons forg-

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auction to enhance the price without giving notice of his intention to do so (*n*), though possibly there might be a difference if the intent were not to enhance the price generally, but only to prevent the goods from going off at an undervalue (*o*). And it is clear that the employment of anyone to bid vitiates a sale advertised to be *without reserve* (*p*). So, if the vendor fraudulently conceal what he ought to communicate; as, for example, by giving a partial and fragmentary account which is misleading (*q*), or give a false description of the goods, *e.g.*, by calling them the property of a gentleman deceased, and sold by order of his executor (*r*). And though an article be sold *with all faults*, yet artifice used by the vendor to disguise vitiates the sale (*s*); but it is not so clear whether his knowledge of the faults will, if he use no artifice, have that effect (*t*), and the passive acquiescence of the seller in the self-deception of the buyer does not entitle the latter to avoid the contract (*u*). It seems that if the vendee knew a misdescription to be such, he cannot avoid the sale on account of it (*x*); *haud enim decipitur qui scit se decipi.*

ing or falsely applying to goods trade marks, &c., or selling or exposing for sale goods with forged trade mark or false trade description, see the Merchandise Marks Act, 1887, s. 2, in the Appendix.

(*n*) *Howard* v. *Castle*, 6 T. R. 642; *Bexwell* v. *Christie*, Cowp. 395; *Conolly* v. *Parsons*, 3 Ves. 625, n.; *Wheeler* v. *Collier*, 1 M. & M. 123; *Crowder* v. *Austin*, 3 Bing. 368; *Thornett* v. *Haines*, 15 M. & W. 367; *Flint* v. *Woodin*, 9 Hare, 618; *Green* v. *Baverstock*, 14 C. B. N. S. 204; *Parfitt* v. *Jepson*, 46 L. J. C. P. 529. See on sales of land, 30 & 31 Vict. c. 48; *Gilliatt* v. *Gilliatt*, L. R. 9 Eq. 60; and Dart on Vendors and Purchasers, 6th ed. 225.

(*o*) *Smith* v. *Clarke*, 12 Ves. 477. See *Woodward* v. *Miller*, 2 Coll. 279. But see per *Willes*, J., in *Green* v. *Baverstock*, 14 C. B. N. S. 206.

(*p*) *Meadows* v. *Tanner*, 5 Madd. 34; *Warlow* v. *Harrison*, 1 E. & E. 295; Dart on Vendors and Purchasers, 6th ed. 226.

(*q*) *Peek* v. *Gurney*, L. R. 6 H. L. at p. 403; *Jessel*, M. R., in *Smell* v. *Chadwick*, 20 Ch. D. at p. 58; *Smith* v. *Hughes*, L. R. 6 Q. B. 597.

(*r*) *Bexell* v. *Christie*, Cowp. 395; *Early* v. *Garrett*, 9 B. & C. 928; *Hill* v. *Gray*, 1 Stark. 434; *Duke of Norfolk* v. *Worthy*, 1 Camp. 337; *Schneider* v. *Heath*, 3 Camp. 506; *Baglehole* v. *Walters*, 3 Camp. 154; *Pickering* v. *Dowson*, 4 Taunt. 779; *Jones* v. *Bowden*, Id. 847; *Regina* v. *Kenrick*, 5 Q. B. 49; and see per cur. *Horsfall* v. *Thomas*, 1 H. & C. 90; *Smith* v. *Chadwick*, 9 App. Cas. 7.

(*s*) *Baglehole* v. *Walters*, 3 Camp. 154.

(*t*) Ibid.; *Mellish* v. *Motteux*, Peake, 115; *Bywater* v. *Richardson*, 1 Ad. & E. 508; *Barber* v. *Morris*, 1 M. & Rob. 62.

(*u*) *Smith* v. *Hughes*, L. R. 6 Q. B. 597.

(*x*) *Dyer* v. *Hargrave*, 10 Ves. 505; Dart on Vendors and Purchasers, 6th ed. 1204. See *Barber* v. *Morris*, 1 M. & Rob. 62.

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Though a vendor who has been imposed upon has in every case a right to repudiate the contract, and may, if he have paid his money, recover it back from the seller, yet he must elect to avoid the contract as soon as he discovers the fraud, and if he lie by and treat the property as his own, he will be considered as having elected to confirm the transaction, and that even though he subsequently has discovered a new incident in the fraud; for that does not give him a new right to rescind, but merely strengthens the evidence of the vendor's dishonesty (*y*).

It was once said that the vendor cannot maintain an action on his contract to sell and deliver at a future day goods which, at the time of so contracting, he had not in his possession, had not contracted to buy, and had no expectation of receiving by consignment—such a transaction amounting to a wager on the price (*z*). This doctrine is, however, overruled (*a*).

If the goods have been delivered, and the vendee after that neglect to pay the price, the vendor may recover it in an action for goods sold and delivered (*b*). But he cannot recover in contract before the time of credit, if there be one, has expired, although the fraud of the defendant be such as would entitle him to rescind the contract and bring trover for the goods immediately (*c*), unless a rescission of the contract can be inferred from the circumstances (*d*).

(*y*) *Campbell* v. *Fleming*, 1 Ad. & E. 40; *White* v. *Garden*, 10 C. B. 919; *Clough* v. *London and North Western Ry. Co.*, L. R. 7 Ex. 26. See *Clarke* v. *Dickson*, E. B. & E. 148.

(*z*) *Bryan* v. *Lewis*, R. & M. 386. See *Macgregor* v. *Lowe*, R. & M. 57; and the remarks of *Abbott*, C. J., in *Lorymer* v. *Smith*, 1 B. & C. at p. 3. The Court will, if possible, construe a contract so as to hinder it from bearing the construction of a wager: *Boyd* v. *Sifflkin*, 2 Camp. 326; *Hawes* v. *Humble*, cited Ibid.; *Hayward* v. *Scougall*, 2 Camp. 56. Compare *Splidt* v. *Heath*, 2 Camp. 57, n.; and *Gorrissen* v. *Perrin*, 2 C. B. N. S. 681.

(*a*) *Hibblewhite* v. *M'Morine*, 5 M. & W. 462; *M'Callan* v. *Mortimer*, 9 M. & W. 636.

(*b*) There are instances in which he has been allowed to waive the tort and recover in this form of action against one who had wrongfully and fraudulently gained possession of them: *Hill* v. *Perrot*, 3 Taunt. 274; *Biddle* v. *Levy*, 1 Stark. 20, per *Gibbs*, C. J. See *Lee* v. *Shore*, 1 B. & C. 94; *Lucas* v. *Godwin*, 3 Bing. N. C. 737.

(*c*) *Ferguson* v. *Carrington*, 9 B. & C. 59; *Strutt* v. *Smith*, 4 Tyr. 1019. See *De Symons* v. *Minchwich*, 1 Esp. 430; *Read* v. *Hutchinson*, 3 Camp. 352.

(*d*) *Bartholomew* v. *Markwick*, 15 C. B. N. S. 711; *Cunliffe* v. *Harrison*, 6 Ex. 903; *Harnor* v. *Groves* (using half a sack out of twenty-five), 15 C. B. 667; *Lucy* v. *Mouflet* (omitting

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It sometimes happens that there is such a difference between the goods delivered and their description in the bargain as would have justified the vendee in refusing to receive them, notwithstanding which he has taken them into his possession and made use of them. In such a case his conduct would be taken to amount to a confession that the vendor had performed his contract and that he would be obliged to pay the whole price stipulated (*e*). And where the vendee had expressly stipulated that they should be returned if not approved of, his keeping them for an unreasonable time precluded him from doing so (*f*). "Where a party desires to rescind a purchase upon the ground that the quality of the goods does not correspond with the sample, it is his duty to make a distinct offer to return, or in fact to return, the goods by stating to the vendor that the goods are at his risk" (*g*). But there are some cases in which it would be impossible or very difficult to return the goods; for instance, where they consist of bricks and timbers put together in the shape of a building, or the breach of contract may not have been discovered till the articles have been received and used by the vendee. In such a case the vendee may, in the action by the vendor, set up the defective quality as a defence, or by way of counterclaim, if consequential damages be sought (*h*). The vendor cannot recover more than the value of the benefit which the vendee has actually derived, and therefore, where there has been no benefit derived, shall recover nothing at all (*i*). And this rule holds, even when

to answer a letter), 5 H. & N. 229; *Couston* v. *Chapman*, L. R. 2 H. L. Sc. 250 (keeping goods an unreasonable time).

(*e*) *Grimaldi* v. *White*, 4 Esp. 95. Sed quære, for it seems mere evidence by admission. And see *Allen* v. *Cameron*, 1 C. & M. 832. See also *Campbell* v. *Fleming*, 1 Ad. & E. 40; *Richardson* v. *Dunn*, 2 Q. B. 218, where silence for a week was held an assent to a shipment of a smaller quantity than that mentioned in the order; *Couston* v. *Chapman*, L. R. 2 H. L. Sc. 250; or *Grimoldby* v. *Wells*, L. R. 10 C. P. 391.

(*f*) *Beverley* v. *Lincoln Gas Light Co.*, 6 Ad. & E. 829; and cases in note (*y*), p. 658.

(*g*) Lord *Chelmsford* in *Couston* v. *Chapman*, p. 256, explained in *Grimoldby* v. *Wells*, supra.

(*h*) Rules of Supreme Court, 1883, Ord. 19, r. 3.

(*i*) See *Farnsworth* v. *Garrard*, 1 Camp. 38; *Thornton* v. *Place*, 1 M. & R. 218.

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the vendee's complaint is, that the vendor has not complied with an express warranty (*k*); as, for instance, that a horse is sound, in which case it is clear that no acceptance of the goods can amount to a conclusive recognition that the vendor has performed his contract (though a presumption to that effect may arise from long silence on the part of the vendee (*l*)), and the vendee may counterclaim upon the warranty (*m*).

A question has sometimes arisen whether a vendee who has refused to accept goods on the ground that they do not correspond with the order or sample, can justify selling them as the vendor's agent in order to avoid the expense of export (*n*). It is a dangerous course to pursue, and never ought to be resorted to without necessity. The better course is to give the vendor notice that they are rejected, and require him to remove them (*o*).

Where goods are sold without an express stipulation as to price (*p*), the vendor has a right to receive as much as they are, on a reasonable estimation, worth, even although the contract may be one which it was necessary to reduce to writing in order to satisfy the Statute of Frauds (*q*). In the absence of proof as to their value, it is presumed, it has been said, that they were of the lowest price of goods of that description; unless the vendee have himself suppressed the means of ascertaining the truth, for then a contrary presumption arises (*r*).

For information respecting the mode of payment, the reader is referred to the next chapter.

(*k*) *Street* v. *Blay*, 2 B. & Ad. 456.

(*l*) *Fielder* v. *Starkin*, 1 H. Bl. at p. 20, per Lord *Loughborough*.

(*m*) *Buchanan* v. *Parnshaw*, 2 T. R. 745; *Street* v. *Blay*, 2 B. & Ad. 456; *Pateshall* v. *Tranter*, 3 Ad. & E. 103.

(*n*) *Chapman* v. *Morton*, 11 M. & W. 534 (defendant complained that goods were not up to sample, but advertised them for sale in his own name and sold them).

(*o*) *Grimoldby* v. *Wells*, L. R. 10 C. P. 391. See ante, pp. 655, 656.

(*p*) But where there has been a sale by *parol*, at a fixed price, the plaintiff cannot, by producing a written agreement, silent as to price, recover on a *quantum valebat*: *Elmore* v. *Kingscote*, 5 B. & C. 583; *Acebal* v. *Levy*, 10 Bing. 376.

(*q*) *Hoadley* v. *M'Laine*, 10 Bing. 482. As to goods sold on price to be determined by valuation, *Thurnell* v. *Balbirnie*, 2 M. & W. 680.

(*r*) *Clunnes* v. *Pezzey*, 1 Camp. 8, and the note; *Armory* v. *Delamirie*, 1 Str. 505; 1 Smith, L. C. 385, 9th edit.

Section V.—*Illegality of Contract an Excuse for Non-performance by either Party.*

Illegality of contract an excuse for non-performance by either party.

Either party may of course excuse himself from the performance of his contract by showing that it is illegal, as where the goods were drugs, sold to a brewer to be used in his brewery (*s*), or libellous and obscene prints (*t*), or dress furnished for the express purpose of prostitution (*u*); nor is it necessarily an excuse that the parties *thought* they were acting legally (*x*).

"We agree," said *Blackburn*, J., in *Waugh* v. *Morris* (*y*), "that where a contract is to do a thing which cannot be performed without a violation of the law, it is void, whether the parties knew the law or not. But we think that in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law."

A distinction was drawn between cases in which the contract violates a law designed for the protection of the public, and those in which it violates a law merely designed for the protection of the revenue, and it has been said that in the former cases only is the contract void (*z*). But this distinction is now repudiated.

"It may be safely laid down," says *Parke*, B., delivering judgment in *Cope* v. *Rowlands* (*a*), "notwithstanding some dicta apparently to the contrary, that, if *the contract* be rendered illegal, it can make no difference in point of law whether the statute which makes it so has in view the protection of the revenue or any other object. The sole question is, whether the statute means to prohibit the contract."

(*s*) *Langton* v. *Hughes*, 1 M. & S. 593.

(*t*) *Fores* v. *Johnes*, 4 Esp. 97.

(*u*) *Bowry* v. *Bennett*, 1 Camp. 348; *Pearce* v. *Brooks*, L. R. 1 Ex. 213. And see *Taylor* v. *Chester*, L. R. 4 Q. B. 309; *Smith* v. *White*, L. R. 1 Eq. 626.

(*x*) *Wilkinson* v. *Loudonsack*, 3 M. & S. 117.

(*y*) L. R. 8 Q. B. 202, at p. 208.

(*z*) *Brown* v. *Duncan*, 10 B. & C. 93. See *Hodgson* v. *Temple*, 5 Taunt. 181; *Johnson* v. *Hudson*, 11 East, 180.

(*a*) 2 M. & W. at p. 157.

Illegality of contract an excuse for non-performance by either party.

The true rule is that laid down by Lord *Tenterden* in *Wetherell* v. *Jones* (*b*). His lordship there says,—

"Where a contract, which a party seeks to enforce, is expressly, or by implication (*c*), forbidden by the statute or common law, no court will lend its assistance to give it effect; and there are numerous cases in the books, where an action on the contract has failed, because either the consideration for the promise or the act to be done was illegal, as being against the express provisions of the law, or contrary to justice, morality, and sound policy. But *where the consideration and the matter to be performed are both legal*, we are not aware that a plaintiff has ever been precluded from recovering, by an *infringement of the law, not contemplated by the contract*, in the *performance* of something to be done on his part."

Therefore, in that case, a rectifier, having, contrary to stat. 6 Geo. 4, c. 80, ss. 115, 117, sold spirits without a permit expressing their true strength, was allowed to maintain an action for the price (*d*). For a full treatment of this subject the reader must be referred to works on the law of contract, especially Mr. Leake's, and Sir W. Anson's.

By stat. 29 Car. 2, c. 7 (*e*), "no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or execute any worldly labour, business or work *of their ordinary callings*, works of necessity and charity only excepted, and no person whatsoever shall publicly cry, show forth, or expose to sale any wares, merchandizes, fruit, herbs, goods or chattels upon the Lord's day." It has been held, since this Act, that the sale of a horse on Sunday, not being within the plaintiff's *ordinary calling*, is not void (*f*); *contrà* where it is so (*g*); the statute prohibiting only work done in a man's *ordinary call-*

(*b*) 3 B. & Ad. 221, at p. 225.

(*c*) *E. g.*, where a statute, without saying that a contract shall be void, inflicts a penalty on the maker; for a penalty implies a prohibition. See judgment of *Tindal*, C. J., in *De Begnis* v. *Armistead*, 10 Bing. 107.

(*d*) See *Pellecat* v. *Angell*, 2 C. M. & R. 311; *Bailey* v. *Harris*, 12 Q. B. 905; *Waugh* v. *Morris*, L. R. 8 Q. B. 202.

(*e*) See 27 Hen. 6, c. 5 (fairs and markets); 3 Car. 1, c. 2.

(*f*) *Drury* v. *Defontaine*, 1 Taunt. 131. See *Scarfe* v. *Morgan*, 4 M. & W. 270.

(*g*) *Drury* v. *Defontaine*, and *Scarfe* v. *Morgan*, supra; *Fennell* v. *Ridler*, 5 B. & C. 406. See, too, *Simpson* v. *Nicholls*, 3 M. & W. 240, and the form of plea there.

ing (*h*). It has been said, too, that a contract of sale is not void against a person ignorant that the vendor was exercising his *ordinary calling* (*i*); but this is questionable (*k*). And where a heifer was sold on Sunday, and the vendee retained, and on a *subsequent day* promised to pay for it, he was held liable upon his subsequent promise (*l*). The Act applies only to persons *ejusdem generis* with those mentioned in it (*m*).

Illegality of contract an excuse for non-performance by either party.

By 7 Geo. 2, c. 8, entitled, "An Act to prevent the nefarious practice of Stockjobbing," a large class of speculative bargains on the Stock Exchange were declared void and prohibited under heavy penalties. This Act, however, has been repealed (*n*). Such transactions, therefore, are no longer *illegal*. Still, if no contract of sale be intended by either of the parties to the bargain for the sale and purchase of the stocks, or if there be an arrangement that such contract will not be carried out (*o*), it will fall within the statute 8 & 9 Vict. c. 109, which, by sect. 18, enacts "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be *null* and *void*" (*p*). But, as we have seen, where a broker is employed to speculate for a client upon the Stock Exchange by buying and selling stocks from and to jobbers, the employment is not within this enactment, and the broker is entitled to be indemnified by the client against

(*h*) *R.* v. *Whitnash*, 7 B. & C. 596; *Peate* v. *Dicken*, 3 Dowl. 171; 1 C. M. & R. 422; *Norton* v. *Powell*, 4 M. & G. 42.

(*i*) *Bloxsome* v. *Williams*, 3 B. & C. 232.

(*k*) See *Smith* v. *Sparrow*, 4 Bing. 84.

(*l*) *Williams* v. *Paul*, 6 Bing. 653. But see *Simpson* v. *Nicholls*, 3 M. & W. 240. In *Scarfe* v. *Morgan*, 4 M. & W. 270, a distinction was pointed out between the effect of the Act on contracts *executed* and *executory*. See, however, *Fergusson* v. *Norman*, 5 Bing. N. C. 76. And further, *Norton* v. *Powell*, 4 M. & G. 42. There is an exception in the Act in favour of sales of meat in inns, cook-shops and victualling-houses, for such as cannot otherwise be provided, and of crying or selling milk, before nine in the morning and after four in the afternoon. As to the qualifications under which a baker's business may be conducted on Sunday, see 6 & 7 Will. 4, c. 37.

(*m*) Per *Park*, J., *Peate* v. *Dicken*, 3 Dowl. 171; 1 C. M. & R. 422; *R.* v. *Whitnash*, 7 B. & C. 596.

(*n*) 23 & 24 Vict. c. 28.

(*o*) *Grizewood* v. *Blane*, 11 C. B. 538; *Knight* v. *Fitch*, 15 C. B. 566. See *Lindley*, J., in *Thacker* v. *Hardy*, 4 Q. B. D. at p. 689, as to the rarity of such contracts.

(*p*) The statute does not make such contracts *illegal*: *Fitch* v. *Jones*, 5 E. & B. 238. See *Thacker* v. *Hardy*, 4 Q. B. D. at p. 687.

Illegality of contract an excuse for non-performance by either party.

losses, although there was an understanding between the client and the broker that the latter would endeavour to so arrange that differences only should be paid by the client (*q*). A sale even of goods by way of a wager would be void (*r*).

A sale may be void for contravening the enactments of the Legislature which aim at the establishment of uniformity of weights and measures (*s*). The principal Acts now in force on this subject are the Weights and Measures Acts, 1878 and 1889 (41 & 42 Vict. c. 49, and 52 & 53 Vict. c. 21), which consolidate the laws relating to weights and measures (*t*). By sect. 19, every contract, bargain, sale or dealing made or had in the United Kingdom for work, goods, wares or merchandise to be done, sold, delivered, carried or agreed for by weight or measure, shall be void unless made and had according to one of the weights or measures ascertained by the Act, or to some multiple or part thereof. This provision does not apply, unless the goods are to be weighed or measured in this country; consequently, a contract made here for goods which are to be delivered abroad, according to a foreign measure, is perfectly valid (*u*). The Act permits the use of the metric system of weights and measures, and of decimal sub-divisions of imperial weights and measures, whether metric or otherwise (*x*).

(*q*) *Thacker* v. *Hardy*, 4 Q. B. D. 685; *Ex parte Rogers*, 15 Ch. D. at p. 214; *Perry* v. *Barnett*, 15 Q. B. D. 388.

(*r*) *Rourke* v. *Short*, 5 E. & B. 904.

(*s*) See *R.* v. *Major*, 4 T. R. 750; *Tyson* v. *Thomas*, 1 M'Cl. & Y. 119; *Hospital of St. Cross* v. *Howard de Walden*, 6 T. R. 338; *Noble* v. *Durell*, 3 T. R. 271; *Watts* v. *Friend*, 10 B. & C. 446.

(*t*) See Appendix.

(*u*) See *Rosseter* v. *Cahlmann*, 8 Exch. 361.

(*x*) Sect. 21.

CHAPTER XIII.

CONTRACTS OF DEBT (*a*).

SECT. 1. *Definition.*
2. *Duty of Debtor.*
3. *Duty of Creditor.*

SECTION 1.—*Definition.*

Definition.

A CONTRACT of debt is defined by Sir *William Blackstone* to be that whereby a chose in action, or right to a certain sum of money, is mutually acquired and lost. He remarks that it may arise from any of the other contracts; as, in case of sale, if the price be not paid in ready money, the vendee becomes indebted for its amount to the vendor, and the vendor has the property in his price, as a chose in action, by means of this contract of debt. Any contract, in short, whereby a determinate sum of money becomes due to any person, and is not paid, but remains in action merely, is a contract *of debt* (*b*).

Sums which are paid to the credit of a customer with a banker, though usually called *deposits*, are in truth *loans* by the customer to the banker (*c*).

(*a*) This chapter deals with a part of the general subject of performance of contracts. The title "Contract of Debt" has been retained; but the chapter includes much more than that contract, strictly speaking.

(*b*) 2 Bl. Com. 464.

(*c*) *Foley* v. *Hill*, 1 Ph. 399; 2 H. L. Ca. 28; *Pott* v. *Clegg*, 16 M. & W. 321.

A common evidence of loan is what is called an I O U. It requires no stamp, and is primâ facie evidence of a loan to the party who signs from him who produces it: *Douglas* v. *Holme*, 12 Ad. & E. 641. See *Lemere* v. *Elliott*, 6 H. & N. 656; and *Hinton* v. *Sparkes*, L. R. 3 C. P. 161.

Section II.—*Duty of Debtor.*

Duty of debtor.

The parties to this contract are called *debtor* and *creditor;* the debtor's duty under it is, to tender payment to the creditor or his agent at the proper place and time, *i.e.*, generally speaking, before demand made (*d*), or action brought against him (*e*); but if, as in the case of a bill, there be a day specially fixed for payment, then at that day (*f*), in the proper mode, and to the proper amount;—the creditor's, to receive it, and make him a proper acquittance.

First. *Mode of payment.*—Where the creditor has himself chalked out the mode of payment, it will be sufficient to follow his directions. Thus, where he desires that a bill or note may be remitted by the post, if it be lost, the loss will fall on him (*g*). If the creditor and debtor meet and balance their account, by deducting the debt out of some other demand by the debtor against the creditor, such a transaction is equivalent to actual payment (*h*). So is an agreement that goods furnished by the debtor shall go in satisfaction of the debt (*i*); so, too, is a payment, accepted by the creditor, by bonds representing at the time money's worth, though they afterwards become worthless (*k*). By the Rules of the Supreme Court, Ord. 45, r. 7, payment by a garnishee, or execution levied upon him, is a valid discharge to him to the amount paid or levied (*l*).

(*d*) *Tyler* v. *Bland*, 9 M. & W. 338; *Cotton* v. *Godwin*, 7 M. & W. 147; *Carter* v. *The Burial Board of Tong*, 5 H. & N. 523.

(*e*) *Briggs* v. *Calverly*, 8 T. R. 629.

(*f*) *Poole* v. *Tumbridge*, 2 M. & W. 223; *Dixon* v. *Clark*, 5 C. B. at p. 379; *Dobie* v. *Larkan*, 10 Ex. 776. In cases of sale, in calculating the time of credit, the day of the sale is excluded; and *semble*, that months mean *calendar* months, as well in a case of *open* credit as in one of *close* credit, *i.e.*, credit by bill: *Webb* v. *Fairmaner*, 3 M. & W. 473; *Hart* v. *Middleton*, 2 C. & K. 9.

(*g*) *Warwicke* v. *Noakes*, Peake, 67; *Page* v. *Meek*, 32 L. J. Q. B. 4.

(*h*) *Owens* v. *Denton*, 1 C. M. & R. 711; *Callander* v. *Howard*, 10 C. B. 290. In such a case the balance struck constitutes a new demand, and the Statute of Limitations runs from that time only: *Ashby* v. *James*, 11 M. & W. 542.

(*i*) *Hooper* v. *Stephens*, 4 Ad. & E. 71; *Hart* v. *Nash*, 2 C. M. & R. 337.

(*k*) *Shroder's Case*, L. R. 11 Eq. 131 (payment by Confederate bonds).

(*l*) See 17 & 18 Vict. c. 125, s. 65, repealed by 46 & 47 Vict. c. 49.

Duty of debtor.

Payment to an agent by way of set off will not amount to payment to the principal; the mode of payment must be in accordance with the agent's authority (*m*).

In the absence of directions from the creditor there must, to constitute a legal tender of the debt, be an actual production and offer of the sum due, unless the creditor dispense with it by a declaration that he will not accept it (*n*). This tender must be of *money*, if beyond 40*s.* in gold (*o*), or in what has been rendered by Act of Parliament equivalent to money for that purpose, viz., notes of the Bank of England payable to bearer on demand, which are a legal tender for any sum above *five pounds*, except at the Bank itself and its branches (*p*). Although, strictly speaking, a legal tender must be made in money if required, a tender of country bank notes, if not objected to on that account, will be sufficient (*q*). The tender of a larger sum than that due is legal (*r*); but a tender of a larger sum requiring change, is not so (*s*); nor is a tender good if accompanied by a condition (*t*), as that a document shall be given up to be cancelled, or a receipt *in full*, or even a stamped receipt (*u*) given, or that it shall be received *as all that is due* (*x*). An offer to pay the money upon the

(*m*) *Pearson* v. *Scott*, 9 Ch. D. 198. See supra, pp. 154, 155.

(*n*) *Thomas* v. *Evans*, 10 East, 101; *Dickinson* v. *Shee*, 4 Esp. 67; *Glasscott* v. *Day*, 5 Esp. 48; *Holland* v. *Phillips*, 6 Esp. 46; *Isherwood* v. *Whitmore*, 11 M. & W. 347. See *Finch* v. *Brook*, 1 Bing. N. C. 253; *Turner* v. *Crossley*, 3 M. & W. 43.

(*o*) 33 Vict. c. 10, s. 4. As to gold coin issued by Her Majesty's colonial branch mints being legal tender, see 29 & 30 Vict. c. 65.

(*p*) Stat. 3 & 4 Will. 4, c. 6, s. 98. This Act took effect from the 1st of August, 1834, and is continued by 7 & 8 Vict. c. 32.

(*q*) *Polglass* v. *Oliver*, 2 C. & J. 15. A banker's own notes are not a legal tender to him: *Forster* v. *Wilson*, 12 M. & W. at p. 201, per *Parke*, B.

(*r*) *Dean* v. *James*, 4 B. & Ad. 546; *Wade's case*, 5 Rep. 114; Noy, 74; *Bevans* v. *Rees*, 5 M. & W. 306.

(*s*) *Robinson* v. *Cook*, 6 Taunt. 336; *Watkins* v. *Robb*, 2 Esp. 711; *Betterbee* v. *Davis*, 3 Camp. 70.

(*t*) *Mitchell* v. *King*, 6 C. & P. 237; *Evans* v. *Judkins*, 4 Camp. 156; *Free* v. *Kingston*, Ibid., note; *Huxham* v. *Smith*, 2 Camp. 19; *Glasscott* v. *Day*, 5 Esp. 48; *Finch* v. *Miller*, 5 C. B. 428. See *Hough* v. *May*, 4 Ad. & E. 954; sed vide *Cole* v. *Blake*, Peake, 179.

(*u*) But see *Richardson* v. *Jackson*, 8 M. & W. 298; *Laing* v. *Meader*, 1 C. & P. 257; 33 & 34 Vict. c. 97, s. 123.

(*x*) *Sutton* v. *Hawkins*, 8 C. & P. 259; *Cheminant* v. *Thornton*, 2 C. & P. 50; *Strong* v. *Harvey*, 3 Bing. 304; 11 Moore, 72.

Duty of debtor.

debtor giving a receipt, if objected to on that account, has been held not to be a good tender (*y*). Now, however, by the Stamp Act, 1870, upon the payment of a sum amounting to 2*l.*, a receipt duly stamped must be given to the person paying under a penalty of 10*l.* for refusal to do so (*z*). And it is a general rule, that a tender shall not be in terms which would compel the creditor to make an admission: thus, "*I tender you* 21*l. in payment of the half-year's rent due at Lady-day last*," is a bad tender (*a*). But, "*I am come with the amount of your bill*" (*b*), accompanied by the production of the money, or an offer to pay "under protest" (*c*), has been held sufficient. Some of these cases are not very easily reconcileable *inter se*, if the particular facts only be looked at. The principle, however, *that a tender must be unconditional*, is recognised in all of them. The observations of the Court of Queen's Bench in *Henwood* v. *Oliver* (*d*), and in the later case of *Bowen* v. *Owen* (*d*), seem certainly more in accordance with that which the understanding of a man of business, unembarrassed with legal distinctions, would suggest, than some of the decisions at Nisi Prius above referred to.

"The defendant," said Mr. Justice *Patteson*, in the former case, "who makes a tender always means that the amount tendered, though less than the plaintiff's bill, is all he is entitled to demand in respect of it. How, then, would the plaintiff preclude himself from recovering more, by accepting an offer of part, accompanied by expressions which are implied in every tender? *Expressio eorum quæ tacité insunt nihil operatur.*"

At the same time it must be observed that, in the very case then before the Court, if the creditor had accepted the money offered in the terms there used, "I am come with the amount

(*y*) *Richardson* v. *Jackson*, 8 M. & W. 298; *Laing* v. *Meader*, 1 C. & P. 257.

(*z*) 33 & 34 Vict. c. 97, ss. 120, 123.

(*a*) *Marquis of Hastings* v. *Thorley*, 8 C. & P. 573 (the creditor alleged that the half-year's rent was 23*l.*). See *Griffith* v. *Hodges*, 1 C. & P. 419. But see *Bowen* v. *Owen*, infra.

(*b*) *Henwood* v. *Oliver*, 1 Q. B. 409; *Bowen* v. *Owen*, 11 Q. B. 130.

(*c*) *Manning* v. *Lunn*, 2 C. & K. 13; *Scott* v. *The Uxbridge and R. Rail. Co.*, L. R. 1 C. P. 596; *Sweny* v. *Smith*, L. R. 7 Eq. 324.

(*d*) Supra.

Duty of debtor.

of your bill," he would have found it difficult, afterwards, to persuade a jury that he had not admitted it to be truly what it was called, "the amount of his bill." It is true, he might have guarded himself by saying, "I am willing to take it, but my claim on account of my bill is larger"; but to require him to do that, would be to shift the onus of keeping clear of words implying an admission from the debtor to the creditor.

However, if the creditor refuse to receive the money on some other account, *ex. gr.*, on the ground that more is due to him, and do not object to the informality of the tender, that will in general cure such informality (*e*); but though an *informal* offer of the money may be thus available, yet there must be an offer (*f*).

A tender to an authorised agent is a tender to his principal (*g*). If, however, at the time of the tender the person to whom it is made, and who would otherwise be presumed to be authorised, distinctly disclaims authority to receive it, the tender is made at the peril of him who makes it. Should it turn out that the person to whom it was made had in truth no authority to receive the money, the tender will be bad (*h*). A tender to one of several joint creditors is a tender to all (*i*).

Payment of a less sum than the amount of a debt is not a satisfaction of the debt, even though it be paid and received at the time in satisfaction of the larger sum (*k*), unless there be an acquittance under seal (*l*), or unless there be some consideration for the agreement to receive the smaller sum. Thus, a negotiable instrument, so given and taken, may operate as a satisfaction of a debt of a larger amount, not due upon an instrument of the same sort; the negotiability of the instrument

(*e*) See *Wright* v. *Reed*, 3 T. R. 554; *Lockyer* v. *Jones*, Peake, 180, n.; *Black* v. *Smith*, Peake, 88; *Cole* v. *Blake*, Peake, 179. But see *Huxham* v. *Smith* and *Glasscott* v. *Day*, supra; *Read* v. *Goldring*, 2 M. & S. 86; *Richardson* v. *Jackson*, 8 M. & W. 298.

(*f*) *Thomas* v. *Evans*, 10 East, 101; *Dickinson* v. *Shee*, 4 Esp. 67. See *Douglas* v. *Patrick*, 3 T. R. 683.

(*g*) *Goodland* v. *Blewith*, 1 Camp. 477; *Kirton* v. *Braithwaite*, 1 M. & W. 310.

(*h*) *Finch* v. *Boning*, 4 C. P. D. 143.

(*i*) *Douglas* v. *Patrick*, 3 T. R. 683. And so of payment: *Husband* v. *Davis*, 10 C. B. 645. In the case of payment by bankers, see Ibid.; *Foley* v. *Hill*, 2 H. L. Ca. 28.

(*k*) *Pinnel's case*, 5 Rep. 117 a; *Cumber* v. *Wane*, 1 Sm. L. C. 9th ed. 359; *Foakes* v. *Beer*, 9 App. Cas. 605.

(*l*) Ibid.

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is regarded as consideration for the agreement of the creditor to receive it in satisfaction (*m*). So, of a cheque for a smaller amount of a third person, even though he be the solicitor of the debtor (*n*). So where an agreement is entered into between *a number of creditors* and a debtor, to accept a composition of a smaller amount in satisfaction of their debts, if the debtor duly performs his part of the agreement, the debts are discharged, the agreement of the other creditors to forego a part of their debt affording a consideration for the agreement of each creditor to that effect (*o*).

A creditor who receives from his debtor a negotiable instrument or a cheque, or something other than money, in full discharge cannot, in general, treat the payment as "on account"; he must either accept in accordance with the debtor's intentions, or return it. But this is not a necessary inference, and the Courts appear disposed to deal with each case as it arises. In *Ackroyd* v. *Smithies* (*p*), the Court thought that the fact that a debtor who had sent a cheque in full discharge, and afterwards sent another cheque, was evidence that the debtor assented to the treatment of the first cheque by the creditor as being sent on account. But the question is one of fact; the Court of Appeal lately declined to hold as matter of law that the keeping of a cheque sent in satisfaction of a claim for a large amount, amounted to accord and satisfaction (*q*).

It has been questioned whether there can be a good tender of *part* of a debt so as to protect the debtor from an action for that part, if it turn out that more was due, and the creditor objected to the tender of the part upon that ground. The earlier decisions seem to be at variance on this point (*r*); but it has since been held (*s*) that the true distinction is between a demand severable into parts, and an entire demand, such as that in *Cotton* v.

(*m*) *Sibree* v. *Tripp*, 15 M. & W. 23; *Goddard* v. *O'Brien*, 9 Q. B. D. 37.

(*n*) *Bidder* v. *Bridges*, 37 Ch. D. 406 (C. A.).

(*o*) *Reay* v. *White*, 1 C. & M. 748; *Slater* v. *Jones*, L. R. 8 Exch. 186; *Cranley* v. *Hillary*, 2 M. & S. 120; *Newell* v. *Van Praagh*, L. R. 9 C. P. 96.

(*p*) 54 L. T. N. S. 130.

(*q*) *Day* v. *McLea*, 22 Q. B. D. 610.

(*r*) See *Brandon* v. *Newington*, 3 Q. B. 915; *Tyler* v. *Bland*, 9 M. & W. 338; *Cotton* v. *Godwin*, 7 M. & W. 147.

(*s*) *Dixon* v. *Clarke*, 5 C. B. 365.

Duty of debtor.

Godwin (*t*), where the debt was a promissory note. The person tendering must be ready and willing to perform (*u*).

Although, as we have seen, there can be no *legal tender* except of cash or its equivalent, payment (*x*) is often, by mutual consent, made in a bill or note. The taking of this amounts to an agreement to give the debtor credit for the time it has to run, and suspend the creditor's remedy in the meanwhile (*y*), except in cases where the debt is also secured by a specialty (*z*), or is otherwise of higher degree than simple contract, as, for instance, if it be due on account of rent (*a*). Still a bill or note may, by mutual agreement, operate as immediate payment (*b*); and the transferable note of the debtor himself may be taken in discharge of a liquidated debt of a greater amount (*c*). It is, however, in general, no satisfaction of any debt or demand for which it has been given (*d*), but only *primâ facie* evidence of payment, rendering it necessary that the creditor should account for it before he can be entitled to recover the consideration (*e*).

(*t*) 7 M. & W. 147.

(*u*) *Coore* v. *Callaway*, 1 Esp. 115; *Rivers* v. *Griffiths*, 5 B. & Ald. 630.

(*x*) *Maillard* v. *The Duke of Argyle*, 6 M. & G. 40. See *Caine* v. *Coulton*, 1 H. & C. 764.

(*y*) *Stedman* v. *Gooch*, 1 Esp. 3; *Kearslake* v. *Morgan*, 5 T. R. 513; *Dangerfield* v. *Wilby*, 4 Esp. 159; *Davey* v. *Phelps*, 2 M. & G. 300; *Cohen* v. *Hale*, 3 Q. B. D. 371; *Richardson* v. *Harris*, 22 Q. B. D. at p. 275. As to the effect of contracts giving the buyer the option of paying by cash or by bill, see *Schneider* v. *Foster*, 2 H. & N. 4.

(*z*) *Drake* v. *Mitchell*, 3 East, 251; *Curtis* v. *Rush*, 2 V. & B. 416; B. N. P. 182; *Worthington* v. *Wigley*, 3 Bing. N. C. 454. But in *Baker* v. *Walker*, 14 M. & W. 465, the Court held that a note payable at a future day, which did not appear to be transferable, given for and on account of a judgment debt, was good, because the inference was, that the creditor agreed to suspend his remedy, compliance with which agreement was a sufficient consideration.

(*a*) *Davis* v. *Gyde*, 2 Ad. & E. 623. But see *Parrott* v. *Anderson*, 7 Exch. 93.

(*b*) *Sard* v. *Rhodes*, 1 M. & W. 153; *Cowasjee* v. *Thompson*, 3 Moo. Ind. Ap. Ca. 422.

(*c*) *Sibree* v. *Tripp*, 15 M. & W. 23.

(*d*) *Puckford* v. *Maxwell*, 6 T. R. 52; *Owenson* v. *Morse*, 7 T. R. 64; *Tapley* v. *Martens*, 8 T. R. 451; *Constable* v. *Andrew*, 2 C. & M. 298; *Tarleton* v. *Allhusen*, 2 Ad. & E. 32; *Hough* v. *May*, 4 Ad. & E. 954; *Goodwin* v. *Coates*, 1 M. & Rob. 221, where *Parke*, J., held, at N. P., that a vendor taking from his vendee the note of a third party, payable two months after date, and not indorsed by the vendee, was not bound to present it before suing for the price, for that it was the duty of the maker to pay it without demand, and, therefore, that of the vendee to see it paid. But see *Mercer* v. *Cheese*, 4 M. & G. 804.

(*e*) Per *Pollock*, C. B., *Griffith* v. *Owen*, 13 M. & W. at p. 64; *Caine* v. *Coulton*, supra.

Duty of debtor.

Although, generally speaking, the bill or note is no satisfaction, it will operate as such if the debtor's liability (*f*) upon it be discharged by its loss (*g*), or by the holder's laches (*h*) or folly, as if he alter it so as to discharge the parties thereto (*i*); or if the creditor agree to receive it *as cash* and take upon himself the risk of its being paid (*k*), or if it were transferred to him by way of sale (*l*).

If the creditor negotiate the bill or note for value, and without rendering himself liable, it will, though dishonoured, operate as payment, and the vendor's lien will not revive. Therefore, in *Bunney* v. *Poyntz* (*m*), where the agent of a vendor took the notes of the vendee and another for the price, discounted them with his banker and indorsed them, but the vendor, his employer, did not indorse them, the Court held, that the vendor must be considered as having received payment for his goods,

(*f*) And so he will be discharged, though the debtor be not liable upon it, by laches, &c.

(*g*) *Crow* v. *Clay*, 9 Exch. 604; *Jungbluth* v. *Way*, 1 H. & N. 71.

(*h*) *Peacock* v. *Pursell*, 14 C. B. N. S. 728; even though it was received only as collateral security. *Hopkins* v. *Ware*, L. R. 4 Ex. 268; *Smith* v. *Mercer*, L. R. 3 Ex. 51. But if notes of a banker be given on account, and he happen to have failed, the debtor will not be discharged, if the creditor ascertain and give notice of the failure to the debtor within a reasonable time, though this be not done before the period for presentment has expired, and no presentment have been made: *Robson* v. *Oliver*, 10 Q. B. 704.

(*i*) Byles on Bills, 14th ed. 340; *Alderson* v. *Langdale*, 3 B. & Ad. 660; *Bridges* v. *Berry*, 3 Taunt. 130; *Bishop* v. *Rowe*, 3 M. & S. 362. See *Sloman* v. *Cox*, 1 C. M. & R. 471. Unless, indeed, the debtor, being himself the maker or acceptor, could have no remedy over on it against any other party, and consequently cannot be damnified by the alteration: *Atkinson* v. *Hawdon*, 2 A. & E. 628.

(*k*) *Read* v. *Hutchinson*, 3 Camp. 352; *Sard* v. *Rhodes*, 1 M. & W. 153; *Guardians of Lichfield* v. *Greene*, 1 H. & N. 884. See *Owenson* v. *Morse*, 7 T. R. 64; *Camidge* v. *Allenby*, 6 B. & C. 373; *Ward* v. *Evans*, 2 Ld. Raym. 928; *Brown* v. *Kewley*, 2 B. & P. 518; *Clerk* v. *Mundall*, 12 Mod. 203; 1 Salk. 124.

(*l*) *Fydell* v. *Clark*, 1 Esp. 447; *Ex parte Shuttleworth*, 3 Ves. 368; *Bank of England* v. *Newman*, B. N. P. 277; *Ex parte Isbester*, 1 Rose, 23. Unless the party giving it knew at the time that it was of no value, for that is fraud (*Fenn* v. *Harrison*, 3 T. R. 757; *Gompertz* v. *Bartlett*, 2 E. & B. 849); upon discovery of which the holder may, if the instrument were given in payment for goods, disaffirm the contract of sale, and sue for them in trover: *Hawse* v. *Ramsbottom*, 1 R. & M. 414; *Bishop* v. *Shillito*, 2 B. & A. 329, n.; *White* v. *Garden*, 10 C. B. 919; *Read* v. *Hutchinson*, 3 Camp. 352; *Earl of Bristol* v. *Wilsmore*, 1 B. & C. 514; *Kilby* v. *Wilson*, 1 R. & M. 178.

(*m*) 4 B. & Ad. 568.

Duty of debtor.

and could not retain them, though his agent afterwards became bankrupt, and the notes were dishonoured. But if the creditor negotiate the bill or note so as to render himself personally liable upon it, in that case it will not operate as payment if dishonoured. Thus, in *Miles* v. *Gorton* (*n*), where the vendee of some hops accepted a bill for the price which the vendor drew, and afterwards indorsed and negotiated, it was held that, on the vendee becoming bankrupt, and the bill being dishonoured, the vendor's lien on the hops revived. To the like effect is the case of *Gunn* v. *Bolckow & Co.* (*o*). The defendants had sold iron rails to the A. Company, payment to be made by buyer's acceptances. As the wharfingers' certificates were delivered, the A. Company accepted the drafts of the defendants, which the latter negotiated. The A. Company becoming insolvent, and the bills not being met, the Court of Appeal held that the defendants' lien as unpaid vendors revived. The reason of this distinction appears to be, that, in the former case, the vendor has obtained value for the instrument, which value he cannot be compelled to refund, and would, therefore, be paid twice, if permitted to recover the price of the goods. But, in the latter case, he is, as an indorser, compellable to refund the value he has received. And I conceive that, on the same principle, if, instead of indorsing the instrument, he were to give it in payment for other goods, inasmuch as, on its dishonour, his liability for those second goods would revive, so also would his right to sue for the price of his own goods if delivered, or to retain them, if in his possession and not delivered. However, in this latter case, which was the case in *Miles* v. *Gorton* (*n*), till he has actually taken up the bill or paid for the other goods, it is uncertain whether the bill will prove valuable to him or not; and it seems, therefore, that he ought not to be allowed to sue for the price of his own goods till that

(*n*) 2 C. & M. 504.

(*o*) L. R. 10 Ch. 491. *Mellish*, L. J., says, at p. 503, "Mr. *Kay* said that Bolckow, Vaughan & Co., had negotiated these bills. I do not think myself that that would make any difference, because they have no security on those bills; there is no third person or party to the bills." But it is conceived that the circumstance of third persons being liable would not affect the matter, if the vendors were liable.

Duty of debtor.

uncertainty has been determined (*p*), though, if he have them in his hands, he may retain his lien on them, as in *Miles* v. *Gorton* (*q*). In *Tarleton* v. *Allhusen* (*r*), the doctrine just laid down was carried a step further, and it was held, that when the vendor took a bill, and indorsed it to B. & Co., who sued the acceptor and obtained judgment, but did not sue out execution, and the vendor afterwards took up the bill, he was not to be considered paid for his goods, upon the principle laid down before in this Book, Chap. I., viz., that judgment is not *per se* a satisfaction.

In one case, payment by the delivery to the bankrupt of his own dishonoured acceptance was held sufficient (*s*); but that seems to have proceeded on the ground that the bankrupt's conduct amounted to an assent to receive it as cash, otherwise it would be difficult to reconcile the case with *Hough* v. *May* (*t*).

If payment is to be made by a bill payable at a certain period, the creditor cannot, even if the bill be not delivered according to agreement, commence an action on the consideration till the expiration of that period, though he may sue in the meantime upon the special contract, and complain of the non-delivery of the bill in conformity thereto (*u*). Where goods were sold at six months' credit, payment then to be made by a bill at two *or* three months, this was considered in effect a nine months' credit (*x*).

By the civil law, payment by whomever made liberated the debtor—"*Nec interest creditori quis solvat, utrum is qui debet an alius pro eo; liberatur enim et alio solvente, sive sciente sive ignorante debitore, solutio vel invito eo fiat.*" It would appear

(*p*) That a negotiable bill or note is outstanding in other hands, is, in general (*The National Savings Bank* v. *Tranah*, L. R. 2 C. P. 556), an answer to an action for the debt for which it was given, see *Belshaw* v. *Bush*, 11 C. B. 191.

(*q*) 2 C. & M. 504.

(*r*) 2 Ad. & E. 32.

(*s*) *Mayer* v. *Nias*, 1 Bing. 311.

(*t*) 4 Ad. & E. 954.

(*u*) *Helps* v. *Winterbotham*, 2 B. & Ad. 431; *Sibree* v. *Tripp*, 15 M. & W. 23. See, where the vendee has the option to pay either in cash or by bill, *Schneider* v. *Foster*, 2 H. & N. 4; also, where the contract is only partially executed, and he has rescinded it, *Bartholomew* v. *Markwick*, 15 C. B. N. S. 711.

(*x*) *Helps* v. *Winterbotham*, 2 B. & Ad. 431, *Parke*, J., dubitante.

Duty of debtor.

that by the law of England, if payment be made by a stranger for or on account of the debtor, and the latter choose to adopt it while the creditor retains the money, the payment is good (*y*).

There may be discharge by novation, that is, a new contract may be entered into with intent to dissolve a former contract. The acceptance of the new liability will be good consideration for giving up rights under the first contract (*a*). Where a debtor gives to his creditor a draft or order on a debtor of the former, and the creditor together with the debtor assents to the substitution, and the original debt is discharged (*b*), there may be discharge by expromission, that is, the substitution with his assent of a new debtor (*c*). So far as insurance companies are concerned, the matter is regulated by 35 & 36 Vict. c. 41, s. 7, which declares—

"Where a company, either before or after the passing of this Act, has transferred its business to or been amalgamated with another company, no policy-holder in the first-mentioned company who shall pay to the other company the premiums accruing due in respect of his policy shall by reason of any such payment made after the passing of this Act, or by reason of any other act done after the passing of this Act, be deemed to have abandoned any claim which he would have had against the first-mentioned company on due payment of premiums to such company, or to have accepted in lieu thereof the liability of the other company, unless such abandonment and acceptance have been signified by some writing signed by him or by his agent lawfully authorized."

This discharge is effectual as to bills and notes. The Bills of Exchange Act, 1882, by s. 62, enacts:—

"(1.) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor, the bill is discharged. The renunciation must be in writing unless the bill is delivered up to the acceptor.

(*y*) *Belshaw* v. *Bush*, 11 C. B. 191; *Simpson* v. *Eggington*, 10 Ex. 845; *Cook* v. *Lister*, 13 C. B. N. S. 543; *Kemp* v. *Balls*, 24 L. J. Ex. 47. But see *Jones* v. *Broadhurst*, 9 C. B. 173; *Walter* v. *James*, L. R. 6 Ex. 124; *Lucas* v. *Wilkinson*, 1 H. & N. 420.

(*a*) *Wilson* v. *Coupland*, 5 B. & Ald. 228.

(*b*) *Dickinson* v. *Marrow*, 14 M. & W. 719.

(*c*) *Thornhill* v. *Neats*, 8 C. B. N. S. 831.

Duty of debtor.

"(2.) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation."

Amount of Payment—Interest.—The amount of the sum due to the creditor is frequently, between the time of contract and that of payment, increased by the addition of *Interest*. Interest is, and always was, payable where there has been a contract to that effect, express, or to be implied from circumstances, the usage of trade (*d*), or the mode of dealing between the parties (*e*); and also upon a bond, bill, or promissory note (*f*).

In most other cases, there was a considerable dispute upon the question of interest, and the leaning of the Courts seemed on the whole against allowing it. However, by stat. 3 & 4 Will. 4, c. 42, it was enacted—

Sect. 28. "Upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue or inquisition of damages, may, *if they shall think fit*, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or, if payable otherwise, then from the time when demand of payment (*g*) shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment, provided that interest shall be payable in all cases in which it is now payable by law" (*h*).

Sect. 29. "The jury on the trial of any issue or inquisition may,

(*d*) *Ex parte Bishop*, 15 Ch. D. 400.

(*e*) *Eddowes* v. *Hopkins*, Dougl. 376; *Marshall* v. *Poole*, 13 East, 98; *Porter* v. *Palsgrave*, 2 Camp. 472; *Becher* v. *Jones*, 2 Camp. 428, n.; *Boyce* v. *Warburton*, 2 Camp. 480; *Robinson* v. *Bland*, 2 Burr. 1077; *Arnott* v. *Redfern*, 3 Bing. 353; *Nichol* v. *Thompson*, 1 Camp. 52, n.; *Bruce* v. *Hunter*, 3 Camp. 467: *Moore* v. *Voughton*, 1 Stark. 487; *Morgan* v. *Jones*, 8 Exch. 620; *In re Gosman*, 17 Ch. D. 771 (Crown not chargeable with interest on rents and profits received from property in its possession).

(*f*) *Vernon* v. *Cholmondeley*, Bunh. 119.

(*g*) As to what is a sufficient "demand," see *Ward* v. *Eyre*, 15 Ch. D. 130; *Geake* v. *Ross*, 44 L.J. C. P. 315.

(*h*) See, on the construction of this section, *Attwood* v. *Taylor*, 1 M. & G. 279; *Mowatt* v. *Lord Londesborough*, 4 E. & B. 1. It would seem the certain time need not, even if it can be ascertained, be fixed by the instrument: *Duncombe* v. *Brighton Club Co.*, L. R. 10 Q. B. 371.

if they think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in all actions on policies of insurance" (*i*). Duty of debtor.

Order LVIII. r. 19, of the Rules of the Supreme Court, 1883, provides as follows:—

"On an appeal from the High Court, interest for such time as execution has been delayed by the appeal shall be allowed, unless the Court or a judge otherwise orders; and the taxing officer may compute such interest without any order for that purpose."

By sect. 17 of 1 & 2 Vict. c. 110, all judgment debts carry interest at four per cent., for which, as well as for the principal, execution may issue.

Compound Interest, i.e., interest on a balance of account, debiting the debtor with former interest, is allowable where there is a contract to that effect, either express or to be collected from circumstances, as where the parties had been in the habit of dealing on those terms (*k*), or a banker's customer knew it to be the practice of the house (*l*), but not otherwise (*m*).

Usury.—The various laws relating to this subject were all repealed by the statute 17 & 18 Vict. c. 90 (*n*), save so far as they affected transactions prior to the 10th day of August, 1854.

Appropriation of Payments.—It frequently happens, that a party who pays money is indebted in several ways to the party who receives it from him; in such cases it becomes a question, to the reduction of which of his debts the payment must be

(*i*) As to the meaning of this section, and also as to the circumstances under which, at common law, interest was given for detention, see *Webster* v. *British Empire Life Assurance Co.*, 15 Ch. D. 169 (C. A.).

(*k*) *Bruce* v. *Hunter*, 3 Camp. 467; *Newal* v. *Jones*, M. & M. 449. See 4 Mad. 64, n.; *Fergusson* v. *Fyffe*, 8 C. & F. 121.

(*l*) *Moore* v. *Voughton*, 1 Stark. 487.

(*m*) *Dawes* v. *Pinner*, 2 Camp. 486, n.

(*n*) See them enumerated in the schedule.

Duty of debtor.

applied. The rule is, that the party paying has power to make the application *at the time of payment* (*o*), which he may do either by express words, or a conduct indicative of his intention (*p*); but that, if he neglect to make it, the party receiving may (*q*), and is not bound to make an immediate application (*r*); and though it was once said that perhaps he ought to make one within a reasonable time (*s*), it seems now pretty well established that he may make it at any time before the matter comes to the consideration of a jury (*t*).

When there is *an account current* between the parties, *ex. gr.*, a banking account, the law, in the absence of any other specific arrangement, or course of dealing between the parties, presumes that they intended to apply the first item on the credit side to the first item on the debit side, and so on (*u*).

"The civil law," said *Tindal*, C. J., in *Mills* v. *Fowkes* (*x*), "it is said, applies the payment to the more burdensome of two debts, where one is more burdensome than the other; but I do not think that such is the rule of our law. According to the

(*o*) Per *Bayley*, J., *Simson* v. *Ingham*, 2 B. & C. 72; *Lancashire Waggon Co.* v. *Nuttall*, 42 L. T. N. S. 465.

(*p*) *Clayton's case*, 1 Mer. 572; *Newmarch* v. *Clay*, 14 East, 239; *Shaw* v. *Picton*, 4 B. & C. 715; *Taylor* v. *Kymer*, 3 B. & Ad. 320; *Marryatts* v. *White*, 2 Stark. 101; *Thompson* v. *Hudson*, L. R. 6 Ch. 320; *Johnson* v. *Roberts*, L. R. 10 Ch. 505. See *Kirkpatrick* v. *S. Australian Insurance Co.*, 11 App. Cas. 177.

(*q*) *Kinnaird* v. *Webster*, 10 Ch. D. 139; *Hooper* v. *Keay*, 1 Q. B. D. 178; *Goddard* v. *Cox*, 2 Str. 1194; *Plomer* v. *Long*, 1 Stark. 153; *Marryatts* v. *White*, 2 Stark. 101; *Mathews* v. *Walwyn*, 4 Ves. 118; *Peters* v. *Anderson*, 5 Taunt. 596; *Hall* v. *Wood*, 14 East, 243, n.; *Kirby* v. *Duke of Marlborough*, 2 M. & S. 18; *Bosanquet* v. *Wray*, 6 Taunt. 597; *Bodenham* v. *Purchas*, 2 B. & Ald. 39. The following rule may be useful in ascertaining the intention with which any particular payment was made and received, and the mode in which it ought to be applied: "Where a creditor receives, without objection, what is offered by his debtor, solvitur in modum solventis. Where the creditor objects, recipitur in modum recipientis."—Per *Tindal*, C. J., *Webb* v. *Weatherby*, 1 Bing. N. C. at p. 505; *Croft* v. *Lumley*, 5 E. & B. 648.

(*r*) *Simson* v. *Ingham*, 2 B. & C. 65. See *Cox* v. *Troy*, 5 B. & Ald. 474; *Mills* v. *Fowkes*, 5 Bing. N. C. 455.

(*s*) See *Simson* v. *Ingham*, per *Best*, J., ubi supra.

(*t*) *Philpott* v. *Jones*, 2 A. & E. 42.

(*u*) *Clayton's case*, 1 Mer 572; *Bodenham* v. *Purchas*, 2 B. & Ald. 39; *Dawe* v. *Holdsworth*, Peak, 64, and notes; *Wilson* v. *Hirst*, 4 B. & Ad. at p. 767. But see *Henniker* v. *Wigg*, 4 Q. B. 792; *City Discount Co.* v. *McLean*, L. R. 9 C. P. 692; *Kinnaird* v. *Webster*, L. R. 10 Ch. D. 139; *Pearl* v. *Deacon*, 1 De G. & J. 461.

(*x*) 5 Bing. N. C. at p. 461.

Duty of debtor.

law of England, the debtor may, in the first instance, appropriate the payment—*solvitur in modum solventis;* if he omit to do so, the creditor may make the appropriation—*recipitur in modum recipientis;* but if neither make any appropriation, the law appropriates the payment to the earlier debt." And, accordingly, in that case it was held, that the debtor having made no appropriation at the time of payment, the creditor had a right to appropriate a payment made generally to a debt barred by the Statute of Limitations (*y*). Nay, in one case it was decided that a solicitor who had done work for a corporation without a retainer under seal, might appropriate a general payment to the work so done; though the Court held at the same time that he could not have recovered payment in an action (*z*). Where there are distinct demands, one against a firm, and the other against one only of the partners, if the money paid be the money of the partners, and be not specifically appropriated by the payer, the creditor must not, and the law will not, apply it to the demand upon the individual; for that would be to pay the debt of one with the money of others (*a*). Nor will the rule apply where a trustee, who has paid in trust money to his own private account at his bankers, draws out sums by cheques generally; he will be taken to have drawn out his own money. A trustee cannot be heard to say that he took away the trust money when he had a right to take away his own money (*b*). Nor will an appropriation be allowed, which would deprive the party paying of a benefit, such as the taxation of costs; and, therefore, a solicitor cannot apply a general payment to the taxable items of his bill only (*c*). If some of the demands be illegal, a general payment will be applied to the legal demands (*d*); but where an Act of Parliament does not render a particular species of contract illegal, but only prohibits the enforcement of it *by action*, there a creditor

(*y*) Accord. *Williams* v. *Griffith*, 5 M. & W. 300. See *Walker* v. *Butler*, 6 E. & B. 506.

(*z*) *Arnold* v. *Mayor of Poole*, 4 M. & G. 860. See the case of an uncertificated attorney, *In re Jones*, L. R. 9 Eq. 63.

(*a*) *Thompson* v. *Brown*, M. & M. 40.

(*b*) *In re Hallett's Estate*, 13 Ch. D. 696; *Hancock* v. *Smith*, 41 Ch. D. 456.

(*c*) *James* v. *Child*, 2 Tyr. 732.

(*d*) *Ribbans* v. *Crickett*, 1 B. & P. 264; *Wright* v. *Laing*, 3 B. & C. 165.

Duty of debtor.

may appropriate a general payment to a demand arising out of such a contract (*e*). Where the same broker sold goods of A. and goods of B. to the payer, a general payment, if insufficient to discharge both debts, must be applied proportionably to them both (*f*). The rule in *Clayton's case* (*g*) presupposes the existence of an unbroken account, and payments made in that account; it does not apply where payments are made to a new and distinct account (*h*). An intention on the part of the debtor to appropriate to a particular debt is, perhaps, more easily presumed in favour of a surety, where there are any circumstances which can be considered indicative thereof (*i*); but in the absence of a contract, express or implied, the mere existence of the relation of principal and surety does not take away the right of the payee to appropriate payments in accordance with the rule in *Clayton's case* (*k*). Where a partner dies and the partnership is in debt, and the surviving partners continue to deal with a creditor who joins the transactions of the old and new firms in one account, the payments made by the surviving partners must be applied to the old debt (*l*).

Section III.—*Duty of Creditor.*

Duty of creditor.

The duty of the creditor is to receive the payment, if tendered at the proper time, and give a proper acquittance. The consequence of his refusing payment when tendered will be, that if he afterwards commence an action for the amount, the tender, accompanied by a payment of the sum tendered into Court, will be a good defence, unless the creditor can prove a prior or subsequent demand and refusal (*m*). Such a tender, moreover, will prevent interest from afterwards running against the debtor (*n*).

(*e*) *Philipott* v. *Jones*, 4 N. & M. 14; 2 Ad. & E. 41; *Cruikshanks* v. *Rose*, 1 M. & Rob. 100.

(*f*) *Favenc* v. *Bennett*, 11 East, 36.

(*g*) Supra.

(*h*) *In re Sherry*, 25 Ch. D. 692, 702.

(*i*) *Marryatts* v. *White*, 2 Stark 101.

(*k*) *In re Sherry*, 25 Ch. D. 692; *Plomer* v. *Long*, 1 Stark. 153. See *Wright* v. *Hickling*, L. R. 2 C. P. 199.

(*l*) *Hooper* v. *Keay*, 1 Q. B. D. 178.

(*m*) *Spybey* v. *Hide*, 1 Camp. 181; *Rivers* v. *Griffiths*, 5 B. & Ald. 630; *Coore* v. *Callaway*, 1 Esp. 115.

(*n*) *Dent* v. *Dunn*, 3 Camp. 296. See *Hume* v. *Peploe*, 8 East, 168.

Duty of creditor.

As to Acquittance.—It seems doubtful whether the debtor had, at common law, a right to demand a receipt on payment, excepting from the King's receiver (*o*). However, by 33 & 34 Vict. c. 97, s. 123, if a person refuses to give a receipt duly stamped, in any case where it would be liable to duty, he shall forfeit the sum of 10*l.* (*p*).

A receipt, though strong, is not *conclusive* evidence of payment (*q*), unless it be by deed; for then, in the absence of fraud, the law admits no evidence to the contrary (*r*). A receipt in full of all demands is an admission of great weight, and it has even been said, that, in the absence of mistake, it is conclusive (*s*). But this doctrine is incapable of being supported, and we may venture to assume that it must, like other matters not amounting to estoppel, be used as evidence to be submitted to the jury, and is capable of being rebutted (*t*). All receipts for or upon the payment of money amounting to 2*l.* or upwards, now (*u*) bear one uniform duty of 1*d.*, for which adhesive stamps may be used, which the creditor must cancel. The former exception of bankers' accountable receipts given to their *customers* still exists, qualified by the proviso, that the money is expressed to be received from the person to whom it is to be accounted for. Receipts requiring a stamp cannot be stamped after they have been written, except within fourteen days, on payment of the duty and 5*l.*; or one calendar month, on payment of the duty and 10*l.* (*x*).

(*o*) See *Cole* v. *Blake*, Peake, 179; Bunb. 348; Fitz. "Damage," 75; Bro. Ab. tit. "Faites," pl. 8; Fortescue, 145. See, however, the observations of *Parke*, B., in *Richardson* v. *Jackson*, 8 M. & W. 299.

(*p*) See pp. 667, 668, ante.

(*q*) *Straton* v. *Rastall*, 2 T. R. 366; *Lampon* v. *Corke*, 5 B. & Ald. 606; *Skaife* v. *Jackson*, 3 B. & C. 421; *Graves* v. *Key*, 3 B. & Ad. 313.

(*r*) Gilb. L. Ev. 142; *Hirschfield* v. *L. B. & S. C. Ry. Co.*, 2 Q. B. D. 1.

(*s*) *Alner* v. *George*, 1 Camp. 392. See *Bristow* v. *Eastman*, 1 Esp. 172.

(*t*) *Lee* v. *Lancashire & Yorkshire Ry. Co.*, L. R. 6 Ch. 527; *Benson* v. *Bennett*, 1 Camp. 394, n.; *Lampon* v. *Corke*, ubi supra; B. N. P. 56; *Farrar* v. *Hutchinson*, 9 Ad. & E. 641; *Hirschfield* v. *L. B. & S. C. Ry. Co.*, supra.

(*u*) 33 & 34 Vict. c. 97, ss. 120, 121, Sched.

(*x*) 33 & 34 Vict. c. 97, s. 122.

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A

COMPENDIUM

OF

MERCANTILE LAW

BY

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TENTH EDITION

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BOOK THE FOURTH.

OF MERCANTILE REMEDIES.

It is proposed to treat, in this Book, of *Mercantile Remedies:* that is, omitting all consideration of those universal ones, by action, which are open to merchants in common with the rest of her Majesty's subjects, to speak of such as are, from their very nature, exclusively, or almost exclusively, appropriated to that class of the community, with whom we are, in this Treatise, chiefly concerned.

CHAPTER I.

STOPPAGE IN TRANSITU.

Sect. 1. *Right to stop in Transitu—what.*
2. *Who possesses it.*
3. *How long it continues*
4. *How defeated.*
5. *How exercised.*

Section I.—*Right to stop in Transitu—what.*

Right to stop in transitu—what.

The first subject which we shall place under this head is that of Stoppage in Transitu, which is, indeed, a measure rather of prevention than of cure; but yet sufficiently entitled to the epithet *remedial* to justify its present collocation.

When goods are consigned on credit by one merchant to another, it sometimes happens that the consignee becomes

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bankrupt or insolvent (*a*) while the goods are on their way to him, and before they are delivered. In such case, as it would be hard that the goods of the consignor should be applied in payment of the debts of the consignee, the former is allowed by law to resume possession (*c*) of them, if he can succeed in doing so while they are on their way, and before they have got into the purchaser's possession. This resumption is called stoppage *in transitu* (*d*), and the doctrine of stoppage *in transitu* has always been construed favourably to the unpaid vendor (*e*). *Insolvency* is understood generally by merchants as having a popular and not a technical meaning, and it has been frequently construed by the Courts in its larger sense. The term insolvency (when used with reference to this branch of the law) is satisfied by general inability to pay, evidenced by stoppage of payment. In *Biddlecombe* v. *Bond* (*f*), it was held in a contract to mean general inability to pay debts. It seems that there is no necessity that the vendee should have become bankrupt, or that a receiving order should have been made against him, but that general inability to pay, evidenced by stoppage of payment, is sufficient (*g*). Mere failure by the vendee to comply with a condition subsequent, as the sending, in accordance with the contract, of a banker's draft for the price, does not give the vendor the right to resume possession after the property has vested in the vendee (*h*).

(*a*) For history of the right, see Lord *Abinger's* judgment in *Gibson* v. *Carruthers*, 8 M. & W. 321. In *Wilmshurst* v. *Bowker*, 2 M. & G. at p. 812, *Tindal*, C. J., says, "The ordinary right of countermanding the actual delivery of goods shipped to a consignee is limited to the cases in which the *bankruptcy* or *insolvency* of the consignee has taken place."

(*c*) See *The Tigress*, 32 L. J. Adm. 97.

(*d*) In former editions it was said that this right "was first allowed by equity," alluding to *Wiseman* v. *Vandeput* (1690), 2 Vern. 203; *Snee* v. *Prescott*, 1 Atk. 246, and *D'Aquila* v. *Lambert*, 2 Eden, 75; Ambl. 399. But the right seems to have existed as part of the lex mercatoria: Blackburn on Sale, 2nd ed., p. 318.

(*e*) *Bethell* v. *Clark*, 20 Q. B. D. at p. 617, per Lord *Esher*, M. R.

(*f*) 4 Ad. & E. 332. See per *James*, V.-C., in *Re European Assurance Society*, L. R. 9 Eq. at p. 128.

(*g*) See *Vertue* v. *Jewell*, 4 Camp. 31; *Newsom* v. *Thornton*, 6 East, 17 (in both of which cases the stoppage in transitu was effected before the bankruptcy of the vendee).

(*h*) *Wilmshurst* v. *Bowker*, 7 M. & G. 882 (Exch. Ch.); and see *Key* v. *Cotesworth*, 7 Exch. 595, and *R.* v. *Saddlers' Co.*, 10 H. L. Cas. 404, at p. 425, per *Willes*, J.

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Whether its effect be or be not to dissolve the contract of sale between the consignor and consignee of the goods stopped, has been much discussed (*i*). Lord *Kenyon* was of opinion that it did not rescind the sale, but was an "*equitable* (*j*) lien, adopted by the law for the purposes of substantial justice" (*k*); an opinion which certainly consists best with the decisions which have taken place, that payment of part of the price (unless the contract be apportionable (*l*)), or acceptance of a bill for the whole of it, by the vendee, will not defeat the vendor's right to stop *in transitu*, if the vendee become insolvent before the remainder of the price has been liquidated, or the bill taken up (*m*), and that the vendor is not, when he stops *in transitu*, obliged to tender back a bill he has received on account of the price (*n*). Mr. Justice *Bayley*, in *Bloxam* v. *Saunders* (*o*), gave a descrip-

(*i*) In *Stephens* v. *Wilkinson*, 2 B. & Ad. 320. In *Edwards* v. *Brewer*, 2 M. & W. 375, and *Gibson* v. *Carruthers*, 8 M. & W. 321, the Court adverted to it as undetermined. And see *Wilmshurst* v. *Bowker*, 5 Bing. N. C. 541. In Bell's Comm. it is treated as a rescission (3rd ed. I. 2, p. 2, c. 1).

(*j*) *Schotsmans* v. *Lancashire and Yorkshire Rail. Co.*, L. R. 2 Ch. 332.

(*k*) *Hodgson* v. *Loy*, 7 T. R. at p. 445.

(*l*) See *Merchant Banking Co.* v. *Phœnix Bessemer Steel Co.*, 5 Ch. D. at p. 220.

(*m*) *Hodgson* v. *Loy*, 7 T. R. 440; *Feise* v. *Wray*, 3 East, 93. Compare *Cowasjee* v. *Thompson*, 5 Moo. P. C. 165.

(*n*) *Edwards* v. *Brewer*, 2 M. & W. 375; *Jenkyns* v. *Usborne*, 7 M. & G. 678.

(*o*) 4 B. & C. at p. 948. "The buyer's right," said his Lordship, "in respect of the price is not a mere lien, which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion. If the seller has despatched the goods to the buyer, and insolvency occurs, he has a right, in virtue of his original ownership, to stop them in transitu.—Why? Because the *property* is vested in the buyer, so as to subject him to the risk of any accident, but he has not an indefeasible right to the *possession*; and his insolvency, without payment of the price, defeats that right. And if this be the case after he has despatched the goods, and whilst they are in transitu, à fortiori is it when he has never parted with the goods, and when no transitus has begun? The buyer, or those who stand in his place, may still obtain the right of *possession*, if they will pay or tender the price; or they may still act upon their right of *property*, if anything unwarrantable is done to that right. If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the injury they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which the right of *property* and right of *possession* are both requisite, unless they have both those rights." See also *Valpy* v. *Oakeley*, 16 Q. B. 941; *Wilmshurst* v. *Bowker*, 5 Bing. N. C. 541. See, also, *Milgate* v. *Kebble*, 3 M. & G. 100, where it was held that the vendee could not maintain trover against the vendor for taking the goods

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tion of the nature of a vendor's lien for his price, wide enough to include the right of stoppage *in transitu*, and seemingly opposed to the idea that the exercise of that right operates as a rescission of the contract of sale. In *Edwards* v. *Brewer* (*p*), *Parke*, B., says, "the effect is the same as if the consignor had not delivered them on board ship. Then, if so, he has a right to retain them till payment of the whole price." There is now a general consensus of opinion that the effect of stoppage *in transitu* is not to rescind the contract (*q*).

In *Vertue* v. *Jewell* (*r*), Lord *Ellenborough* held that although the vendee may have become insolvent, still if the state of his accounts with the vendor be such that the vendor is, upon the whole, indebted to the vendee, he cannot stop *in transitu* goods of less value consigned to the vendee, on account of the balance; for the delivery of them to the vendee's representatives can, in that case, be productive of no injustice; and if the balance against him be occasioned by the vendee being under acceptances for his accommodation, he cannot stop *in transitu* until the bills are paid. This view was confirmed by the Court in banc. But it has often been questioned.

away, the plaintiff not being in actual possession, and the price, *which was to be paid before removal*, unpaid. And see *Lord* v. *Price*, L. R. 9 Ex. 54; *Johnson* v. *Stear*, 15 C. B. N. S. 330; *Halliday* v. *Holgate*, L. R. 3 Ex. 299.

(*p*) Ubi supra.

(*q*) See per *Brett*, L. J., in *Kendal* v. *Marshall, Stevens & Co.*, 11 Q. B. D. 356, at p. 364; where he observes, "where the goods are in the course of transit from the vendor to the vendee, although the property has passed to vendee, and although he has the constructive possession of them, the right to stop prevails." In *Phelps, Stokes & Co.* v. *Comber*, 29 Ch. D. 813, at p. 821, *Cotton*, L. J., thus describes the right: "*It is a retaking by the unpaid vendor*, either on the cancellation of the contract, as some people say, or, as I should rather say, *on resuming possession for the purpose of insisting on his lien for the price, at any time while the goods are in the hands of the carrier, &c.*" Benjamin on Sale, 4th ed. 898.

(*r*) 4 Camp. 31.

Section II.—*Who possesses it.*

Who possesses it.

Lord *Ellenborough* stated, in *Siffken* v. *Wray* (*s*), that the person who stopped goods *in transitu* must not be a mere surety for their price; one, for instance, who had, at the request of the vendee, accepted bills drawn by the vendor for their purchase-money. But since the passing of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97, s. 5) this is not necessarily the case; a surety who has paid may exercise the right. In *The Imperial Bank* v. *The London and St. Katharine's Dock Co.* (*t*), a broker who purchased for an undisclosed principal, and who was liable to pay the payee in the event of default, was held entitled to exercise the right; and a person abroad, who, in pursuance of orders sent him by a British merchant, purchases goods, on his own credit, of others whose names are unknown to the merchant, and charges a commission on the price, is a consignor, and is entitled to stop the goods *in transitu* if the merchants fail while they are on their passage; for he stands in the light of a vendor, and the British merchant of *his* vendee (*u*). So is a person who consigns goods to be sold on the joint account of himself and the consignee (*v*). The right belongs to a buyer who resells his interest in the goods (*w*).

If the stoppage be made by an unauthorized person on behalf of vendor, the act must be ratified before the transit is over (*x*), otherwise it will not be effectual.

(*s*) 6 East, 371. See *Sweet* v. *Pym*, 1 East, 4.

(*t*) 5 Ch. D. 195.

(*u*) *Feise* v. *Wray*, 3 East, 93; *The Tigress*, 32 L. J. Adm. 97. See *Ireland* v. *Livingston*, L. R. 5 H. L. 395; *Ex parte Banner*, 2 Ch. D. 278; *Ex parte Cooper*, 11 Ch. D. 68.

(*v*) *Newsom* v. *Thornton*, 6 East, 17. As to the authority of an agent to stop goods in transitu, and the effect of a ratification, see *Nicholls* v. *Le Feuvre*, 2 Bing. N. C. 81; *Whitehead* v. *Anderson*, 9 M. & W. 518; *Bird* v. *Brown*, 4 Exch. 786; *Hutchings* v. *Nunes*, 1 Moore, P. C. N. S. 243.

(*w*) *Jenkyns* v. *Usborne*, 7 M. & G. 678.

(*x*) *Bird* v. *Brown*, 4 Ex. 786.

Section III.—*How long it continues.*

How long it continues.

The period during which the right to stop the goods continues is, as we have seen, co-extensive with that of their transit from the vendor to the purchaser. Hence, in cases where the propriety of a resumption of this sort is questioned, the point disputed generally is, whether, at the time of seizure by the vendor, the transit of the goods had or had not determined. Such cases always mainly depend upon their own peculiar circumstances, but the general rule to be collected from all the decisions is, that goods are to be deemed *in transitu* till they get into the hands of the purchaser, his servants or agents.

Most of the cases fall into the following groups:—

(a) *Where the goods, after sale, remain in the possession of the vendor.*—These, which are scarcely cases of stoppage *in transitu*, have already been discussed with reference to the Statute of Frauds; the purchaser not having acquired the actual possession, the vendor's lien exists (*y*).

(b) *Where the goods are in the possession of a carrier, or railway company, or a general ship not belonging to or chartered by the vendee.*—Goods are to be deemed *in transitu* so long as they remain in the possession of carriers as such, whether by water or land (*z*), even though such carrier may have been appointed by the consignee himself (*a*); and until they come into the actual

(*y*) *Hurry* v. *Mangles*, 1 Camp. 452; *Miles* v. *Gorton*, 2 C. & M. 504; *Townley* v. *Crump*, 1 A. & E. 58; *Lackington* v. *Atherton*, 8 Scott, N. S. 38; *Grice* v. *Richardson*, 3 App. Cas. 319.

(*z*) *Mills* v. *Ball*, 2 B. & P. 457. Per *James*, L. J., in *Ex parte Rosevear China Clay Co.*, 11 Ch. D. at p. 568.

(*a*) *Holst* v. *Pownal*, 1 Esp. 240; *Northey* v. *Field*, 2 Esp. 613; *Hodgson* v. *Loy*, 7 T. R. 440; *Jackson* v. *Nichol*, 5 Bing. N. C. 508; *Berndtson* v. *Strang*, L. R. 4 Eq. 481; 3 Ch. 588; *Rodger* v. *The Comptoir d'Escompte de Paris*, L. R. 2 P. C. 393; *Ex parte Rosevear China Clay Co.*, 11 Ch. D. 560; *Ex parte Barrow*, 6 Ch. D. 783; *Stokes* v. *La Riviere*, cited in *Bothlingk* v. *Inglis*, 3 East, 381; *Smith* v. *Goss*, 1 Camp. 282; *Coates* v. *Railton*, 6 B. & C. 422; *Nicholls* v. *Le Feuvre*, 2 Bing. N. C. 81; *Turner* v. *Trustees of Liverpool Dock Co.*, 6 Exch. 593; *James* v.

or constructive possession of the consignee, who may require the goods to be delivered to him at any stage of the journey (*b*). How long it continues.

(c) *Where the goods are in any place of deposit connected with the transmission and delivery of them.*—Such goods are still in transit. Thus, if they be landed at a seaport town, and there deposited with a wharfinger appointed by the consignee to forward them by land to his own residence, while in the hands of the wharfinger they are subject to the consignor's right of stoppage (*c*). "Nothing is clearer than that it is not delivery to any agent which terminates the transit" (*d*). But the *transitus* is completely at an end when the goods arrive at an agent's, who is to keep them till he receives the further orders of the vendee (*e*). The warehouse of the intermediary may really be the warehouse of the vendee; a carrier or wharfinger may hold the goods for him. If a consignee be in the habit, with the consent of the owner, of using the warehouse of a carrier, packer, wharfinger, or other person as his own, for instance, by making it the repository of his goods, and disposing of them there, the transit will be considered as at an end when they have arrived at such warehouse (*f*). Where the right of stoppage *in transitu* is to be defeated by a constructive possession through the medium of the carrier,

Griffin, 2 M. & W. 623; *Bolton* v. *The L. & Y. Rail. Co.*, L. R. 1 C. P. 431; *Edwards* v. *Brewer*, 2 M. & W. 375. See *Whitehead* v. *Anderson*, 9 M. & W. 518; *Nicholson* v. *Bower*, 1 E. & E. 172.

(*b*) *London and North Western Rail. Co.* v. *Bartlett*, 7 H. & N. 400; *Fraser* v. *Witt*, L. R. 7 Eq. 64.

(*c*) *Mills* v. *Ball*, 2 B. & P. 457; *Ex parte Barrow*, 6 Ch. D. 787; *Kendal* v. *Marshall*, 11 Q. B. D. 356, 365.

(*d*) *Fry*, L. J., in *Bethell* v. *Clarke*, 20 Q. B. D. at p. 619.

(*e*) Per Lord *Ellenborough*, in *Dixon* v. *Baldwin*, 5 East, 175; and *Parke*, B., in *Wentworth* v. *Outhwaite*, 10 M. & W. at p. 450; *Bethell* v. *Clarke*, 20 Q. B. D. at pp. 619, 620. The right to stop will not be revived by a re-delivery to the vendor for a special purpose, *e.g.*, to repack: *Valpy* v. *Gibson*, 4 C. B. 837.

(*f*) *Richardson* v. *Goss*, 3 B. & P. 119; *Scott* v. *Pettit*, 3 B. & P. 469; *Foster* v. *Frampton*, 6 B. & C. 107; *Allan* v. *Gripper*, 2 C. & J. 218; *Wentworth* v. *Outhwaite*, 10 M. & W. 436; *Dodson* v. *Wentworth*, 4 M. & G. 1080; *Rowe* v. *Pickford*, 8 Taunt. 83. See *James* v. *Griffin*, 2 M. & W. 623, and the judgment in *Whitehead* v. *Anderson*, 9 M. & W. 518; *Nicholson* v. *Bower*, 1 E. & E. 172; *Smith* v. *Hudson*, 6 B. & S. 431; and compare *Bethell* v. *Clarke*, supra.

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acts of dominion exercised by the vendee over the goods while in the carrier's hands (as, for instance, by taking samples), will not have the effect of creating such a constructive possession, unless they be accompanied by such circumstances as denote that the carrier was intended to keep, and assented to keep, the goods in the nature of an agent for custody (*g*).

(d) *Where goods are put on board the vendee's ship.*—This will be a delivery to the vendee, unless the vendor stipulates by the form of bills of lading or otherwise to the contrary, so as to show that the master is an agent for carriage, and not an agent to receive possession for the vendee (*h*), *e.g.*, where goods are put on board a vessel chartered by vendee. If the charter be of the ordinary character, not operating as a demise of the ship, and not giving the charterers for the time being complete control of the ship and crew, this will not take away the vendor's right of stoppage (*i*).

(e) *Agreement as to destination.*—The vendor and vendee may agree as to the transit, as in *Ex parte Watson, In re Love* (*j*); and in this case the transit will continue until the goods reach their agreed destination.

The following observations of *Bowen*, L. J., in *Kendal* v. *Marshall, Stevens & Co.* (*k*), explain the law where no destination is named :—

"In *Ex parte Watson* (*l*), it was held that the right to stop *in transitu* continued, because, wherever it is part of the bargain between the vendor and the vendee that the transit shall last up to a certain time, the transit continues until that time has arrived (*m*). But when goods are bought to be afterwards despatched as the vendee shall direct, and it is not part of the bargain that the goods shall be sent

(*g*) *Whitehead* v. *Anderson*, 9 M. & W. 518; *Coventry* v. *Gladstone*, L. R. 6 Eq. 44; *London and North Western Rail. Co.* v. *Bartlett*, 7 H. & N. 400. See *Merchant Banking Co.* v. *Phœnix Bessemer Steel Co.*, 5 Ch. D. 205.

(*h*) *Rodger* v. *Comptoir d'Escompte*, L. R. 2 P. C. 393; *Schotsmans* v. *Lancashire and Yorkshire Rail. Co.*, L. R. 2 Ch. 332; *Ex parte Francis*, 56 L. T. 577.

(*i*) *Berndtson* v. *Strang*, L. R. 3 Ch. 588; *Ex parte Rosevear China Clay Co.*, 11 Ch. D. 560.

(*j*) 5 Ch. D. 35; *Ex parte Miles, Re Isaacs*, 15 Q. B. D. 39. See, however, *Whitehead* v. *Anderson*, 9 M. & W. 518.

(*k*) 11 Q. B. D. 356, at p. 369.

(*l*) 5 Ch. D. 35.

(*m*) See *Bethell* v. *Clarke*, supra.

to any particular place, in that case the transit only ends when the goods reach the place ultimately named by the vendee as their destination. In *Coates* v. *Railton* (*n*), several cases were cited by *Bayley*, J., in the course of his judgment, and the principle to be deduced from them is that, where goods are sold to be sent to a particular destination, the *transitus* is not at an end until the goods have reached the place named by the vendee to the vendor as their destination. One exception, at least, is to be found to the principle here laid down: the vendee can always anticipate the place of destination, if he can succeed in getting the goods out of the hands of the carrier. In that case the transit is at an end, whatever may have been said as to the place of destination, and this shows that the real test is not what is said, but what is done. But it has never been decided that where the goods have reached the place of destination named to the vendor by the vendee, to be there held by an agent to the vendee at the vendee's disposal, the right to stop continues" (*o*).

How long it continues.

Though goods may not have reached their ultimate destination, yet if they "have so far gotten to the end of their journey that they [wait] for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, and that without such orders they would continue stationary" (*p*), the *transitus* is at an end.

(*n*) 6 B. & C. 422.

(*o*) See *Bethell* v. *Clark*, 20 Q. B. D. 615. See also the remarks of *Brett*, M. R., in *Ex parte Miles*, 15 Q. B. D. at p. 43.

(*p*) Per Lord *Ellenborough*, C. J., in *Dixon* v. *Baldwin*, 5 East, at p. 186; cited by Lord *Esher*, M. R., in *Ex parte Miles*, 15 Q. B. D. at p. 44, and *Bethell* v. *Clark*, 20 Q. B. D. at p. 619.

The following is an analysis of recent cases on this subject, in order of date:—

Ex parte Watson, In re Love, 5 Ch. D. 35 (1877).—Goods sold by W., a Bradford manufacturer, to L., a London merchant; L. to ship the goods to R., at *Shanghai*, for sale on L.'s account; W. to have lien on bills of lading and goods on transit outwards; goods packed by W.'s packer, who forwarded them by rail to London in bales marked for *Shanghai*, addressed to ship designated by L.; the packer, advising L. of despatch of goods, said they were "at L.'s disposal," and the railway company, advising L. of the arrival of the goods in London, told him they remained at his order, and were held by the railway company as warehousemen, at his risk, but said "will be sent to ship." Held, by Court of Appeal, that the transit was from Bradford to Shanghai. See also *Rodger* v. *Comptoir d'Escompte de Paris*, L. R. 2 P. C. 393.

Ex parte Rosevear Clay Co., In re Cock, 11 Ch. D. 560 (1879).—Sale by Rosevear Co. to C., a merchant at *Roche*, near *St. Austell*, of 80 to 100 tons of clay at 15*s.* per ton, f. o. b. *Fowey*; C. agreed verbally to charter a ship to call at *Fowey*, to convey the clay to *Glasgow* to his agent there for sale; clay delivered by Rosevear Co.

How long it continues.

It has been decided that, where part of the goods sold by one entire contract is taken possession of by the vendee, without any intention on the vendor's part of retaining the rest, but as a step towards and in progress of the delivery of the whole, that is to be deemed a taking possession of the whole (*q*); though it is otherwise if there were such an intention (*r*). It has been said that, *primâ facie*, a delivery of part imports an intention to deliver the whole (*s*). But this is open to grave doubt (*t*).

on board ship at *Fowey*, and invoice and bill of exchange for acceptance sent to C. The Rosevear Co. knew nothing as to the destination of the ship. *Held*, by Court of Appeal (reversing *Bacon*, C. J.), that vendor's right to stop existed after ship had left *Fowey* for *Glasgow*. "The mere fact that the port of destination was left uncertain, or was changed after the contract of sale, can make no difference." Per *James*, L. J., at p. 568. See, also, *Berndtson* v. *Strang*, L. R. 3 Ch. 588.

Kemp v. *Falk*, 7 App. Css. 573 (1882).—Falk, a Liverpool merchant, sold to Kiell, a London merchant, a cargo of salt at 13*s*. 5*d*. per ton, f. o. b. The salt was intended for Calcutta, and was shipped by Falk on board a vessel, chartered by Kiell, for the voyage to Calcutta. Thereupon Falk forwarded invoices and bills of lading to Kiell. The salt was consigned to W. at Calcutta. Kiell obtained from a bank an advance upon the bill of lading, and the salt was sold by W. "to arrive." *Held*, by the House of Lords, affirming Court of Appeal, that the transit was not at an end until the arrival of the ship at Calcutta.

Kendal v. *Marshall, Stevens & Co.*, 11 Q. B. D. 356 (1883.)—L. bought goods of W., a merchant at Bolton, nothing being said as to the place of delivery. L. arranged with M. & Co., shipping agents and carriers at Garston in Lancashire, that the goods should be sent to them at Garston and conveyed by them to Rouen, at a through rate from Bolton to Rouen. L. then instructed W. to send the goods to M. & Co. W. sent the goods by railway to M. & Co. The railway company gave notice to M. & Co. of the arrival of the goods, and stated that they would hold the goods as warehousemen. *Held* by Court of Appeal (reversing the decision of *Mathew*, J.), that the transit was at an end when the goods came into the possession of M. & Co.

Bethell v. *Clark*, 20 Q. B. D. 615 (1888).—Goods were purchased by London merchants from manufacturers at Wolverhampton, the purchasers directed the vendors to consign the goods "to the '*Darling Downs*,' to Melbourne, loading in the East India Docks," the vendors delivered the goods to carriers to be forwarded to the ship. *Held*, by Court of Appeal (affirming *Mathew*, J., and *Cave*, J.) that the transit was not at an end till the goods reached Melbourne.

(*q*) *Hammond* v. *Anderson*, 1 B. & P. N. R. 69. And see *Slubey* v. *Heyward*, 2 H. Bl. 504, and the remarks on these cases in *Ex parte Cooper*, 11 Ch. D. 68.

(*r*) *Bunney* v. *Poyntz*, 4 B. & Ad. 568; *Dixon* v. *Yates*, 5 B. & Ad. 313; *Tanner* v. *Scovell*, 14 M. & W. 28.

(*s*) Per *Taunton*, J., *Betts* v. *Gibbins*, 2 Ad. & E. 57, but quære. And in *Tanner* v. *Scovell*, 14 M. & W. 28, the Court of Exchequer dissented from the dictum of *Taunton*, J., and approved of this quære.

(*t*) See *Ex parte Cooper*, 11 Ch. D. 68.

Section IV.—*How defeated.*

How defeated.

It has been already observed, that the delivery of goods to a carrier named by the vendee, though a delivery to the vendee himself for many purposes, is not such a one as to put an end to the right to stop them *in transitu;* and it has been thought that the vendee, when a particular place of delivery has been appointed, cannot anticipate the regular determination of the transit by going to meet the goods upon their journey (*u*). This, however, as a general rule, has been much questioned and seems overruled (*x*). "If," said Baron *Parke*, in *Whitehead* v. *Anderson* (*y*), "the vendee take them out of the possession of the carrier into his own before their arrival, with or without the consent of the carrier, there seems to be no doubt that the transit would be at an end." But at all events, whatever may be the effect of the receipt of goods by the vendee before the regular determination of the transit, it seems clear that the vendor's right to stop them cannot be taken away by the vendee making a demand of them, while on their journey, with which the carrier, whether rightly or wrongly, refuses to comply (*z*). At the termination of the journey, however, if the vendee demand the goods, the carrier cannot by wrongfully detaining them, prolong the right of the vendor to stop them (*a*). The vendor's right also will not be defeated by the exercise of any claim against the consignee, such, for instance, as process of foreign attachment at the suit of a creditor of the vendee (*b*), or the carrier's claim of a general lien for the balance due to him by the vendee (*c*), or (generally speaking) by his vendee's selling

(*u*) *Holst* v. *Pownall*, 1 Esp. 240, Lord *Kenyon*. But see the observations of Lord *Alvanley* in *Mills* v. *Ball*, 2 B. & P. 461, and those of *Chambre*, J., in *Oppenheim* v. *Russel*, 3 B. & P. 54. See, too, *Foster* v. *Frampton*, 6 B. & C. 107.

(*x*) See *Kendal* v. *Marshall, Stevens & Co.*, L. R. 11 Q. B. D. 356, at pp. 366, 369.

(*y*) 9 M. & W. at p. 534.

(*z*) *Jackson* v. *Nichol*, 5 Bing. N. C. 508; *Whitehead* v. *Anderson*, 9 M. & W. 518; *Coventry* v. *Gladstone*, L. R. 6 Eq. 44.

(*a*) *Bird* v. *Brown*, 4 Exch. 786.

(*b*) *Smith* v. *Goss*, 1 Camp. 282.

(*c*) *Butler* v. *Woolcot*, 2 B. & P. N. R. 64; *Nicholls* v. *Le Feuvre*, 2 Bing. N. C. 81.

How defeated.

them again to a third party, the ordinary rule of law being that the second vendee of a chattel cannot stand in a better situation than his vendor (*d*). Purchasers on credit of a cargo of salt consigned it abroad to W. M. & Co. They obtained upon the security of the bills of lading an advance from a bank. The consignees sold the goods "to arrive" to sub-purchasers, to whom they were delivered. On the purchasers going into liquidation, the seller gave notice to the master, after the sub-sale but before delivery and payment of the freight, to stop the goods *in transitu*. It was contended that the sub-sale displaced the right of stoppage. "But," said Lord *Selborne*, "the original purchaser can transfer no greater or better right than he has; and the right which he has is a right subject to a stoppage *in transitu*, in all cases in which the right of stoppage *in transitu* remains in favour of the original seller of the goods" (*e*). We have, however, seen that the negotiation of a bill of lading for valuable consideration (*f*) will defeat the vendor's right to stop *in transitu* (*g*); and the Factors Act, 1889, as we have also seen (*h*), confers similar efficacy on the transfer of documents of title (*i*).

It must, however, be observed that the negotiation of a bill of lading or other instrument by way of pledge, defeats only the *legal* right to stop *in transitu;* for, in equity, the vendor may, by giving notice to the pledgee, resume his former interest in the goods, subject to the pledgee's claim, and will be entitled to the residue of their proceeds after the pledgee's demand has been satisfied out of them, or to the goods themselves, if it be satisfied *aliunde*, notwithstanding the pledgee may have other demands against the consignee (*k*). The indorsement, therefore, of a bill of lading as a pledge for a specific sum, though it

(*d*) *Dixon* v. *Yates*, 5 B. & Ad. 313.

(*e*) *Kemp* v. *Falk*, 7 App. Cas. 573, 577; but see *Ex parte Golding, Davis & Co.*, 13 Ch. D. 628.

(*f*) *Rodger* v. *The Comptoir d'Escompte de Paris*, L. R. 2 P. C. 393.

(*g*) See ante, p. 346; *Gurney* v. *Behrend*, 3 E. & B. 622; *The Marie Joseph*, L. R. 1 P. C. 219.

(*h*) Ante, B. I. Chap. 4, sect. 4, pp. 145 *et seq.*

(*i*) See Appendix.

(*k*) *In re Westzinthus*, 5 B. & Ad. 817; *Kemp* v. *Falk*, 7 App. Cas. 573. And see *Berndtson* v. *Strang*, L. R. 3 Ch. 588; *Rodger* v. *The Comptoir d'Escompte de Paris*, L. R. 2 P. C. 393.

transfers the property in the goods, will only bar the right of the consignor to stop *in transitu* to that extent. "It [the right of stoppage] is a qualified right in the circumstances which I have mentioned; because it cannot be asserted as against the holder of the bill of lading without paying him off; but the instant his claim is discharged it is exactly the same right as if there had been no security as against the original purchaser, and as against, in my opinion, everyone claiming under him" (*l*). The vendor may recover from the indorsee the difference between the sum for which the pledge was made and the sum realised by their sale, although the indorsee has other claims upon the consignee (*m*). How defeated.

Section V.—*How exercised.*

A consignor who is desirous, and who has a right, to stop his goods *in transitu*, is not obliged to make an actual seizure of them while upon their road; it is sufficient to give notice (*n*) to the carrier or other person in whose hands they are, on the delivery of which notice it becomes that person's duty *to retain the goods;* so that if he afterwards, by mistake, deliver them to the vendee, the vendor may bring trover for them, even against the vendee's assignees, if he himself have become bankrupt (*o*); and the carrier who, after the receipt of such a notice, delivers the goods to the vendee, is guilty of a tortious act, for which he may, of course, be held responsible (*p*). This right to stop extends, not only to countermand delivery to the vendee, but to require re-delivery to the vendor, who may, therefore, at once demand the goods (*q*). The *notice* must, however, that it may How exercised.

(*l*) *Selborne*, L. C., in *Kemp* v. *Falk*, 7 App. Cas. at p. 577.

(*m*) *Spalding* v. *Ruding*, 6 Beav. 376; *Coventry* v. *Gladstone*, L. R. 6 Eq. 44; *Ex parte Golding, Davis & Co.*, 13 Ch. D. 628.

(*n*) As to what notice will suffice, see *Phelps Stokes* v. *Comber*, 29 Ch. D. 813.

(*o*) *Litt* v. *Cowley*, 7 Taunt. 169.

(*p*) *Stokes* v. *La Riviere* (Lord *Mansfield*), cited in *Bothlingk* v. *Inglis*, 3 East, 381; *Hunter* v. *Beale* (Lord *Mansfield*), cited 3 T. R. 466; *Schotsmans* v. *The Lancashire and Yorkshire Railway Co.* L. R. 1 Eq. 349; 2 Ch. 332.

(*q*) *The Tigress*, 32 L. J. Adm. 97.

How exercised.

be effectual, be given to the person who has the immediate custody of the goods: if given to a principal whose servant has such custody, it must be given at such a time, and under such circumstances, that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent the delivery to the consignee (*r*). It has been stated by Lord *Blackburn*, that it is the duty of the shipowner who receives such a notice to forward it to the master (*s*): "I had always myself understood that the law was, that when you became aware that a man, to whom you had sold goods which had been shipped, had become insolvent, your best way, or at least a good way, of stopping them *in transitu*, was to give notice to the shipowner in order that he might send it on. He knew where his master was likely to be, and he might send it on; and I have always been under the belief that although such a notice, if sent, cast upon the shipowner who received it an obligation to send it on with reasonable diligence, yet if, though he used reasonable diligence, somehow or other the goods were delivered before it reached, he would not be responsible. I have always thought that a stoppage, if effected thus, was a sufficient stoppage *in transitu*."

(*r*) *Whitehead* v. *Anderson*, 9 M. & W. 518.

(*s*) *Kemp* v. *Falk*, 7 App. Cas. p. 585.

CHAPTER II.

LIEN.

SECT. 1. *Lien—what.*
2. *How acquired.*
3. *How lost.*
4. *Maritime Liens.*

SECTION I.—*Lien—what.*

Lien—what.

A POSSESSORY lien (*a*) is a right to retain property until a debt due to the person retaining has been satisfied (*b*). It is not incompatible with a right on the part of the person claiming it to sue for the same debt; but he is allowed to do so, retaining his lien as a collateral security (*c*). There are two species of liens known to the common law, viz., *Particular* and *General*. *Particular liens* are where persons claim to retain the goods in respect of which the debt arises; and these are favoured by the law. *General liens* are claimed in respect of a general balance of account; and these are to be taken strictly (*d*). Where a lien exists, it is available, although the debt for which the party retaining claims to hold the goods be of more than six years'

(*a*) Under the name of lien are included rights really diverse. Lien properly means, as the above definition states, a right to retain until the claim be satisfied. But the banker's general lien gives him a right to realise the security. His rights resemble those of a pawnee: *Donald* v. *Suckling*, L. R. 1 Q. B. at p. 604.

(*b*) *Hammond* v. *Barclay*, 2 East, at p. 235; 2 Rose, 357. In *Sunbolf* v. *Alford*, 3 M. & W. 248, an innkeeper set up a claim of lien on his guest's *person*, which was, however, negatived by the Court without hesitation, as was his claim of a right to take the guest's coat from his person and detain it.

(*c*) *Hughes* v. *Lenny*, 5 M. & W. 183.

(*d*) Per *Heath*, J. in *Houghton* v. *Matthews*, 3 B. & P. at p. 494; *Bock* v. *Gorrissen*, 2 De G. F. & J. 434, at p. 443.

Lien—what.

standing, and the remedy by action at law barred in consequence by the Statute of Limitations (*e*). A creditor who elects to exercise his right of lien cannot exercise it as security for the expense of keeping or taking care of the property (*f*).

The goods, while they continue in the possession of a person entitled to a lien, cannot be seized in execution for the real owner's debt (*g*).

Section II.—*How acquired.*

How acquired.

The doctrine of lien originated in certain principles of the common law, by which a party who was *compelled* to receive the goods of another was also entitled to retain them for his indemnity. Thus carriers (*h*) and innkeepers (*i*) had, by the common law, a lien on the goods entrusted to their charge. The rescuer of goods from perils of the sea has, as we have already remarked, on grounds of public policy, a lien at common law for salvage (*j*); and it is a principle, that, where an individual has bestowed labour and skill in the alteration and improvement of the properties of the subject delivered to him, he has a lien on it for his charge. Thus a miller and a shipwright (*k*) have each a lien; so has a trainer, for the expense of keeping and training a race-horse (*l*), for he has, by his instruction, wrought an essential

(*e*) *Spears* v. *Hartley*, 3 Esp. 81; *Higgins* v. *Scott*, 2 B. & Ad. 413; *Re Broomhead*, 16 L. J. Q. B. 355.

(*f*) *Somes* v. *British Empire Shipping Co.*, 8 H. L. Ca. 338.

(*g*) *Legg* v. *Evans*, 6 M. & W. 36.

(*h*) *Skinner* v. *Upshaw*, Ld. Raym. 752. As to lien for freight, see ante, pp. 372 *et seq.*

(*i*) In the case of an innkeeper, the lien is confined to the goods entrusted to his charge by his *guest*: *Smith* v. *Dearlove*, 6 C. B. 132; but they may belong to a third person: *Threfall* v. *Borwick*, L. R. 7 Q. B. 711; 10 Q. B. 210; *Turrill* v. *Crawley*, 13 Q. B. 197; *Snead* v. *Watkins*, 1 C. B. N. S. 267; *Allen* v. *Smith*, 12 C. B. N. S. 638. But see *Broadwood* v. *Granara*, 10 Exch. 417. As to his power to sell the goods, see infra, p. 706, n. (*u*).

(*j*) *Hingston* v. *Wendt*, 1 Q. B. D. 367.

(*k*) *Ex parte Ockenden*, 1 Atk. 235; *Franklin* v. *Hosier*, 4 B. & Ald. 341; and *Chase* v. *Westmore*, 6 M. & S. 180. See *Ex parte Bland*, 2 Rose, 91; *British Empire Shipping Co.* v. *Somes*, E. B. & E. 353.

(*l*) *Bevan* v. *Waters*, M. & M. 236; unless the usual right of the owner to run him when he pleases be inconsistent with a continuing possession of the trainer. See per *Parke*, B., in *Jackson* v. *Cummins*, 5 M. & W. at p. 350, 351; *Forth* v. *Simpson*, 13 Q. B. 680.

How acquired.

improvement in the animal's character and capabilities, unless by usage or contract the owner has a right inconsistent with it, as, for instance, of sending the horse to run for any race he pleases, and selecting the jockey to ride him (*m*). And if the owner of a stallion receive a mare for the purpose of being covered, he has a lien on her for his charge, for she will be rendered more valuable by proving in foal (*n*). So, too, an auctioneer and a factor have liens (though not general) on goods sold by them (*o*). But here the rule appears to stop, and not to include cases wherein expense has been bestowed upon the object claimed to be retained without producing any alteration in it (*p*). Thus it has been decided that a livery-stable keeper has no lien for the keep of a horse (*q*); nor an agister of a horse or cow (*r*) for its agistment.

Such is the description of a lien at common law. Whenever a lien of any other kind is sought to be established, the claim to it is not to be deduced from principles of common law, but founded upon the agreement of the parties, either expressed or to be inferred from usage or course of business (*s*), and will fail if some such contract be not shown to have existed (*t*).

By special agreement.—With respect to liens by express agreement, little need be said; the question, whether one has or has not been created, depends upon the special terms of each individual contract. Where the intention of the parties to create one is plain, there can be no doubt of their legal right to

(*m*) *Forth* v. *Simpson*, 13 Q. B. 680.

(*n*) *Scarfe* v. *Morgan*, 4 M. & W. 270.

(*o*) *Webb* v. *Smell*, 30 Ch. D. 192; *In re Hermann Loog, Limited*, W. N. (1887), 180, 191.

(*p*) *Stone* v. *Lingwood*, 1 Str. 651; and see 8 C. & P. 6; but see 1 H. Bl. 85.

(*q*) *Wallace* v. *Woodgate*, R. & M. 193; *Judson* v. *Etheridge*, 1 C. & M. 743; *Orchard* v. *Rackstraw*, 9 C. B. 698. But see *Taylor* v. *James*, 2 Roll. Abr. 92, M. pl. 3; *Lenton* v. *Cook*, B. N. P. 45. See *Sanderson* v. *Bell*, 2 C. & M. 304.

(*r*) *Jackson* v. *Cummins*, 5 M. & W. 342. An auctioneer has a lien on the goods which he sells: *Webb* v. *Smell*, 30 Ch. D. 192.

(*s*) See *Naylor* v. *Mangles*, 1 Esp. 109; *Kirkman* v. *Shawcross*, 6 T. R. 14. The lien of an unpaid vendor for the price subsists till delivery to the vendee: *Cooper* v. *Bill*, 3 H. & C. 722.

(*t*) *Pratt* v. *Vizard*, 5 B. & Ad. 808. See also *Ogle* v. *Story*, 4 B. & Ad. 735; and quære, if that case be law; see *Harrington* v. *Price*, 3 B. & Ad. 170; *Cumpston* v. *Haigh*, 2 Bing. N. C. 449.

How acquired.

carry it into effect (*u*), and, as they can deal as they please with their own property, they may, of course, frame their contract so as to exclude the right of lien, as well as to create or to extend it: and this may be done, either by direct words, or the insertion of some stipulation incompatible with the existence of a right of lien (*v*), or a similar usage or course of trade, consistent with, and incorporated by implication into, the contract (*x*). Indeed, it once was thought, that, wherever there was an agreement for the payment of a fixed sum, the right of lien must be taken to have been abandoned (*y*). But this doctrine, which seems unreasonable, has been overturned; and the rule now is, that the mere existence of a special agreement will not, of itself, exclude the right of lien; but that if any of its terms be inconsistent with such right, it will do so (*z*). Thus, an agreement stipulating for payment in a particular manner and out of a particular fund, might possibly be held inconsistent with the right of lien (*a*). So would an agreement to deliver goods at a certain time, or whenever demanded (*b*). Where a customer deposited with his bankers a policy of assurance accompanied by a memorandum to secure over-drafts not exceeding at any one time 4,000*l.*, it was held that the bankers might not retain the policy in respect of over-drafts in excess of the amount (*c*). Thus, too, it was remarked by Baron *Parke*, in his judg-

(*u*) See *Snall* v. *Moates*, 9 Bing. 574; *Ward* v. *Bell*, 1 C. & M. 848.

(*v*) *Owenson* v. *Morse*, 7 T. R. 64; *Boardman* v. *Sill*, 1 Camp. 410, n.; *Walker* v. *Birch*, 6 T. R. 258; *Weymouth* v. *Boyer*, 1 Ves. jun. 416. See *Lucas* v. *Nockells*, 10 Bing. 157; *Crawshay* v. *Homfray*, 4 B. & Ald. 50.

(*x*) *Raitt* v. *Mitchell*, 4 Camp. 146.

(*y*) *Brenan* v. *Currint*, Say. 224; B. N. P. 45; *Collins* v. *Ongley*, there cited. In *Chambers* v. *Davidson*, L. R. 1 P. C. 296, Lord *Westbury* says: "But lien is not the result of an express contract; it is given by implication of law. If, therefore, a mercantile relation, which might involve a lien, is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security excludes lien, and limits their rights by the extent of the express contract that they have made. Expressum facit cessare tacitum. If a consignee takes an express security, it excludes general lien." But quære, whether these words are not too wide.

(*z*) *Chase* v. *Harrison*, 5 M. & S. 180; *Hutton* v. *Bragg*, 7 Taunt. 15; *Fisher* v. *Smith*, 4 App. Cas. 1.

(*a*) See *Pinnock* v. *Harrison*, 3 M. & W. 532.

(*b*) Lord *Selborne*, in *Fisher* v. *Smith*, 4 App. Cas. at p. 12; and *Crawshay* v. *Homfray*, 4 B. & Ad. 50.

(*c*) *In re Bowes*, 33 Ch. D. 586.

How acquired.

ment in *Jackson* v. *Cummins* (*d*), that, even if a lien could have been claimed at common law in respect of agistment generally, it would be excluded in a case of agistment of milch cows, by a necessary implication arising from the nature of the subject-matter, since the owner must have possession of them during the time of milking, which establishes that it was not intended the agister should have the entire control. His Lordship observed that a similar implication would arise in the case of a livery-stable keeper, since it must be his intention that the owner of the horse should take him out; and that, even in such a case as *Bevan* v. *Waters* (*dd*), there might be a distinction, as it has since been held there is (*e*), between the situation of the trainer of a horse for ordinary purposes and the trainer of a race-horse, which, according to usage, may be taken away to run for various plates during his training.

By Usage or Course of Business.—As to liens resulting from usage, these depend upon *implied*, as those last mentioned upon *express*, contract (*f*). The usage whence such agreement may be implied is either the common usage of trade, or that of the parties themselves in their previous dealings with each other (*g*). Of this description are most general liens, none of which existed at common law, but all depend upon the agreement of the parties themselves, either expressed, or to be inferred from their previous dealings, or from the usage of trade and the decisions of the courts of law thereon (*h*). It has been settled, that an attorney has a lien for his general balance on papers of his clients, which come to his hands in the course of his professional employment (*i*). So a banker, who has advanced money to a

(*d*) 5 M. & W. at pp. 350, 351.

(*dd*) M. & M. 236.

(*e*) *Forth* v. *Simpson*, 13 Q. B. 680.

(*f*) *Rushworth* v. *Hadfield*, 6 East, 519; 7 East, 224; *Kirkman* v. *Shawcross*, 6 T. R. 14; *Brandao*, v. *Barnett* 12 Cl. & F. 787.

(*g*) *Holderness* v. *Collinson*, 7 B. & C. 212; *Ex parte Ockenden*, 1 Atk. 235; *Kirkman* v. *Shawcross*, 6 T. R. 14; *In re Spotten*, 11 Ir. Rep. Eq. 412.

(*h*) See *Leuckhart* v. *Cooper*, 3 Bing. N. C. 99, in which defendant claimed a lien by the custom of London, which was, however, held to be unreasonable: *Bock* v. *Gorrissen*, 30 L. J. Ch. 39.

(*i*) *Stevenson* v. *Blackelock*, 1 M. & S. 535. If he be the town-clerk of a corporation, or steward of a manor, he will have a lien for work done in his *professional*, though not for work done in his *official*, capacity: *Rex* v.

How acquired.

customer, has a lien for his general balance upon securities belonging to such customer, which come into his hands (*k*), but not on muniments pledged for a specific sum (*l*), or deposited for a defined purpose (*m*), or left by mistake or casually in the banker's possession, after his own refusal to advance money on them (*n*), or negotiable instruments belonging to a third person, left in the banker's hands by his customer (*o*), or locked-up boxes left for safe custody, though containing securities (*p*). The lien belongs to the bankers as such; it does not therefore extend to articles received not by them as such, but as gratuitous bailees or otherwise (*q*). Packers (*r*), calico-printers (*s*), and wharfingers (*t*), have liens for their general balance, but not fullers (*u*), millers (*v*), or dyers (*w*).

However, notwithstanding these decisions, it does not appear certain that the right of lien may not, even with respect to some of the above trades, be hereafter contested, for the Court has remarked, with respect to wharfingers, that there may be a usage in one place varying from that which prevails in another (*x*). The party, therefore, claiming to retain goods for a general balance, should, in almost every instance, be prepared

Sankey, 5 Ad. & E. 423; *Worrall* v. *Johnson*, 2 J. & W. 214; *Newington Local Board* v. *Eldridge*, 12 Ch. D. 349.

(*k*) *London Chartered Bank of Australia* v. *White*, 4 App. Cas. 413; *Brandao* v. *Barnett*, 12 Cl. & F. 787; *In re United Service Co.*, L. R. 6 Ch. 217; *Marten* v. *Roche*, 53 L. T. 946; *Roxburghe* v. *Cox*, 17 Ch. D. 520.

(*l*) *Vanderzee* v. *Willis*, 3 Bro. C. C. 21; *Wolstenholm* v. *Sheffield Banking Co.*, 54 L. T. N. S. 746.

(*m*) *In re Bowes*, 33 Ch. D. 586; *Wolstenholm* v. *Sheffield Banking Co.*, 54 L. T. 746.

(*n*) *Lucas* v. *Dorrein*, 7 Taunt. 278.

(*o*) *Brandao* v. *Barnett*, 12 C. & F. 787.

(*p*) *Leese* v. *Martin*, L. R. 17 Eq. 224; *Giblin* v. *McMullen*, L. R. 2 P. C. 317.

(*q*) See judgment of Lord *Campbell* in *Brandao* v. *Barnett*, 12 C. & F. at p. 809; *Leese* v. *Martin*, L. R. 17 Eq. 224.

(*r*) *Ex parte Deeze*, 1 Atk. 228; *In re Witt*, 2 Ch. D. 489.

(*s*) *Weldon* v. *Gould*, 3 Esp. 268.

(*t*) *Naylor* v. *Mangles*, 1 Esp. 109; *Spears* v. *Hartly*, 3 Esp. 81; *Dresser* v. *Bosanquet*, 4 B. & S. 460; *Moet* v. *Pickering*, 8 Ch. D. 372. The lien of wharfingers was said by Lord *Kenyon*, in *Naylor* v. *Mangles*, to have been proved so often that it was a settled point.

(*u*) *Rose* v. *Hart*, 8 Taunt. 499; 2 Moore, 547.

(*v*) *Ex parte Oekenden*, 1 Atk. 235.

(*w*) *Green* v. *Farmer*, 4 Burr. 2214; *Close* v. *Waterhouse*, 6 East, 523, n.; *Bennett* v. *Johnson*, 2 Chitty, 455; but see *Savill* v. *Barehard*, 4 Esp. 53.

(*x*) *Holderness* v. *Collinson*, 7 B. & C. 212.

How acquired.

with evidence of the usage applicable to his own case. It is, however, established too well for dispute that a factor has a lien upon all goods in his hands, *as factor* (*y*), for the balance of his general account (*z*), whether or not he be authorized to sell in his own name or has any discretion as to the price (*a*). His lien extends to the *price* of goods with the possession of which he has parted. Thus, where A. consigned goods to B. a factor, to whom he owed more than their value, and B. sold them to C., to whom he was himself indebted, the factor having become bankrupt, it was decided that he had a lien on the whole price due from C., which must consequently be placed to the credit of his assignees in winding up his account with C., and that A. was not entitled to any portion of it (*b*). But a factor has not a lien for debts which accrued before his character as such commenced (*c*). Policy brokers have also a general lien, and may avail themselves of it to obtain payment of the balance due to them from their employer, though he be merely an agent, if he did not disclose his principal (*d*), but not if they know, or there is enough to indicate to them, his representative character (*e*).

In *Mildred* v. *Maspons* (*f*), the appellants, merchants in London, acting upon instructions of shipping agents at Havannah, effected policies of insurance on a cargo of tobacco for all whom it might concern. The Havannah agents shipped and consigned

(*y*) *Dixon* v. *Stansfield*, 10 C. B. 398.

(*z*) *Houghton* v. *Matthews*, 3 B. & P. 485; *Kruger* v. *Wilcox*, Ambler, 252; *Gardiner* v. *Coleman*, cited 1 Burr. 494; 6 East, 28, n.; *Man* v. *Shiffner*, 2 East, 523.

(*a*) *Stevens* v. *Biller*, 25 Ch. D. 31.

(*b*) *Hudson* v. *Granger*, 5 B. & Ald. 27. See *Drinkwater* v. *Goodwin*, Cowp. 251, and ante, Book i. Ch. 4.

(*c*) *Houghton* v. *Matthews*, 3 B. & P. 485. See *Walker* v. *Birch*, 6 T. R. 258, per *Lawrence*, J.; *Olive* v. *Smith*, 5 Taunt. 56; *Weldon* v. *Gould*, 3 Esp. 268.

(*d*) *Mann* v. *Forrester*, 4 Camp. 60; *Westwood* v. *Bell*, Id. 349; *Bell* v. *Jutting*, 1 Moore, 155.

(*e*) *Maans* v. *Henderson*, 1 East, 335; *Snook* v. *Davidson*, 2 Camp. 218; *Sweeting* v. *Pearce*, 7 C. B. N. S. 449. See *Man* v. *Shiffner*, 2 East, 523, 529, where a broker employed by a factor to insure, was held to have a lien on the policy to the extent of the factor's balance against his principal; this was on the ground that the factor had a lien, and that the broker might be considered his servant to retain the goods. See *M'Combie* v. *Davies*, 7 East, 5. Therefore, the right of a sub-agent to retain against the principal can never extend beyond that of the immediate agent: *Solly* v. *Rathbone*, 2 M. & S. 298. See *Jackson* v. *Clarke*, 1 Y. & J. 216.

(*f*) 8 App. Cas. 874.

How acquired.

the tobacco in their own names, but they were in fact commission agents for Havannah merchants to whom the tobacco belonged. The plaintiffs, who had notice that the Havannah agents had unnamed principals, were held not entitled to a general lien on the policy money in their hands for the balance of their general account with the Havannah agents. "On this question," said the Court of Appeal, referring to *McFarlane* v. *Norris* (*g*), and *Meyer* v. *Dresser* (*h*), "according to our law the right of the defendants to a lien or set-off depends on a question of fact—viz., whether the defendants did or did not know that Demestre & Co. (the Havannah agents) were acting for an undisclosed principal before the defendants' alleged lien or right of set-off accrued" (*i*).

Where a general lien is claimed by carriers founded on the usage of trade, strong evidence of the usage is required (*j*).

Section III.—*How Lost.*

How lost

As a possessory lien is a right to *retain* possession, it follows of course that where there is no possession there can be no lien (*k*). It also follows, that, where the possession of the goods has once been abandoned, the lien is gone; but when the master of a ship, in obedience to revenue regulations, lands goods at a particular wharf or dock, he does not thereby lose his lien on them for the freight (*l*), and, where they are not required to be landed at any particular dock, the common practice is to

(*g*) 2 B. & S. 783.

(*h*) 16 C. B. N. S. 646, at p. 665.

(*i*) *Maspons* v. *Mildred*, 9 Q. B. D. 530, at p. 543. Lord *Blackburn*, with reference to the same case in the House of Lords (8 App. Cas. at p. 885), suggests that the Factors Act of 1823 (4 Geo. 4, c. 83), s. 1, may have modified the rule as to consignees, so that knowledge, however obtained, that the goods were not the property of the person dealing with them would not necessarily deprive the agent of his lien.

(*j*) *Rushforth* v. *Hadfield*, 6 East, 519; 7 East, 224; *Holderness* v. *Collinson*, 7 B. & C. 212; *Wright* v. *Enell*, 5 B. & Ald. 350; *Butler* v. *Woolcott*, 2 B. & P. 6; but see *Aspinall* v. *Pickford*, 3 B. & P. 44, n. (*a*).

(*k*) *Hutton* v. *Bragg*, 7 Taunt. 14; *Kruger* v. *Wilcox*, Amb. 254; 1 Burr. 494; *Sweet* v. *Pym*, 1 East, 4. The peculiarity, in this respect, of a vendor's lien, if it can properly be so called, for his price, has been treated of in the last chapter.

(*l*) *Wilson* v. *Kymer*, 1 M. & S. 157.

How lost.

land them at a public wharf and direct the wharfinger not to part with them till the charges upon them are paid (*m*); in this case the wharfinger is the shipmaster's agent, and the goods remain in the constructive possession of the latter: the Merchant Shipping Act, 1862, s. 67, directs what course the shipowner is to follow (*n*). But, otherwise, the rule concerning possession is so strict, that if a party having a lien on goods cause them to be taken in execution at his own suit and purchase them, he so alters the nature of the possession that his lien is destroyed, though the goods may never have left his premises (*o*). And if, when the goods are demanded from him, he claim to retain them on some different ground, and make no mention of his lien, he will be considered as having waived it, and the owner of the goods may sue him without tendering a satisfaction for the debt which created his lien (*p*). For it is to be remembered that in all cases the owner of the goods, on tendering such satisfaction, has a right to his property; and if the creditor refuse after such tender to restore it, he does so at his peril, for if the tender were sufficient in amount, he is a wrongdoer, and answerable for his misconduct in an action (*q*). Nor, indeed, is an actual tender strictly so called necessary, if the person in whose possession the goods are have signified his refusal to accept the amount really due (*r*). Moreover, the possession must be *lawful*. A creditor cannot tortiously seize upon his debtor's goods and then claim to retain them by virtue of a lien (*s*); so if he abuse the

(*m*) Abbott on Shipping, 323, 12th ed.; Carver on Carriage by Sea, s. 475; *Mors-le-Blanch* v. *Wilson*, L. R. 8 C. P. 227.

(*n*) See Appendix.

(*o*) *Jacobs* v. *Latour*, 5 Bing. 130.

(*p*) *Boardman* v. *Sill*, 1 Camp. 410, n.; accord. *Weeks* v. *Goode*, 6 C. B. N. S. 367. And see *Knight* v. *Harrison*, 2 Saund. on Pl. and Evidence, 641, and *Thompson* v. *Trail*, 6 B. & C. 36; *Jones* v. *Tarleton*, 9 M. & W. 675; *Dirks* v. *Richards*, 4 M. & G. 574; *Caunce* v. *Spanton*, 7 M. & G. 903.

(*q*) *Chilton* v. *Carrington*, 16 C. B. 206; and the owner paying the overcharge under protest may recover it: *Somes* v. *British E. S. Co.*, 8 H. L. Ca. 338.

(*r*) *Jones* v. *Tarleton*, 9 M. & W. 675; *The Norway*, Brown. & Lush. 377, 404.

(*s*) *Taylor* v. *Robinson*, 2 Moore, 730. So it would seem from the judgment in *Sanderson* v. *Bell*, 2 C. & M. 304, that, if he claim a lien of too large a description, the whole detainer becomes tortious, though he really possesses one of a narrower description. But *Scarfe* v. *Morgan*, 4 M. & W. 270, is contrary to this notion. As to whether an excessive

How lost.

goods, as, for instance, by selling or pledging them, his lien is forfeited (*t*). In the case of a simple lien there is no power of sale or disposition of the goods; whereas, in the case of a pledge or pawn of goods, to secure the payment of money at a certain day, the pawnee, on default by the pawnor, may sell the goods deposited, realize the amount, and become a trustee for the overplus for the pawnor. Even if no day of payment be named, he may, upon waiting a reasonable time, and taking the proper steps, realize his debt in like manner (*u*).

A right of lien is not, however, determined by an alteration in the property of the goods over which it is exercised (*v*). Thus, where the lading of a ship belongs to the charterer, and such lading is subject to the shipowner's lien for the freight reserved by the charterparty, such lading, if it be sold by the charterer, after it is put on board, will pass to the purchaser, subject to the lien which the shipowner had before the sale (*x*).

If a security is taken for the debt for which the party has a lien upon the property of the debtor, such security being payable at a distant day, the lien is gone (*y*). So, too, if the parties come to a new arrangement and agree that the debt shall be paid in a particular manner. But it is doubtful whether the taking of a security not in its nature inconsistent with the existence of a lien will destroy a lien (*z*). A mere right of set-off to an amount equal to that for which the lien

claim will dispense with a tender, see *Allen* v. *Smith*, 12 C. B. N. S. 638.

(*t*) *Johnson* v. *Stear*, 15 C. B. N. S. 330; *Scott* v. *Newington*, 1 M. & Rob. 252; *Jones* v. *Cliff*, 1 C. & M. 540. As to the difference between a lien and a pledge, in this respect, see *Donald* v. *Suckling*, L. R. 1 Q. B. 585; *Halliday* v. *Holgate*, L. R. 3 Exch. 299.

(*u*) *Thames Ironworks Co.* v. *Patent Derrick Co.*, 1 J. & H. 93. Innkeepers, by 41 & 42 Vict. c. 38, have the right to sell goods upon which they have a lien.

(*v*) *Small* v. *Moates*, 9 Bing. 574; *Dixon* v. *Yates*, 5 B. & Ad. 313.

(*x*) *Mitchell* v. *Scaife*, 4 Camp. 298; *Small* v. *Moates*, 9 Bing. 574, at p. 592. But see, when bills of lading are given at a different rate of freight, *Gilkison* v. *Middleton*, 2 C. B. N. S. 134; but as to the latter case, see *Kirchner* v. *Venus*, 12 Moo. P. C. Ca. 361.

(*y*) *Hewison* v. *Guthrie*, 2 Bing. N. C. 755; or if the creditor executes a composition deed which includes a release of the original debt without a reserve of the lien, the lien is gone: *Couper* v. *Green*, 7 M. & W. 633; *Buck* v. *Shippam*, 1 Phillips, 694.

(*z*) *Angus* v. *McLachlan*, 23 Ch. D. 330.

is claimed does not destroy it, for in that case there are two parties having mutual claims on one another, with this difference, that one has a security and the other has not; and, in the absence of special agreement to that effect, it would be obviously unjust to deprive the former of his advantage (*a*). How lost.

Section IV.—*Maritime Liens.*

A maritime lien does not, like a lien at common law, depend upon the possession by the party asserting it of the thing in respect of which the claim arises (*b*). It is the right to enforce by action in the Admiralty Courts a claim against the *res*. It exists in the case of bottomry (*c*), claims for salvage (*d*), for damage done by collision (*e*), and for wages of seamen (*f*). Material men, or persons who have supplied necessaries to a ship, have no maritime lien on the ship (*h*). But they may take proceedings *in rem* under 3 & 4 Vict. c. 65, s. 6, against the ship. The difference is thus explained in the judgment of the Court of Appeal in *The Heinrich Bjorn* (*i*):— Maritime liens.

"But if the material man may thus arrest the property to enforce his claim, how does his claim differ from a maritime lien? The answer is, that a maritime lien arises the moment the event occurs which creates it; the proceeding *in rem* which perfects the inchoate right relates back to the period when it first attached; the maritime lien travels with the thing into whosesoever possession it may come

(*a*) See *Pinnock* v. *Harrison*, 3 M. & W. 532; *Clarke* v. *Fell*, 4 B. & Ad. at p. 408. See *Roxburghe* v. *Cox*, 17 Ch. D. 520.

(*b*) *The Cella*, 57 L. J. Adm. at p. 56; 13 P. D. at p. 87, per Lord *Esher*, M. R.

(*c*) *The Royal Arch*, Swab. 269. See *The Druid*, 1 W. Rob. at p. 399.

(*d*) *The Gustaf*, Lush. 506.

(*e*) *The Bold Buccleugh*, 7 Moo. P. C. 267; *The Charles Amelia*, L. R. 2 A. & E. 330.

(*f*) *The Neptune*, 1 Hagg. at p. 238. See as to the master's wages, 17 & 18 Vict. c. 104, s. 191. Now by 52 & 53 Vict. c. 46, s. 1, the master, "and every person lawfully acting as master by reason of the decease or incapacity from illness of the master," have "the same rights, liens, and remedies for the recovery of disbursements and liabilities properly incurred by him on account of the ship as the master has for the recovery of his wages." This alters the law as laid down in *The Sara*, 14 App. Cas. 209.

(*h*) *The Heinrich Bjorn*, 11 App. Cas. 270.

(*i*) 10 P. D. at p. 54; affirmed, 11 App. Cas. 270.

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(*The Bold Buccleugh* (*k*)), and the arrest can extend only to the ship subject to the lien. But, on the contrary, the arrest of a vessel under the statute is only one of several possible alternative proceedings *ad fundandam jurisdictionem;* no right in the ship or against the ship is created at any time before the arrest; it has no relation back to any earlier period; it is available only against the property of the person who owes the debt for necessaries, and the arrest need not be of the ship in question, but may be of any property of the defendant within the realm. The two proceedings, therefore, though approaching one another in form, are different in substance; in the one case, the arrest is to give effect to a pre-existent lien; in the other, the arrest is only one of several alternative modes of procedure, because, to use the language of Dr. *Lushington* in *The Volant* (*l*), 'it offers the greatest security for obtaining substantial justice in furnishing a security for prompt and immediate payment.'"

A maritime lien attaches to the *res* as soon as the act is done which gives rise to the claim, and prevails against subsequent purchasers, mortgagees, judgment creditors, or persons into whose possession the ship may afterwards come (*m*).

"The position of a creditor who has a proper maritime lien differs from that of a creditor in an unsecured claim in this respect, that the former, unless he has forfeited the right by his own laches, can proceed against the ship notwithstanding any change in her ownership, whereas the latter cannot have an action *in rem*, unless at the time of its institution the *res* is the property of his debtor" (*n*).

The lien may, as above stated, be lost by laches on the part of the person claiming it (*o*).

(*k*) 7 Moo. P. C. 267, 284, 285.

(*l*) 1 Wm. Rob. 383.

(*m*) *The Mellona*, 3 W. Rob. at p. 21; *The Charles Amelia*, supra. See *The Bold Buccleugh*, supra.

(*n*) *The Heinrich Bjorn*, 11 App. Cas. at p. 277, per Lord *Watson*. But where the unsecured creditor has brought an action *in rem*, and the ship has been arrested by the Admiralty Court, the ship is held by the Court as a security for whatever may be found to be due to the creditors. See *The Cella*, supra.

(*o*) See *The Bold Buccleugh*, supra.

CHAPTER III.

BANKRUPTCY.

SECT. 1. *Who may be a Bankrupt.*
2. *How a person may become Bankrupt.*
3. *Who may be a petitioning Creditor.*
4. *Petition in Bankruptcy, and the Court to which it is presented.*
5. *Receiving Order and proceedings thereon.*
(a) *Receiving Order and its consequences.*
(b) *Public Examination of Debtor and Meetings of Creditors.*
(c) *Composition or Scheme of Arrangement.*
(d) *Adjudication.*
6. *Remedies of Creditors.*
(a) *By Proof.*
(b) *Without Proof.*
7. *Official Receivers and Trustees.*
8. *Evidence.*
9. *Dividend and Audit.*
10. *Small Bankruptcies and Administration of Estates of Deceased Insolvents.*
11. *Consequences to Debtor himself.*
12. *Discharge of Debtor and Annulment of Bankruptcy.*

Bankruptcy.

PRIOR to 1861 only traders were subject to the bankruptcy laws. The Bankruptcy Acts of 1861 and 1869 (*a*) subjected non-traders under certain circumstances to their operation, and the Bankruptcy Act, 1883 (*b*), has removed all distinctions

(*a*) 24 & 25 Vict. c. 134; 32 & 33 Vict. c. 71.

(*b*) 46 & 47 Vict. c. 52.

Bankruptcy.

between traders and non-traders, as regards liability to be made bankrupt. It is proposed to consider briefly the law of bankruptcy in the order of topics mentioned at the head of this chapter.

Section I.—*Who may be a Bankrupt.*

Who may be a bankrupt.

Any person whatever, who is capable of binding himself by contracts, as for instance, a person having privilege of parliament (*c*), a clergyman (*d*), a public officer, a foreigner who is domiciled in England, or who, within a year before the date of the presentation of the petition, ordinarily resided or had a dwelling-house or place of business there (*f*), and a convicted felon (*g*), may become bankrupt.

An infant can be made bankrupt only, if at all, in respect of debts for necessaries (*h*). Formerly a married woman could have been made bankrupt only if she were a sole trader by the custom of the City of London, or if her husband were a convict (*i*), or when she could otherwise have been sued personally as if a *feme sole*. But now, by virtue of the Married Women's Property Act, 1882, if she carry on a trade separately from her husband, in respect of her separate property (*k*), she is subject to the bankruptcy laws in the same way as if she were a *feme sole* (*l*). Apparently a lunatic may be made bankrupt, since he may act for all the purposes of the Act by his com-

(*c*) B. A. 1883, s. 124; *Re Duke of Newcastle*, L. R. 5 Ch. 172; and as to the disqualifications resulting from adjudication, s. 32 (1).

(*d*) *Ex parte Meymot*, 1 Atk. 196; *Cobb* v. *Symonds*, 5 B. & Ald. 516. As to sequestration of benefice, s. 52.

(*f*) *Re Mitchell*, 13 Q. B. D. 418; *Re Barne*, 16 Q. B. D. 522.

(*g*) *Ex parte Graves, Re Harris*, 19 Ch. D. 1.

(*h*) 37 & 38 Vict. c. 62. See *Ex parte Kibble, Re Onslow*, L. R. 10 Ch. 373; *Ex parte Jones*, 18 Ch. D. 109.

(*i*) *Lavie* v. *Phillips*, 3 Bur. 1776; *Ex parte Franks*, 7 Bing. 762.

(*k*) "Separate property" does not include an unexercised power of appointment: *Ex parte Gilchrist, In re Armstrong*, 17 Q. B. D. 521.

(*l*) 45 & 46 Vict. c. 75, s. 1, sub-s. 5; B. A. 1883, s. 152. See *Ex parte Gilchrist, In re Armstrong*, supra. But a married woman cannot be committed to prison under sect. 5 of the Debtors Act, 1869, for non-payment of a judgment recovered against her in an action under the Married Women's Property Act: *In re Morley, Ex parte Morley*, 4 Morrell, 286.

mittee or *curator bonis*, and in the case of a lunatic not so found by inquisition the Court may appoint a person to act for him (*m*). Who may be a bankrupt.

Section II.—*How a Person may become Bankrupt.*

How a person may become bankrupt.

Any person indebted may become a bankrupt by committing one of the acts which the law has denominated *acts of bankruptcy* (*n*). These we will now enumerate in the order in which they occur in the statute (*o*). A debtor commits an act of bankruptcy—

Acts of bankruptcy.

(a) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally.

This sub-section seems to contemplate a conveyance of the whole of the debtor's property, which has always been held an act of bankruptcy (*p*). The conveyance may be executed abroad, but it must be intended to operate according to English law (*q*).

It has been long since held that an assignment of the whole property, or of the whole with some exception merely nominal and insufficient to prevent insolvency, for the benefit of one or more of the creditors to the exclusion of the rest, upon account of a bygone and before-contracted debt, carries in itself evidence of fraud, and is an act of bankruptcy (*r*). So far did this doctrine

(*m*) B. A. 1883, s. 148; B. R. 1886, r. 271; *Ex parte Cahen*, 10 Ch. D. 183; *Re Lee*, 23 Ch. D. 216; *Re James*, 12 Q. B. D. 332.

(*n*) See as to the distinction between acts which are necessarily acts of bankruptcy, and acts which are so when coupled with an intent, *Mellish*, L. J., in *Re Wood*, L. R. 7 Ch. at p. 306; *Ex parte Chaplin*, 26 Ch. D. 319.

(*o*) B. A. 1883, s. 4.

(*p*) *Kettle* v. *Hammond*, Cooke, 86; *Ex parte Alsop*, 29 L. J. Bank. 7.

(*q*) *Ex parte Crispin*, L. R. 8 Ch. 374. Evidence may be given of such an assignment, though not stamped in accordance with the Bankruptcy Act, 1877, s. 5. *In re Hollingshead*, 6 Morrell, 66.

(*r*) *Worsley* v. *De Mattos*, 1 Burr. 467; *Re Wood*, *Ex parte Lückes*, L. R. 7 Ch. 302; *Ex parte Hawker*, *Re Keely*, L. R. 7 Ch. 214; *Smith* v. *Cannan*, 2 E. & B. 35; *Oriental Bank* v. *Coleman*, 30 L. J. Ch. 635; *Woodhouse* v. *Murray*, L. R. 2 Q. B. 634; 4 Q. B. 27; *Ex parte Foxley*, L. R. 3 Ch. 515; *Young* v. *Fletcher*, 3 H. & C. 732; *Ex parte Trevor*, 1 Ch. D. 297; *Ex parte Burton*, 13 Ch. D. 102.

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Acts of bankruptcy.

extend, that if a debtor conveyed his property to trustees, such conveyance, though it were for the benefit of all his creditors, and had never passed out of the debtor's hands (*s*), was an act of bankruptcy (*t*); nor would such its effect be prevented by the fact of its non-execution by the trustees (*u*); if, however, it could not operate at all till executed by three persons, it was not an act of bankruptcy when executed only by one, though, when it operated immediately as to that one, it constituted an act of bankruptcy by him (*x*). The transfer must convey, or purport to convey, an interest to the transferee (*y*). Neither a creditor who has executed, or been privy to, or acted under, such a deed, nor any person as his representative, can afterwards set it up as an act of bankruptcy (*z*). Such an assignment for a present consideration—*e.g.*, an advance of money—is not void, unless a fraudulent intent is proved (*a*).

An assignment of part of a debtor's effects, even on account of a bygone and before-contracted debt, does not, like an assignment of the whole, carry with it any intrinsic evidence of fraud; since everybody must, in the course of business, have power to make over some part of his property to creditors (*b*). But though not fraudulent or void *per se*, yet if made in contemplation of bankruptcy, and with an intent to give the transferee an undue advantage over other creditors, it is fraudulent and void (*c*).

It is to be observed that all the cases, without a single exception, where the assignment of his property by a debtor has

(*s*) *Botcherby* v. *Lancaster*, 1 Ad. & E. 77.

(*t*) *Kettle* v. *Hammond*, Co. B. L. 90; *Eckhardt* v. *Wilson*, 8 T. R. 140; *Stewart* v. *Moody*, 1 C. M. & R. 777; *Bowker* v. *Burdekin*, 11 M. & W. 128.

(*u*) *Simpson* v. *Sikes*, 6 M. & S. 295.

(*x*) *Dutton* v. *Morrison*, 17 Ves. 190; *Bowker* v. *Burdekin*, 11 M. & W. 128; *Bannatyne* v. *Leader*, 10 Sim. 350.

(*y*) *Isitt* v. *Beeston*, L. R. 4 Ex. 159.

(*z*) *Ex parte Stray*, L. R. 2 Ch. 374; *Bamford* v. *Baron*, 2 T. R. 594, n.; *Ex parte Cawkell*, 1 Rose, 313; *Ex parte Crawford*, 1 Christ. 137, 182; *Ex parte Shaw*, 1 Madd. 598; *Ex parte Kilner*, Buck, 104; *Ex parte Tealdi*, 1 M. D. & De G. 210; *Marshall* v. *Barkworth*, 4 B. & Ad. 508.

(*a*) *Golden* v. *Gillam*, 20 Ch. D. 389.

(*b*) *Hale* v. *Allnutt*, 18 C. B. 505; *Smith* v. *Timms*, 1 H. & C. 849; *Edwards* v. *Glyn*, 28 L. J. Q. B. 350; *Bills* v. *Smith*, 34 L. J. Q. B. 68.

(*c*) *Ex parte Pearson*, *Re Mortimer*, L. R. 8 Ch. 667; *Lacon* v. *Liffen*, 32 L. J. Ch. 315.

How a person may become bankrupt.

Acts of bankruptcy.

been deemed fraudulent and an act of bankruptcy, are cases where the assignment was made, either without consideration, or for a *bygone* and before-contracted debt. But it is clear that a trader may *sell* the whole, or any part, of his stock, to a fair and *bonâ fide* purchaser, without thereby committing an act of bankruptcy. Nay, even though the intention of the debtor when he sells be to abscond and carry off the purchase-money, still, if the purchaser was not aware of that intent, but dealt fairly and *bonâ fide*, such sale is not an act of bankruptcy (*d*). And an assignment by a debtor of all his effects, executed to secure a bygone debt in consideration of an advance (*e*) by a person lending *bonâ fide* or agreeing *bonâ fide* to make advances or any fair present equivalent, with the object of enabling the debtor to continue his business (*f*), would be supported on the like grounds. So, too, would a *bonâ fide* sale of goods, though the proceeds of the sale were used in making a voluntary payment (*g*).

(b) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof.

A conveyance, gift, delivery, or transfer, if fraudulent, which we observe it must be to constitute an act of bankruptcy within this section, is either fraudulent within stat. 13 Eliz. c. 5, or fraudulent on account of its contravening the policy of the bankrupt laws, which seeks, as we must recollect, the equal distribution of the bankrupt's property among his creditors.

(*d*) *Harwood* v. *Bartlett*, 6 Bing. N. C. 61.

(*e*) *Lomax* v. *Buxton*, L. R. 6 C. P. 107; *Ex parte Snowball*, L. R. 7 Ch. 534; *Ex parte Norton*, L. R. 16 Eq. 397; *Whitmore* v. *Claridge*, 33 L. J. Q. B. 87 (Exch. Ch.); *Mercer* v. *Peterson*, L. R. 2 Ex. 304; 3 Ex. 104; *Pennell* v. *Reynolds*, 11 C. B. N. S. 709; *Baxter* v. *Pritchard*, 1 Ad. & E. 456; *Rose* v. *Haycock*, Id. 460; *Bittlestone* v. *Cook*, 6 E. & B. 296; *Carr* v. *Burdiss*, 1 C. M. & R. 443; *Whitwell* v. *Thompson*, 1 Esp. 68; *Ex parte Izard*, L. R. 9 Ch. 271; *Ex parte Ellis*, 2 Ch. D. 797; *Ex parte Winder*, 1 Ch. D. 290; *Ex parte King*, 2 Ch. D. 256.

(*f*) *Ex parte Reed*, L. R. 14 Eq. 586; *Ex parte Sheen*, 1 Ch. D. 560; *Ex parte Wilkinson*, *Re Berry*, 22 Ch. D. 788; *Ex parte Johnson*, *Re Chapman*, 26 Ch. D. 338; *Ex parte Stubbins*, *Re Wilkinson*, 17 Ch. D. 58; *Ex parte Hauxwell*, *Re Hemingway*, 23 Ch. D. 626; *Ex parte Chaplin*, *Re Sinclair*, 26 Ch. D. 319.

(*g*) *Ex parte Stubbins*, 17 Ch. D. 58; *Ex parte Helder*, 24 Ch. D. 339.

How a person may become bankrupt.

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With respect to the cases on the statute of Elizabeth, they depend each on its own particular circumstances. Where there has been a transfer or assignment of goods, but the transferor or assignor continues in possession of them after such transfer or assignment, that is a badge or evidence of fraud if the continuance of possession be inconsistent with the purport of the assignment (*h*); and it was once held by Lord *Ellenborough* that the transferor remaining in possession, even concurrently with the transferee, would be a mark of fraud (*i*). However, the want of transfer of possession, though evidence, is in no case conclusive evidence of fraud (*k*), and, if consistent with the purport of the assignment, seems not to warrant any imputation thereof (*l*). And there are many other ways of rebutting the imputation of fraud; *e.g.*, if the assignment to the transferee take place under circumstances of such notoriety as occur at a sheriff's sale (*m*), or at an auction (*n*). In short, though there is always reason for suspicion where an assignor who is under pecuniary embarrassments remains in possession of the property assigned, such suspicion of fraud is open to be rebutted, and if it can be rebutted, the assignment is not void (*o*). We shall, however, presently see that property in this situation may become lost to the transferee and pass to the bankrupt's trustee upon another ground, namely, that of its

(*h*) *Twyne's Case*, 3 Rep. 80 b; 1 Smith, L. C. 1; *Edwards* v. *Harben*, 2 T. R. 587; *Freeman* v. *Pope*, L. R. 5 Ch. 538; *Mackay* v. *Douglas*, L. R. 14 Eq. 106; *Ex parte Mercer*, *Re Wise*, 17 Q. B. D. 290; *Taylor* v. *Coenen*, 1 Ch. D. 636; *Ex parte Stephens*, *Re Pearson*, 3 Ch. D. 807; *Spenser* v. *Slater*, 4 Q. B. D. 13; *Boldero* v. *London and Westminster Discount Co.*, 5 Ex. D. 47; *Re Ridler*, *Ridler* v. *Ridler*, 22 Ch. D. 74.

(*i*) *Wordall* v. *Smith*, 1 Camp. 332. But see *Benton* v. *Thornhill*, 7 Taunt. 149; *Latimer* v. *Batson*, 4 B. & C. 652; *Eastwood* v. *Brown*, R. & M. 312.

(*k*) *Martindale* v. *Booth*, 3 B. & Ad. 498; *Carr* v. *Burdiss*, 1 C. M. & R. 782.

(*l*) *Martindale* v. *Booth*, ubi sup.; *Reed* v. *Wilmot*, 7 Bing. 577. See B. N. P. 258; *Steele* v. *Brown*, 1 Taunt. 381. See *Spackman* v. *Miller*, 12 C. B. N. S. 659.

(*m*) *Kidd* v. *Rawlinson*, 2 B. & P. 59; *Watkins* v. *Birch*, 4 Taunt. 823; *Latimer* v. *Batson*, 4 B. & C. 652. See *Willies* v. *Farley*, 3 C. & P. 395.

(*n*) *Leonard* v. *Baker*, 1 M. & S. 251; *Jezeph* v. *Ingram*, 1 Moore, 189. See *Guthrie* v. *Wood*, 1 Stark. 367.

(*o*) See *Eastwood* v. *Brown*, R. & M. 312; *Hoffman* v. *Pitt*, 5 Esp. 22; *Benton* v. *Thornhill*, 7 Taunt. 149; *Manton* v. *Moore*, 7 T. R. 67.

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being in his possession, order, or disposition at the time of bankruptcy.

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Generally speaking, a debtor has, at common law, a right to prefer one creditor to another (*p*); and therefore, though an assignment by a debtor of all his effects, or of all with a nominal exception, to a creditor is void and an act of bankruptcy, on the ground of its contravening the policy of the bankruptcy law, yet it would not be necessarily void under the Statute of Elizabeth (*q*); and we shall see that an assignment of *part* of his property to a creditor is good, unless the debtor made it voluntarily and in contemplation of bankruptcy.

(c) If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon which would, under this or any other Act, be void as a fraudulent preference if he were adjudged bankrupt.

Sect. 48 (1) thus defines a fraudulent preference:

"Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in bankruptcy."

To constitute a fraudulent preference, the conveyance must have been made by a person unable to pay his debts as they become due from his own money, with a view of giving his creditor (or some person in trust for him) a preference over the other creditors, and it must have been made within three months prior to the presentation of the petition on which he has been

(*p*) *Pickstock* v. *Lyster*, 3 M. & S. 371; *Holbird* v. *Anderson*, 5 T. R. 235; *Meux* v. *Howell*, 4 East, 1; *Estwick* v. *Caillaud*, 5 T. R. 420; *Bowen* v. *Bramidge*, 6 C. & P. 140. See s. 48.

(*q*) *Alton* v. *Harrison*, L. R. 4 Ch. 622; *Ex parte Games, Re Bamford*, 12 Ch. D. 314.

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adjudged bankrupt (*r*). The person preferring must, therefore, have been insolvent at the time of making the preference, and must have had a view to prefer (*s*), which seems to imply a voluntary act (*t*); so that it was formerly in many cases held that pressure, or even a demand, would negative fraudulent preference. The Court will now, however, be governed by the statutory definition rather than by the earlier decisions (*u*), and will pay little regard to pressure or demand, at all events unless the debtor was in such a position that it might really induce him to make the payment or conveyance (*x*). If the motive of preferring the creditor is the real, effective, or dominant view of the debtor in making the payment or conveyance, the transaction will be a fraudulent preference; the presence in the debtor's mind of other motives will not save it; it is unnecessary to show that the desire to prefer was the sole motive under which he acted (*y*). The person preferred must be, strictly speaking, a creditor (*z*). Where, however, there is real pressure which influences the debtor (*a*), or where the payment is made in the ordinary course of business, the transaction will not be regarded as a fraudulent preference (*b*).

(d) If with intent to defeat or delay his creditors he departs out of England, or being out of England remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house.

The departure from England must be coupled with an intent, at the moment of departure, to delay creditors (*c*). If such an

(*r*) B. A. 1883, s. 48.

(*s*) *In re Lane*, 23 Q. B. D. at p. 77.

(*t*) *Ex parte Bolland, Re Cherry*, L. R. 7 Ch. 24; *Ex parte Topham, Re Walker*, L. R. 8 Ch. 614; *Butcher* v. *Stead*, L. R. 7 H. L. 839, at p. 846.

(*u*) *Ex parte Griffith, Re Wilcoxon*, 23 Ch. D. 69 (C. A.)

(*x*) *Ex parte Wheatley, Re Grimes*, 45 L. T. 80; *Ex parte Hall, Re Cooper*, 19 Ch. D. 580.

(*y*) *Ex parte Hill, Re Bird*, 23 Ch. D. 695; and compare *Ex parte Taylor, Re Goldsmid*, 18 Q. B. D. 295.

(*z*) *Ex parte Kelly & Co., Re Smith, Fleming & Co.*, 11 Ch. D. 306; *Ex parte Taylor, Re Goldsmid*, supra.

(*a*) *Ex parte Topham*, L. R. 8 Ch. 614; *Ex parte Tempest*, L. R. 6 Ch. 70; *Smith* v. *Pilgrim*, 2 Ch. D. 127; *Ex parte Saffery*, 3 App. Cas. 213.

(*b*) *Tomkins* v. *Saffery*, 3 App. Cas. p. 235.

(*c*) *In re Wood*, L. R. 7 Ch. 302; *In re McKeand*, 6 Morrell, 240. Where the person is a foreigner, see *Ex parte Crispin*, L. R. 8 Ch. 374; *Ex parte Gutierrez*, 11 Ch. D. 298.

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intention exist, it is not necessary that a delay should actually have taken place (*d*). In some cases, where the debtor has gone abroad under circumstances which rendered it highly improbable that he would return to this country, *ex. gr.*, where he had committed murder, it will be inferred that he must have intended to delay his creditors, such being the necessary consequence of his behaviour (*e*).

Where a domiciled Englishman has his permanent home abroad no such intent will be inferred (*f*).

As in the case of departure from the realm, so in the case of departure from the dwelling-house, there must be an intent, at the moment of departure, to delay creditors; and if there be such an intent, there need not be an actual delay (*g*). It seems, that if a person were to depart from his dwelling-house, with intent to delay creditors in case a certain event should happen, which event, however, did not happen, that might not be an act of bankruptcy (*h*).

The words "otherwise absents himself" are extensive in their signification. They are not confined to an absenting from the dwelling-house. If the debtor absent himself from any place, in order to delay his creditors, such an absenting will constitute an act of bankruptcy within this phrase (*i*). Thus a debtor may commit an act of bankruptcy by absenting himself from his own regular place of business in which a man would be expected to be, or from some other place where he expected to meet those to whom he was indebted—for instance, the Royal Exchange (*k*)—in order to delay his creditors. But

(*d*) *Robertson* v. *Liddell*, 9 East, 487.

(*e*) *Woodier's Case*, B. N. P. 39; *Raikes* v. *Poreau*, Co. B. L. 73; *Vernon* v. *Hankey*, Co. B. L. 73. See these cases explained in *Fowler* v. *Padget*, 7 T. R. 509.

(*f*) *Ex parte Brandon, Re Trench*, 25 Ch. D. 500.

(*g*) *Wilson* v. *Norman*, 1 Esp. 334; *Hammond* v. *Hincks*, 5 Esp. 139; *Holroyd* v. *Whitehead*, 3 Camp. 530; *Ex parte Wydown*, 14 Ves. 84; *Ex parte Bamford*, 15 Ves. 449; *Deffle* v. *Desanges*, 8 Taunt. 671. See *Holroyd* v. *Gwynne*, 2 Taunt. 176 (length of absence immaterial); *Spencer* v. *Billing*, 3 Camp. 310; *Bigg* v. *Spooner*, 2 Esp. 651; *Ex parte Birch*, 2 M. D. & De G. 659; *Ex parte Barney*, 32 L. J. Bk. 41.

(*h*) *Fisher* v. *Boucher*, 10 B. & C. 705.

(*i*) *Robson* v. *Rolls*, 9 Bing. 648.

(*k*) See *Maylin* v. *Eyloe*, Str. 809; *Bigg* v. *Spooner*, 2 Esp. 651; *Bayly* v. *Schofield*, 1 M. & S. 338; *Judine* v. *Da Cossen*, 1 B. & P. N. R. 234; *Chenoweth* v. *Hay*, 1 M. & S. 676; *Gillingham* v. *Laing*, 6 Taunt. 532.

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the mere fact of a trader's absenting himself from a place where, though he had once transacted business, it did not appear that he had any business to transact at the time of his staying away from it, and at which, therefore, he would not, in the ordinary course of things, be expected to be present, will not warrant the conclusion that he had committed an act of bankruptcy by absenting himself in order to delay creditors (*l*). Nor will mere failure to keep an appointment with a creditor, apart from intention to delay, be an act of bankruptcy (*m*).

The keeping house must be with the intention to delay a creditor; in the absence of such intention it is not sufficient to make it an act of bankruptcy that a creditor has in fact been delayed. But if there be such an intention, it is an act of bankruptcy, whether the debtor keep house for an hour or a day, and whether any creditor was delayed or no (*n*). The usual evidence of this act is a denial to a creditor. Such denial is not in itself an act of bankruptcy, it is only evidence of one, and therefore may be explained. For instance, it may be shown that he was sick in bed or engaged with company (*o*); on the other hand, it is not the only evidence, and the debtor may therefore be shown to have *kept house* by other means. Thus, if he shut himself up in his house, debarring all access to it, whereby his creditors are delayed, an act of bankruptcy may be established by proof of his having done so. And generally, if a trader seclude himself in his house to avoid the fair importunity of his creditors, who are thus deprived of the means of communicating with him, he begins to keep his house, and commits an act of bankruptcy (*p*). A mere direction by a debtor to deny him to a creditor, if he do no further act

(*l*) *Bernasconi* v. *Farebrother*, 10 B. & C. 549; *Lees* v. *Marton*, 1 M. & Rob. 210; *Ex parte Barney*, 32 L. J. Bkcy. 41.

(*m*) *Lees* v. *Marton*, 1 M. & Rob. 210; *Ex parte Meyer, Re Stephany*, L. R. 7 Ch. 188; *Ex parte Lopez, Re Brelaz*, L. R. 6 Ch. 894; *Ex parte Geisel, Re Stanger*, 22 Ch. D. 436.

(*n*) See *Heyler* v. *Hall*, Palmer, 325.

(*o*) *Round* v. *Hope Byde*, Co. B. L. 94; B. N. P. 39, 40; *Ex parte Preston*, 1 Rose, 21; *Ex parte Hall*, 1 Atk. 201; *Smith* v. *Currie*, 3 Camp. 349; *Shew* v. *Thompson*, 1 Holt, 159. But see *Lazarus* v. *Waithman*, 5 Moore, 313.

(*p*) See *Dudley* v. *Vaughan*, 1 Camp. 271; *Bayly* v. *Schofield*, 1 M. & S. 338; *Cumming* v. *Baily*, 6 Bing. 363; *Fisher* v. *Boucher*, 10 B. & C. 705; *Key* v. *Shaw*, 8 Bing. 320.

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indicative of keeping house, such, for instance, as secluding himself, is not, *per se*, an act of bankruptcy (*q*); neither, on the other hand, is a denial, if he did not order it (*r*). And it has been laid down that such denial must be to a creditor (*s*) who has a debt actually due, and that a denial to a creditor whose debt is payable *in futuro* is not sufficient (*t*). If a debtor order himself to be *generally* denied, and be in consequence denied to a creditor, that is sufficient, though it was not that creditor, but another, whom he intended to avoid (*u*).

(e) If execution issued against him has been levied by seizure and sale of his goods under process in an action in any Court, or in any civil proceeding in the High Court.

In order to render the levying of such an execution an act of bankruptcy, there must be not only a seizure but a sale (*x*). The act of bankruptcy not being complete till the sale has divested the debtor of the property, the proceeds would belong to the creditor; but by a subsequent section (*y*) the officer executing the process, if the judgment on which execution has issued exceeds twenty pounds, is to retain them for fourteen days, and in the event of notice of a petition in bankruptcy being served on him within that period, and the debtor being adjudged a bankrupt, he is to hold them, after deducting expenses, for the trustee.

(f) If he files in the Court a declaration of his inability to pay his debts, or presents a bankruptcy petition against himself.

The declaration must be in proper form (*z*), and filed,

(*q*) *Fisher* v. *Boucher*, 10 B. & C. 705; *Garret* v. *Moule*, 5 T. R. 575; *Hare* v. *Waring*, 3 M. & W. 362.

(*r*) *Dudley* v. *Vaughan*, 1 Camp. 271; *Ex parte Foster*, 17 Ves. 416.

(*s*) *Clements* v. *M'Kibben*, 2 H. & N. 62.

(*t*) See *Ex parte Levi*, 7 Vin. Abr. 61, pl. 14; *Colkett* v. *Freeman*, 2 T. R. 59; *Jackmar* v. *Nightingale*, B. N. P. 40; *Jeffs* v. *Smith*, 2 Taunt. 401; *Ex parte Bamford*, 15 Ves. 449.

(*u*) *Mucklow* v. *May*, 1 Taunt. 479.

(*x*) *Ex parte Brooke, Re Hassall*, L. R. 9 Ch. 301; *Stock* v. *Holland*, L. R. 9 Ex. 147.

(*y*) B. A. 1883, s. 46; *Ex parte Crossthwaite*, 14 Q. B. D. 966.

(*z*) B. R. 1886, Rule 135.

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that is, delivered to the proper officer for that purpose (*a*). A debtor may now present a petition against himself; and the presentation thereof will be deemed an act of bankruptcy without the previous filing of any declaration of inability to pay debts (*b*).

(g) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice in case the service is effected in England, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off, or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained.

A bankruptcy notice under this sub-section can be issued only by the creditor who has obtained the judgment, or his legal personal representative (*c*). On the act of bankruptcy, however, which is complete upon the failure of the judgment debtor to comply with the notice, any creditor may found a petition (*d*). The judgment must be a final one, strictly so called, upon which the creditor may at once issue execution (*e*). A garnishee order

(*a*) *Ransford* v. *Maule*, L. R. 8 C. P. 672.

(*b*) B. A. 1883, s. 8.

(*c*) *Ex parte Blanchett*, *Re Keeling*, 17 Q. B. D. 303; *Ex parte Woodall*, 13 Q. B. D. 479. As to form of notice, No. 6.

(*d*) *Ex parte Dearle*, *Re Hastings*, 14 Q. B. D. 184.

(*e*) *Ex parte Feast*, 4 Mor. 37; *Ex parte Woodall*, supra; *Ex parte Chinery*, 12 Q. B. D. 342; *Ex parte Schmitz*, *Re Cohen*, 12 Q. B. D. 509; *Ex parte Moore*, *Re Faithfull*, 14 Q. B. D. 627; *Ex parte Whinney*, *Re Sanders*, 13 Q. B. D. 476; *Ex parte Grimwade*, *Re Tennent*, 17 Q. B. D. 357; *Ex parte Ide*, 17 Q. B. D. 755; *Ex parte Ford*, 3 Mor. 283; *In re Connon*, 5 Morrell, 80; *In re Reddell*, 5 Mor. 59.

In *Ex parte Woodall*, supra, it was said, that the executrix (i. e., the *legal personal representative*) of a judgment creditor would be included in the words "creditor who has obtained a final judgment," if she had obtained leave to issue execution; but in *Ex parte Blanchett*, 17 Q. B. D. 303, the Court of Appeal decided that they did not apply to the assignee of a judgment debt; and in *In re Goldring*, 22 Q. B. D. 87, that they did not

absolute is not a final judgment within the section (*f*). Satisfaction may be made under the provision in the latter part of the sub-section, by giving a note or bill, during the currency of which the creditor would not be entitled to proceed on the notice (*g*).

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(h) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.

The notice may be given by word of mouth (*h*), but must be formal and deliberate (*i*), such as business men would understand to denote an intention to suspend payment.

Section III.—*Who may be petitioning Creditor.*

Who may be petitioning creditor.

In order to found proceedings in bankruptcy there must be a liquidated debt or debts amounting to 50*l.* payable either immediately or at some certain future time (*k*), an act of bankruptcy must have been committed by the debtor within three months before the presentation of the petition, and the debtor must be domiciled in England, or within a year before the presentation of the petition have ordinarily resided or had a dwelling-house or place of business in England (*l*). We must now consider who may be petitioning creditor, and of what nature must be his debt.

A single creditor or two or more creditors may petition (*m*). In the case of a debt due to a company or co-partnership authorized to sue and be sued in the name of a public officer or agent, the petition and affidavit may be filed by any such officer or

apply to the trustee in the bankruptcy of a judgment creditor.

(*f*) *Ex parte Chinery*, 12 Q. B. D. 342.

(*g*) *Ex parte Matthew*, 12 Q. B. D. 506.

(*h*) *Ex parte Nicholl, Re Walker*, 13 Q. B. D. 469.

(*i*) *Ex parte Oastler, Re Friedlander*, 13 Q. B. D. 471. But compare *In re Lamb, Ex parte Gibson*, 4 Morrell, 25.

(*k*) A judgment recovered against the debtor is not necessarily conclusive; and, if sufficient reasons are given, the Court of Bankruptcy will inquire into the validity of the judgment: *In re Lennox, Ex parte Lennox*, 16 Q. B. D. 315; *In re Saville, Ex parte Saville*, 4 Morrell, 277.

(*l*) B. A. 1883, s. 6.

(*m*) B. A. 1883, s. 6, sub-s. 1 (a).

Who may be petitioning creditor.

agent (*n*). A married woman in cases where she can sue alone (*o*), an infant (*p*), an executor (*q*), and a factor who has sold goods in his own name (*r*), can all be petitioning creditors; so can a trustee provided the *cestui que trust* joins in the petition (*s*). But a receiver appointed by the Chancery Division to collect certain property cannot (*t*).

We have seen that the debt or debts must amount to fifty pounds, and that they must be liquidated and payable either immediately or at some certain future time (*u*). Though, in the present Act, there are no express words, as there were in the preceding one, to the effect that a debt "due in equity" will suffice, it would seem that such a debt will still support a petition. Apparently, however, there may be, in equity, liabilities to pay money which would not constitute debts (*x*).

The debt may be on account, if the creditor swear to a sufficient balance (*y*), or a sum awarded, notwithstanding a motion to set aside the award (z), or a solicitor's bill, though not signed, or delivered, or taxed (*a*), or the debt of a surety (*b*). Differences on the Stock Exchange, as fixed by the official assignee according to the rules of the Stock Exchange, will be a good petitioning debt (*c*). But not a mere security for a contingent demand (*d*), nor unliquidated damages on a covenant, or for a tort before judgment (*e*); nor a cross-acceptance, unless the creditor have paid his own (*f*); nor can the husband petition

(*n*) B. A. 1883, s. 148; B. R. 1886, r. 258.

(*o*) 45 & 46 Vict. c. 75, s. 1; 20 & 21 Vict. c. 85.

(*p*) *Ex parte Broeklebank*, 6 Ch. D. 358.

(*q*) *Ex parte Paddy*, 3 Madd. 241.

(*r*) *Sadler* v. *Leigh*, 4 Camp. 195.

(*s*) *Ex parte Culley*, *Re Adams*, 9 Ch. D. 307; *Ex parte Dearle*, *Re Hastings*, 14 Q. B. D. 184.

(*t*) *In re Sacker*, 22 Q. B. D. 179.

(*u*) B. A. 1883, s. 6, sub-s. 1 (a), (b).

(*x*) *Ex parte Jones*, 18 Ch. D. 109; and *Unity Banking Association*, 3 De G. & J. 63.

(*y*) *Flower* v. *Herbert*, 2 Ves. sen. 327; *Re Scott Russell*, 31 L. J. B. 37. But see *Ex parte Bowes*, 4 Ves. 168.

(*z*) *Ex parte Lingwood*, 1 Atk. 240; *Marson* v. *Barber*, Gow, 17.

(*a*) *Ex parte Sutton*, 11 Ves. 163; *Ex parte Steel*, 16 Ves. 166; *Ex parte Howell*, 1 Rose, 312. See *Ex parte Prideaux*, 1 G. & J. 28.

(*b*) *Heylor* v. *Hall*, Palm. 325; *Denham's case*, Stone, 183.

(*c*) *Ex parte Ward*, 22 Ch. D. 132.

(*d*) *Ex parte Page*, 1 G. & J. 100.

(*e*) *Re Broadhurst*, 22 L. J. Bank. 21; *Ex parte Charles*, 16 Ves. 256; *Beavan* v. *Walker*, 12 C. B. 480.

(*f*) *Sarratt* v. *Austin*, 4 Taunt. 200. See *Hope* v. *Meek*, 10 Exch. 829.

alone on a debt due to his wife *dum sola* (*g*); unless it be a bill or note payable to bearer or order (*h*). Of course, the debt must not be void for illegality (*i*). It must not be a debt barred by the Statute of Limitations (*k*); nor will a sum assessed as damages against a co-respondent, and ordered by the Court to be paid by him to the husband, be a good petitioning creditor's debt (*l*). Who may be petitioning creditor.

A secured creditor (*m*) must either state in his petition that he is willing to give up his security, or must estimate its value, and petition only in respect of the balance remaining after deducting the amount of such estimate (*n*). By omitting to observe these regulations, he will not, however, forfeit his security (*o*), nor will such an omission be fatal to the petition; it will be treated as a formal defect, and amended (*p*).

The debt, in order to support a petition, must have been due from the debtor before an act of bankruptcy (*q*). As a bill of exchange is a debt from the time of issuing it, as against the drawer, it is sufficient to constitute a petitioning creditor's debt, though not indorsed to the creditor till after an act of bankruptcy (*r*); but if the creditor be indorsee, it must appear that it was indorsed to him before the petition was filed (*s*). Such a bill was held sufficient to support a fiat against the drawer, though paid by the acceptor after fiat issued (*t*). Upon such a bill it is, for obvious reasons, necessary to prove presentment and notice of dishonour (*u*).

The costs of all proceedings, down to the making of a receiv-

(*g*) *Rumsey* v. *George*, 1 M. & S. 176.

(*h*) *Ex parte Barber, Re Shaw*, 1 G. & J. 1. See *M'Neilage* v. *Holloway*, 1 B. & Ald. 218; but see *Sherrington* v. *Yates*, 12 M. & W. 855.

(*i*) *M'Connell* v. *Hector*, 3 B. & P. 113; *Ex parte Randleson*, 1 Mont. & M'A. 86.

(*k*) *Quantock* v. *England*, 2 W. Bl. 703; *Ex parte Tynte*, 15 Ch. D. 125.

(*l*) *Ex parte Muirhead*, 2 Ch. D. 22.

(*m*) Sect. 168.

(*n*) B. A. 1883, s. 6, sub-s. (2).

(*o*) *Moor* v. *Anglo-Italian Bank*, 10 Ch. D. 681.

(*p*) *Ex parte Vanderlinden, Re Pogose*, 20 Ch. D. 289.

(*q*) *Ex parte Hayward*, L. R. 6 Ch. 546; *Ex parte Waimman*, Co. B. L. 31; *Hill* v. *Harris*, M. & M. 448; *Mavor* v. *Pyne*, 2 C. & P. 91.

(*r*) *Macarty* v. *Barrow*, 2 Str. 949; *Glaister* v. *Hewer*, 7 T. R. 498; *Anon.* 2 Wils. 135; *Ex parte Cyrus*, L. R. 5 Ch. 176.

(*s*) *Rose* v. *Rowcroft*, 4 Camp. 245; *Cowie* v. *Harris*, Moo. & M. 141.

(*t*) *Ex parte Douthat*, 4 B. & Ald. 67.

(*u*) *Cooper* v. *Machin*, 1 Bing. 426.

Who may be petitioning creditor.

ing order, will have to be borne by the petitioning creditor; but he will be entitled to be recouped out of the debtor's estate as soon as the actual expenses of the official receiver, the prescribed fees and percentages, the fees and costs of the official receiver, repayment of deposits, and the remuneration of the special manager, have been provided for (*x*). Two or more petitions presented against the same debtor may be consolidated (*y*). A stay of proceedings under a petition may be ordered (*z*), and if the petitioning creditor does not proceed with due diligence, another creditor may be substituted for him (*a*).

Where the debt is due from a firm, any creditor, who could petition against all, may petition against one or more of the partners (*b*); and the Court may dismiss a joint petition as to one or more of the partners, without affecting the proceedings as to the others (*c*).

Section IV.—*The Petition, and the Court to which it is presented.*

The petition, and the Court to which it is presented.

A petition in bankruptcy must be fairly written or printed, or partly written and partly printed, and it must not be altered without leave of the registrar (*d*). It must be attested (*e*), and must set out the residence and place of business of the debtor, and any former residence or place of business which he occupied at the time of contracting the debt (*f*). Where the debtor resides and carries on business in different districts, the petition should be presented to the Court in district of which he carries on business (*g*). The petitioning creditor must make a deposit of five pounds, and such further sum as the Court may, from time to time, direct (*h*), and he will have to verify the

(*x*) B. R. 1886, rr. 125, 183.
(*y*) B. A. 1883, s. 106.
(*z*) B. A. 1883, s. 109.
(*a*) B. A. 1883, s. 107.
(*b*) B. A. 1883, s. 110.
(*c*) B. A. 1883, s. 111.
(*d*) B. R. 1886, r. 143.
(*e*) B. R. 1886, r. 146.
(*f*) B. R. 1886, r. 144.
(*g*) B. R. 1886, r. 145.
(*h*) B. R. 1886, r. 147.

petition by the affidavit of himself or of some person who can depose to the facts (*i*).

The petition, and the Court to which it is presented.

The petition will be investigated by the registrar (*k*), after which two sealed copies will be delivered to the petitioner (*l*). He must then serve the debtor *personally* with one of the sealed copies (*m*), unless substituted service be ordered by the Court (*n*). A time and place are appointed for the hearing of the petition (*o*), and the debtor will be entitled to show cause (*p*). At the hearing, the petitioner must be prepared to prove the debt, the act of bankruptcy, and service of the petition (*q*). If satisfied with such proof, the Court may make a receiving order (*r*), or it may, in certain cases, order proceedings in the petition to be stayed (*s*). If not satisfied with the proof, the Court may dismiss the petition (*t*). In the case of a petition presented by the debtor himself, a receiving order will be made forthwith (*u*).

Where it is necessary for the protection of the estate, the Court may, at any time after presentation of a petition, appoint the official receiver interim receiver of the property of the debtor (*x*), and it may also stay any action, execution, or other legal process against the property or person of the debtor (*y*).

The Act does not provide any remedy or punishment for maliciously and without reasonable and probable cause taking proceedings in bankruptcy. But such an action would lie at the instance of a person who could show that the proceedings had been set aside or dismissed (*z*).

(*i*) B. R. 1886, rr. 149, 150; B. A. 1883, s. 7, sub-s. 1. The petition may be signed by his duly constituted attorney: *Ex parte Wallace*, 14 Q. B. D. 22. As to amending the petition, *Ex parte Dearle*, 14 Q. B. D. 184.

(*k*) B. R. 1886, r. 152.

(*l*) B. R. 1886, rr. 149, 153.

(*m*) B. R. 1886, r. 149.

(*n*) B. R. 1886, r. 154.

(*o*) B. R. 1886, r. 158.

(*p*) B. R. 1886, rr. 160, 162.

(*q*) B. A. 1883, s. 7, sub-s. (1).

(*r*) B. A. 1883, ss. 5, 7, sub-s. (1).

(*s*) B. A. 1883, s. 7, sub-sects. (4) and (5).

(*t*) B. A. 1883, s. 7, sub-s. (3).

(*u*) B. A. 1883, s. 8; B. R. 1886, r. 157.

(*x*) B. A. 1883, s. 10, sub-s. (1); B. R. 1886, rr. 170—175.

(*y*) B. A. 1883, s. 10, sub-s. (2).

(*z*) *Whitworth* v. *Hall*, 2 B. & Ad. 695; *Johnson* v. *Emerson*, L. R. 6 Ex. 329; *Quartz Hill Gold Mining Co.* v. *Eyre*, 11 Q. B. D. 674; *Metropolitan Bank* v. *Pooley*, 10 App. Cas. 210.

The petition, and the Court to which it is presented.

Where the debtor dies, proceedings will be continued as if he were alive, unless the Court otherwise orders (*a*).

The Courts which have jurisdiction in bankruptcy are the High Court of Justice, the district of which includes the City of London and the liberties thereof, and the districts of the Metropolitan County Courts, enumerated in Schedule III. of the Act, and elsewhere the County Courts (*b*). In the High Court the bankruptcy business is assigned to the Queen's Bench Division (*c*), and is transacted before a judge of that Division and the Bankruptcy Registrars (*d*). A County Court has in bankruptcy all the powers and jurisdiction of the High Court (*e*).

Persons aggrieved have a right of appeal from the High Court to the Court of Appeal, and, by leave, thence to the House of Lords (*f*); from the County Courts to a Divisional Court in bankruptcy of the High Court of Justice, and thence, by leave, to the Court of Appeal, whose decision in such cases is final (*g*). The official receiver should not appear on an appeal unless there are special circumstances to bring before the Court (*h*).

In order to enable these Courts to carry into effect the purpose for which they are intended, a general power is given them in the following terms :—

"Sect. 102.—(1.) Subject to the provisions of this Act, every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities (*i*), and all other questions whatsoever (*k*), whether of law or fact, which may arise in any case of bankruptcy (*l*) coming within the cognizance of the Court,

(*a*) B. A. 1883, s. 108; *In re Walker*, 3 Morrell, 69.

(*b*) See B. A. 1883, ss. 92—96, and Sched. 3.

(*c*) Order of Lord Chancellor, dated 1st January, 1884.

(*d*) B. A. 1883, s. 99.

(*e*) B. A. 1883, s. 100.

(*f*) B. A. 1883, s. 104, sub-s. (2). As to who is and is not a person aggrieved, see *Ex parte Learoyd, Re Foulds*, 10 Ch. D. 3; *Ex parte Ditton, Re Woods*, 11 Ch. D. 56; *Ex parte Mason, Re White*, 14 Ch. D. 71; *Ex parte Sidebotham*, 14 Ch. D. 458; *Ex parte Castle Mail Packet Co.*, 3 Morrell, 270; *In re Batten, Ex parte Milne*, 22 Q. B. D. 685 (trustee under deed of arrangement).

(*g*) 47 Vict. c. 9, s. 2.

(*h*) *Ex parte Dixon*, 13 Q. B. D. 118; *Ex parte White*, 14 Q. B. D. 600; *Ex parte Reed and Bowen*, 17 Q. B. D. 244.

(*i*) *Ex parte Payne*, 11 Ch. D. 539.

(*k*) *Ex parte Streeter*, 19 Ch. D. 216.

(*l*) Including a composition: *Ex parte Rumboll*, L. R. 6 Ch. 843; *In re Thorpe*, L. R. 8 Ch. 743; *In re Hawke*, 3 Morrell, 1.

or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case (*m*).

The petition, and the Court to which it is presented.

"Provided that the jurisdiction hereby given shall not be exercised by the County Court for the purpose of adjudicating upon any claim, not arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court, unless all parties to the proceeding consent thereto, or the money, money's worth, or right in dispute does not in the opinion of the judge exceed in value 200*l*.

"(2.) A Court having jurisdiction in bankruptcy under this Act shall not be subject to be restrained in the execution of its powers under this Act by the order of any other Court, nor shall any appeal lie from its decisions, except in manner directed by this Act.

"(3.) If in any proceeding in bankruptcy there arises any question of fact which either of the parties desire to be tried before a jury instead of by the Court itself, or which the Court thinks ought to be tried by a jury, the Court may, if it thinks fit, direct the trial to be had with a jury, and the trial may be had accordingly in the High Court in the same manner as if it were the trial of an issue of fact in an action, and in the County Court in the manner in which jury trials in ordinary cases are by law held in that Court.

"(4.) Where a receiving order has been made in the High Court under this Act, the judge by whom such order was made shall have power, if he sees fit, without any further consent, to order the transfer to such judge of any action pending in any other division, brought or continued by or against the bankrupt.

"(5.) Where default is made by a trustee, debtor, or other person, in obeying any order or direction given by the Board of Trade or by an official receiver, or any other officer of the Board of Trade, under any power conferred by this Act, the Court may, on the application of the Board of Trade or an official receiver, or other duly authorized person, order such defaulting trustee, debtor, or person to comply with the order or direction so given; and the Court may also, if it shall think fit, upon any such application, make an immediate order for the committal of such defaulting trustee, debtor, or other person; provided that the power given by this sub-section shall be deemed to be in addition to and not in substitution for any other right or remedy in respect of such default."

The powers thus conferred are very wide, and if the trustee or other party resort to them he will be deemed to have made

(*m*) *Ex parte Great Western Ry. Co.*, 22 Ch. D. 470; *Ex parte Hirst*, 11 Ch. D. 278.

The petition, and the Court to which it is presented.

his election, and cannot proceed for the same matter elsewhere. But they do not exclude the jurisdiction of other tribunals, and therefore the trustee may still assert his rights in the ordinary course against strangers (*p*).

Where the case falls within this section (*q*), the Court has a discretion whether it shall act upon it or leave the matter to be decided in the ordinary course (*r*); but if it determines to act under the section, it may restrain parties from resorting to any other tribunal (*s*).

The debtor is bound to give every assistance in the realization and discovery of his property under pain of being held guilty of contempt of Court (*t*). Wide powers are given to the Court, if it be necessary to prevent his making away with or concealing his property or in any way delaying the proceedings against him, to order his arrest and the seizure of his papers (*u*). The Court may also summon and cause to be examined any debtor against whom a receiving order has been made, or his wife or any person known or suspected to have in his possession any of the debtor's property, or supposed to be indebted to him, or to be capable of giving information as to him, his dealings, or property (*x*). Production of documents may also be ordered (*y*).

The orders and warrants of these Courts may be enforced in any part of her Majesty's dominions (*z*).

These several Courts, and the Courts of Bankruptcy in Scotland and Ireland, and every like British Court elsewhere, are to act in aid of, and be auxiliary to each other in all matters of bankruptcy (*a*).

(*p*) *Ellis* v. *Silber*, L. R. 8 Ch. 83; *In re Thorpe*, Ibid. 743; *Jenney* v. *Bell*, 2 Ch. D. 547.

(*q*) *Smith* v. *Baker*, L. R. 8 C. P. 350.

(*r*) *Ex parte Reynolds*, *Re Barnett*, 15 Q. B. D. 169; *Ex parte Armitage*, 17 Ch. D. 13.

(*s*) *Ex parte Cohen*, *Re Sparke*, L. R. 7 Ch. 20; *Morley* v. *White*, L. R. 8 Ch. 214.

(*t*) B. A. 1883, s. 24.

(*u*) B. A. 1883, s. 25.

(*x*) B. A. 1883, s. 27.

(*y*) B. R. 1886, r. 69.

(*z*) B. A. 1883, ss. 117, 119.

(*a*) B. A. 1883, s. 118.

SECTION V.—*Receiving Order, and Proceedings thereupon.*

(A) *Receiving Order and its Consequences.*

Receiving order, and proceedings thereupon.

If satisfied with the proof by the petitioning creditor of his debt and the act of bankruptcy, and service of the petition, the Court will make a receiving order. This order will be served on the debtor (*b*), and gazetted and advertised in a local paper (*c*). The result of the order will be that the official receiver will be constituted receiver of the debtor's property, and that after it is made no creditor will have any remedy against the debtor's property or person in respect of any provable debt other than those provided by the Act, or be able to commence any action or other legal proceedings without leave of the Court (*d*). The debtor, for example, will be protected from the day on which the order is pronounced (*e*) as regards the remedies given to creditors by the Debtors Act, 1869 (*f*). But the receiving order, it is important to observe, will not in any way affect the power of secured creditors to realize or otherwise deal with their securities (*g*). A secured creditor is defined as one who holds a mortgage, charge, or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor (*h*). Creditors who have issued execution against the goods or land of their debtor, or who have attached any debt due to them, will be allowed, as against a trustee in bankruptcy, to retain the benefit of the execution or attachment only if they have completed it before the date of the receiving order, and before notice of any bankruptcy petition presented by or against the debtor, or the commission of any available act of bankruptcy by the debtor (*i*). That is to say, in the case of execution against goods, there must

(*b*) B. R. 1886, r. 179.

(*c*) B. A. 1883, s. 13; B. R. 1886, r. 182.

(*d*) B. A. 1883, s. 9, sub-s. 1.

(*e*) *Re Manning*, 30 Ch. D. 480.

(*f*) 32 & 33 Vict. c. 62, s. 4; *Cobham* v. *Dalton*, L. R. 10 Ch. 655; *Earl of Lewes* v. *Barnett*, 6 Ch. D. 252; *Re Ryley, Ex parte Official Receiver*, 15 Q. B. D. 329.

(*g*) B. A. 1883, s. 9, sub-s. (2).

(*h*) B. A. 1883, s. 168, sub-s. (1).

(*i*) B. A. 1883, s. 45, sub-s. (1).

Receiving order, and proceedings thereupon.

have been seizure and sale (*j*), and against land, seizure or the appointment of a receiver (*k*), and in the case of attachment, the debt attached must have been received (*l*). An available act of bankruptcy is one available for a petition at the date of the presentation of the petition on which the receiving order is made (*m*); in other words, an act of bankruptcy committed within three months next preceding the date of presentation of the petition (*n*).

(B) *Public Examination of the Debtor, and Meetings of Creditors.*

Every debtor must undergo a public examination on oath in open Court (*o*). An appointment for this purpose is made by the Court on the application of the official receiver when the receiving order has been made (*p*), and notice thereof is given to the creditors (*q*). Any creditor who has tendered a proof, or his representative authorized in writing, may question the debtor concerning his affairs and the causes of his failure (*r*). Notes of the examination are taken, and are open to the inspection of creditors at all reasonable times (*s*). The first meeting of creditors is held within fourteen days after the date of the receiving order (*t*). Notice of the meeting is gazetted and advertised, and sent to each creditor, together with a summary of the debtor's statement of affairs (*u*). At the first meeting, the creditors consider any proposal made by the debtor for a composition or scheme of arrangement, or the question whether the debtor should be adjudged bankrupt, and will also consider the mode of dealing with the debtor's property (*x*). A creditor will not be able to vote unless he has proved his debt and lodged his proof with the official receiver at the time specified in the notice convening the meeting (*y*). Nor can he vote in

(*j*) *Jones* v. *Parcell*, 11 Q. B. D. 430.
(*k*) *Ex parte Evans*, 13 Ch. D. 252; *Smith* v. *Cowell*, 6 Q. B. D. 75.
(*l*) B. A. 1883, s. 45, sub-s. (2).
(*m*) B. A. 1883, s. 168, sub-s. (1).
(*n*) B. A. 1883, s. 6, sub-s. (1) (c.).
(*o*) B. A. 1883, s. 17; B. R. 1886, r. 6.
(*p*) B. R. 1886, r. 184.
(*q*) B. R. 1886, r. 186.
(*r*) B. A. 1883, s. 17, sub-s. (4).
(*s*) B. A. 1883, s. 17, sub-s. (8).
(*t*) B. A. 1883, s. 15, Sched. I., r. 1.
(*u*) B. A. 1883, Sched. I., rr. 2, 3.
(*x*) B. A. 1883, s. 15.
(*y*) B. A. 1883, Sched. I., r. 8; B. R. 1886, r. 222.

respect of any unliquidated, contingent or unascertained debt (*z*). Creditors may vote by proxy and give a general proxy to their manager, clerk, or any other person in their regular employ (*a*), and a special proxy to vote at any specified meeting for any specific resolution (*b*). Proxies may also be given to the official receiver (*c*), and, if given by a firm or person carrying on business, may be signed by any person in the employ of the firm or by any person having a written general authority to sign for the firm or person (*d*). Subsequent meetings are summoned by notice (*e*). The costs of any meeting summoned by any person other than the official receiver or trustee will be borne by him, but may be repaid to him out of the estate by direction of the Court or the creditors (*f*). Receiving order, and proceedings thereupon.

Every debtor must make out a statement of affairs, and any person stating himself in writing to be a creditor will be entitled, personally or by agent, to inspect and take a copy of or extracts from it; but any person who untruthfully so states himself to be a creditor, will be guilty of contempt of Court (*g*).

(c) *Composition or Scheme of Arrangement.*

A composition or scheme of arrangement, the terms of which must be settled at the first meeting, or an adjournment of it (*h*), may be resolved on by a resolution passed by a majority in number, and three-fourths in value, of the creditors present personally or by proxy, and voting (*i*), and must be confirmed at a subsequent meeting held after the debtor's public examination is concluded, by a resolution passed by a majority in number representing three-fourths in value of all the creditors who have proved (*k*). At the subsequent meeting a creditor

(*z*) B. A. 1883, Sched. I., r. 9.
(*a*) B. A. 1883, Sched. I., rr. 15, 17; B. R. 1886, r. 245.
(*b*) B. A. 1883, Sched. I., r. 18.
(*c*) B. A. 1883, Sched. I., r. 21.
(*d*) B. R. 1886, r. 246. As to proxies generally, see B. A. 1883, Sched. I., rr. 15—21; B. R. 1886, rr. 245—248.
(*e*) B. A. 1883, Sched. I., r. 6; B. R. 1886, r. 251.
(*f*) B. R. 1886, r. 254.
(*g*) B. A. 1883, s. 16.
(*h*) B. R. 1886, r. 195.
(*i*) B. A. 1883, s. 18, sub-s. (1); s. 168, sub-s. (1).
(*k*) B. A. 1883, s. 18, sub-sects. (2) and (3).

Receiving order, and proceedings thereupon.

may vote by letter, witnessed and sent to the official receiver not later than the day before the meeting (*m*). Before the composition or scheme becomes binding on the creditors, however, it must be approved by the Court, which will have regard to the interests of the creditors and the conduct of the debtor, and exercise discretion as to approving it (*n*), on application by the debtor or official receiver, notice of the hearing of which will be given to every creditor who has proved (*o*). On the application, the official receiver will make a report, and any creditor may object to the approval (*p*).

If the composition or scheme is approved, the debtor or trustee appointed thereunder (if any) will be put in possession of the debtor's property, and the receiving order will be rescinded (*q*). The release to the debtor will be the same as if he had obtained a discharge in bankruptcy (*r*). If default is made in payment of any instalment under the composition or scheme, or if the Court thinks that it cannot be carried out without injustice or undue delay to the creditors or debtor, or that the approval was obtained by fraud, the Court may adjudge the debtor a bankrupt (*s*). It may also do so if, between the first and the subsequent meetings, the debtor informs the official receiver in writing that he cannot carry out the composition or scheme, or if the composition or scheme is not confirmed at the subsequent meeting (*t*). Default in payment of a composition under the Act will not, apparently, restore a creditor to his original rights in respect of the debt, his remedy being by application to the Court (*u*). Compositions or schemes of arrangement may also be accepted after adjudication (*x*), in which cases the rules relating thereto will apply as if they had been accepted in the first instance (*y*).

(*m*) B. A. 1883, s. 18, sub-s. (2); B. R. 1886, r. 245.

(*n*) *In re Genese*, 3 Morrell, 274; *In re Barlow*, 3 Morrell, 304; *In re Postlethwaite*, 3 Morrell, 169; see *Lucas* v. *Martin*, 37 Ch. D. 597, in which the Court declined to carry out an agreement which had been approved.

(*o*) B. A. 1883, s. 18, sub-s. (4); B. R. 1886, rr. 197—199.

(*p*) B. A. 1883, s. 18, sub-s. (5).

(*q*) B. R. 1886, r. 208.

(*r*) B. A. 1883, s. 18, sub-s. (8); *Flint* v. *Barnard*, 22 Q. B. D. 90.

(*s*) B. A. 1883, s. 18, sub-s. (11).

(*t*) B. R. 1886, r. 192.

(*u*) B. R. 1886, r. 211.

(*x*) B. A. 1883, s. 23.

(*y*) B. R. 1886, r. 216.

(D) *Adjudication.*

Receiving order, and proceedings thereupon.

If the creditors so resolve at the first meeting, or if they pass no resolution, or if a composition or scheme is not accepted or approved within fourteen days after the conclusion of the public examination, the debtor will be adjudged bankrupt by the Court; and his property will forthwith become divisible amongst his creditors, and vest in a trustee (*z*). There is also power to adjudge the debtor a bankrupt at the time of making the receiving order, or at any time thereafter on his own application (*a*), and on the application of a creditor or the official receiver after the receiving order if there is no quorum of creditors at the first meeting or one adjournment thereof, or if the debtor has absconded or does not propose any composition or scheme (*b*).

The Court has power, notwithstanding the adoption of a composition or scheme (*c*), to adjudge the debtor bankrupt if it cannot, owing to legal difficulties, or for any sufficient reason, proceed without injustice or undue delay to the creditors, or if the approval of the Court was obtained by fraud. In *Re Moon* (*d*), the debtor represented that his assets were sufficient to pay twenty shillings in the pound, and the creditors adopted a scheme of arrangement for the payment of such sum, and assigned to a trustee all his property, except certain property included in a post-nuptial settlement. The value of the property assigned was greatly over-estimated; although no charge of fraud was made against the debtor, the Court, under this section, adjudicated him bankrupt.

An adjudication operates not merely from its date or the date of the petition, but retrospectively, it being enacted by s. 43:—

"The bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him; or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back

(*z*) B. A. 1883, s. 20.
(*a*) B. R. 1886, r. 190.
(*b*) B. R. 1886, r. 191.
(*c*) Sect. 18, sub-s. (11).
(*d*) 19 Q. B. D. 669.

Receiving order, and proceedings thereupon.

to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition; but no bankruptcy petition, receiving order, or adjudication shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor" (*e*).

Section VI.—*Remedies of Creditors.*

(A.) *Proof of Debts.*

Remedies of creditors.

First, with regard to the mode of proof. A debt is to be proved as soon as may be after the receiving order by affidavit sent to the official receiver or trustee by post, and made by the creditor or some person authorised by him (*f*). The affidavit should contain or refer to an account showing the particulars of the debt; and trade discounts must be deducted, but not discounts for cash not exceeding 5*l.* per cent. per annum (*g*). As the jurisdiction in this matter is both legal and equitable, the consideration of the alleged debt can always be looked into, notwithstanding an award, a verdict, or a judgment (*h*).

The Court may examine into the validity of a judgment upon evidence of fraud, collusion, or miscarriage of justice (*i*); and it has been laid down that when the only evidence of a debt is a judgment, and the judgment has been recovered after the act of bankruptcy, the judgment debt cannot be proved in the bankruptcy (*k*).

A bill of exchange, promissory note, or other negotiable instrument or security must be produced before a proof of it can

(*e*) *Ex parte Kelder*, 24 Ch. D. 339; *Ex parte Edwards*, 13 Q. B. D. 747.

(*f*) B. A. 1883, Sched. II., rr. 1—3; B. R. 1886, *r.* 219.

(*g*) B. A. 1883, Sched. II., rr. 4, 8.

(*h*) *Ex parte Butterfill*, 1 Rose, 192; *Ex parte Kemshead*, 1 Rose, 149. See *Ex parte Mudie*, 3 M. D. & De G. 66; *Ex parte Thornthwaite*, 1 De G. M. & G. Bk. App. 407; *Ex parte Kibble, Re Onslow*, L. R. 10 Ch. 373; *Ex parte Banner, Re Blythe*, 17 Ch. D. 480; *Ex parte Revell, Re Tollemache*, 13 Q. B. D. 720; *Ex parte Lennox*, 16 Q. B. D. 315; *Ex parte Anderson, Re Tollemache*, 14 Q. B. D. 606; *Ex parte Bonham, Re Tollemache*, 14 Q. B. D. 604; *Ex parte Revell, Re Tollemache*, 13 Q. B. D. 727; *In re Savile*, 4 Morrell, 277.

(*i*) *In re Flatau*, 22 Q. B. D. 83.

(*k*) *Ex parte Bonham, Re Tollemache*, 14 Q. B. D. 604; *In re Lopes*, 6 Morrell, 245.

Remedies of creditors.

be admitted (*l*). In respect of periodical payments the creditor may prove for the proportionate part due down to the date of the receiving order (*m*). Debts payable in future may be proved for, but a rebate of interest at five per cent. will be deducted from the dividend (*n*). The creditor may prove for interest at four per cent. from the date when the debt became due down to the date of the receiving order if the debt was payable by virtue of a written instrument at a certain time, and if otherwise from the date of notice in writing to the debtor that interest would thenceforth be claimed (*o*). The official receiver or trustee will examine every proof, and in writing reject or admit it wholly or in part not later than seven days from the latest date specified in the notice to declare a dividend (*p*). Any decision as to a proof is subject to an appeal by the creditor to the Court within twenty-one days from the decision (*q*). The Court may expunge or reduce a proof on the application of the trustee or a creditor if the trustee declines to interfere (*r*). The cost of proof is borne by the creditor, unless the Court otherwise order (*s*).

There are some peculiar rules respecting the admission to proof of creditors holding securities for their debts. Such persons have, as will be more fully explained in a subsequent part of this chapter, considerable advantages over the bankrupt's other creditors; they are able to avail themselves of their securities as far as they will go, toward payment of their demands. A secured creditor may, as we have seen, deal with his security just as if no receiving order had been made (*t*). He may, therefore, realize his security if it be sufficient, and not prove at all. If, however, his security is insufficient, he may either realize it, and prove for the balance after deducting the net proceeds (*u*), or he may surrender his security for the benefit of the creditors and prove for the whole debt (*x*); or he may assess its value in

(*l*) B. R. 1886, r. 221. See as to proofs on bills not due, B. A. Sched. II., r. 21.
(*m*) B. A. Sched. II., r. 19.
(*n*) B. A. Sched. II., r. 21.
(*o*) B. A. Sched. II., r. 20.
(*p*) B. A. Sched. II., rr. 22, 27; B. R. 1886, rr. 227, 228.
(*q*) B. A. Sched. II., r. 24; B. R. 1886, r. 230.
(*r*) B. A. Sched. II., rr. 23, 25.
(*s*) B. A. 1883, Sched. II., r. 6.
(*t*) B. A. 1883, s. 9.
(*u*) B. A. 1883, Sched. II., r. 9.
(*x*) B. A. 1883, Sched. II., r. 10.

Remedies of creditors.

his proof and receive a dividend on the balance in respect of the balance after deducting such assessed value (*y*). There are provisions in such a case for amendment of the valuation and enabling the trustee to redeem the security at the value put upon it by the creditor (*z*). The penalty for non-compliance with these rules is exclusion from dividend (*a*).

For the purpose of voting at any meeting of creditors, a secured creditor is to be deemed a creditor only for the balance of his debt after allowing for the value of his security, and if he votes in respect of the whole debt he will be deemed to have surrendered his security (*b*). A secured creditor means one holding a mortgage, charge or lien on any part of the bankrupt's property as security for a debt due to him from the debtor (*c*). A creditor, therefore, holding the security of a third person is not obliged to give it up, or sell it, before proving; and as the separate estates of partners are considered as distinct from the joint estate of the firm, it would seem that a joint creditor, holding a separate security, from one of the co-debtors, or separate securities from both of them (*d*), may prove against the joint estate, without surrender or sale of his security (*e*). And so the holder of a joint security may prove against the separate estate of one debtor, and recover what he can against the other. But more than twenty shillings in the pound must not be received in the whole (*f*). Where a security is deposited generally, and the creditor has two demands, one provable, the other not, he may apply his security to the demand which is not provable (*g*).

What debts provable.—Having considered the *mode of proof*, the next question that occurs under the head of proof is, *what*

(*y*) B. A. 1883, Sched. II., r. 11.

(*z*) B. A. 1883, Sched. II., rr. 12—15; *Ex parte Norris, Re Sadler*, 17 Q. B. D. 728; 3 Morrell, 260.

(*a*) B. A. 1883, Sched. II., r. 16.

(*b*) B. A. 1883, Sched. II., r. 10; *Baines* v. *Wright*, 15 Q. B. D. 102.

(*c*) B. A. 1883, s. 168, sub-s. 1.

(*d*) *Re Plummer*, 1 Ph. 56.

(*e*) *Ex parte Peacock*, 2 G. & J. 27. See *Ex parte Freen*, Id. 250; *Ex parte M'Kenna*, 30 L. J. Bkcy. 25; *Ex parte West Riding*, 19 Ch. D. 105; *Ex parte Caldicott*, 25 Ch. D. 716.

(*f*) B. A. 1883, Sched. II., r. 17; *Ex parte Bennet*, 2 Atk. 527; *Ex parte Parr*, 1 Rose, 76; *Ex parte Taylor*, 26 L. J. Bkcy. 58.

(*g*) *Ex parte Havard*, Co. B. L. 124; *Ex parte Hunter*, 6 Ves. 94.

Remedies of creditors.

debts are provable. No debt can be so, if it arise out of an illegal contract, or is barred by the Statute of Limitations (*h*), or if there be no consideration for it.

A debt founded in felony will probably be provable unless the creditor is shown to be omitting some duty, as that of taking proceedings for a prosecution, in regard to prosecuting the felon (*i*). Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust are not provable; nor can a creditor who has notice of an act of bankruptcy available against the debtor prove for any debt or liability contracted subsequently to the date of his having notice (*k*). Thus, a demand of damages for the commission of a tort is not provable, unless judgment has been signed for them before the receiving order, or they have been liquidated by agreement before bankruptcy (*l*).

Except demands for unliquidated damages and debts contracted after notice of an act of bankruptcy (which, as we have seen, are not provable), all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any liability incurred before such date, are provable (*m*). The value of contingent debts will be estimated; if incapable of valuation such debts will not be provable (*n*).

The word "liability" includes any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether the breach does or does not occur, or is or is not likely to occur

(*h*) *Ex parte Dewdney*, 15 Ves. 498; *Ex parte Roffey*, 2 Rose, 245; *Ex parte Bell*, 1 M. & S. 751; *Ex parte Chavasse*, 34 L. J. Bktcy. 17; *Ex parte Mather*, 3 Ves. 373.

(*i*) See *Ex parte Ball*, *Re Shepherd*, 10 Ch. D. 667; *Midland Insurance Co.* v. *Smith*, 6 Q. B. D. 561; *Ex parte Leslie*, *Re Guerrier*, 20 Ch. D. 131; *Roope* v. *D'Avigdor*, 10 Q. B. D. 412.

(*k*) B. A. 1883, s. 37.

(*l*) *Ex parte Baum*, *Re Edwards*, L. R. 9 Ch. 673; *Ex parte Brook*, *Re Newman*, 3 Ch. D. 494; *Ex parte Mumford*, 15 Ves. 289; *Ex parte Harding*, *Re Pickering*, 23 L. J. Bktcy. 22; *Watson* v. *Holliday*, 20 Ch. D. 780; *In re Giles*, 6 Morrell, 158.

(*m*) B. A. 1883, s. 37, sub-s. 3.

(*n*) B. A. 1883, s. 37, sub-ss. 4, 6; *Linton* v. *Linton*, 15 Q. B. D. 239.

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or capable of occurring before the discharge of the debtor, and generally it includes any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of money or money's worth, whether the payment is, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency, or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or as matter of opinion (*o*).

These terms are exceedingly comprehensive (*p*)—indeed it is impossible that wider terms should have been employed—and the Court is disposed to give them an operation which shall relieve the bankrupt "from any liability under any contract he had ever entered into" (*q*).

Thus, debts arising from fraud or breach of trust (*r*), money paid for a lost bet or for differences on the Stock Exchange (*s*), liability for calls in a winding-up (*t*), voluntary bonds (*u*), may all form the subject of a proof. The holder of a bill of exchange may, in general, prove against all the parties liable upon it for the full amount of the bill, and he may prove against the estate of the drawer or acceptor before the bill is dishonoured (*x*). Where, however, the bill is a fraud on the bankruptcy law, and the holder knew or ought to have known that it was so, he can only prove at most for the amount which he has paid to obtain the bill (*y*). In the case of accommodation acceptances, if one of the parties only becomes bankrupt, the other may prove for the amount he has paid for the bankrupt's accommodation (*z*), but if both are bankrupt, only the

(*o*) B. A. 1883, s. 37, sub-s. 8.

(*p*) *Ex parte Naden, Re Wood*, L. R. 9 Ch. 670; *Ex parte Peacock, Re Duffield*, L. R. 8 Ch. 682.

(*q*) *Ex parte Llynvi C. & I. Co.*, L. R. 7 Ch. 28; *Ex parte Waters*, L. R. 8 Ch. 562; *Robinson* v. *Ommanney*, 23 Ch. D. 285.

(*r*) B. A. 1883, s. 37, sub-ss. (1) and (3); *Emma Silver Mining Co.* v. *Grant*, 17 Ch. D. 122; *Jack* v. *Kipping*, 9 Q. B. D. 113.

(*s*) *Ex parte Pyke, Re Lister*, 8 Ch. D. 754; *Ex parte Rogers*, 15 Ch. D. 207.

(*t*) *Re Mercantile Marine Assurance Co.*, 25 Ch. D. 415.

(*u*) *Ex parte Pottinger, Re Stewart*, 8 Ch. D. 621.

(*x*) *Ex parte Brymer*, Co. B. L. 165; *Cowley* v. *Dunlop*, 7 T. R. 565; *Ex parte Bartlett*, 3 De G. & J. 378; *Ex parte Hayward*, L. R. 6 Ch. 546; *Ex parte Newton*, 16 Ch. D. 330. As to the right of voting, see B. A. 1883, Sched. I. rr. 11, 12, in Appendix.

(*y*) *Jones* v. *Gordon*, 2 App. Cas. 616.

(*z*) *Re Bowness*, Co. B. L. 162.

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cash balance on the one side or the other can be proved for (*a*). A party who has negotiated a bill of exchange cannot prove against the acceptor's estate, unless he takes up the bill (*b*). A surety can only prove against his co-surety's estate if he has paid more than his proportion of the debt (*c*). Persons who have made loans under Bovill's Act, without becoming partners (*d*), and married women who have lent money to their husbands, cannot prove at all until the other creditors have been paid in full (*e*).

There are certain debts directed to be paid in priority to all others, viz. :—

All parochial or other local rates due from the bankrupt at the date of the receiving order, and having become due and payable within twelve months next before such time, and all assessed taxes, land tax, property or income tax, assessed on him up to the 5th day of April next before the date of the receiving order, and not exceeding in the whole one year's assessment (*f*) ;

All wages or salary of any clerk or servant in respect of services rendered to the bankrupt during four months before the date of the receiving order, not exceeding 50*l.* (*g*) ;

All wages of any labourer or workman, not exceeding 25*l.*, whether payable for time or piece-work, in respect of services

(*a*) *Ex parte Walker*, 4 Ves. 373 ; *Ex parte Macredie, Re Charles*, L. R. 8 Ch. 535 ; *Ex parte Cama, Re London, Bombay, and Mediterranean Bank*, L. R. 9 Ch. 686. As to outstanding acceptances, see *Ex parte Solarte*, 2 D. & C. 261 ; *Ex parte Newton, Re Bunyard*, 16 Ch. D. 330.

(*b*) *Ex parte Macredie*, L. R. 8 Ch. 535 ; *Ex parte Mann*, 5 Ch. D. 367.

(*c*) *Ex parte Snowdon*, 17 Ch. D. 44 ; as to the rights of a surety who has paid the debt as regards the estate of the principal debtor, see *Ex parte Rushworth*, 10 Ves. 409 ; *Gray* v. *Seckham*, L. R. 7 Ch. 680 ; *Ellis* v. *Emmanuel*, 1 Ex. D. 157 ; *Duncan, Fox & Co.* v. *N. & S. Wales Bank*, 6 App. Cas. 1 ; *Ex parte National Provincial Bank, Re Rees*, 17 Ch. D. 98.

(*d*) 28 & 29 Vict. c. 86, s. 5, in Appendix. See supra, p. 14.

(*e*) *Ex parte District Bank*, 16 Q. B. D. 700 ; *Ex parte Taylor, Re Grason*, 12 Ch. D. 366 ; 45 & 46 Vict. c. 75, s. 3 ; *Ex parte Fox*, L. R. 17 Q. B. D. 4 ("four months before," that is, next before).

(*f*) 51 & 52 Vict. c. 62, s. 1, sub-s. 1 (a) ; *In re Thomas, Ex parte Ystradfodwg Local Board*, 4 Morrell, 295.

(*g*) 51 & 52 Vict. c. 62, s. 1, sub-s. 1 (b).

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rendered to the bankrupt during two months before the date of the receiving order (*h*).

These will be paid in full forthwith. They are a first charge on goods distrained by the landlord. But if the property is insufficient to meet them, the debts of such creditors will abate in equal proportions between themselves (*i*). A labourer in husbandry who has contracted for a lump sum at the end of the year of hiring will have priority as to the whole sum, or as to such proportionate part as the Court may decide to be the proportion due for services to the date of the receiving order (*j*). There are also provisions giving preferential claims to apprentices and articled clerks of the bankrupt (*k*). With the above exceptions, and with the exception of priorities under the Friendly Societies Act, 1875 (*l*), and of the postponement of certain debts by virtue of Bovill's Act as to loans by persons not partners (*m*), and the Married Women's Property Act (*n*), all provable debts are paid *pari passu* (*o*).

There remains to be considered proof for interest and for costs. With respect to *interest*, the general rule was that no interest was provable, save that which was reserved by contract (*p*). Now, however, it is provided that on any debt or sum certain, payable at a certain time or otherwise, whereon interest is not reserved or agreed for, and which is overdue at the date of the receiving order and provable in bankruptcy, interest may be proved for not exceeding 4 per cent. per annum to the date of the order from the time the debt or sum is payable, if payable under a written instrument at a certain time, and if not, from the time when written notice has been given to the

(*h*) 51 & 52 Vict. c. 62, s. 1, sub-s. 1 (c).

(*i*) 51 & 52 Vict. c. 62, s. 1, sub-ss. 2, 3, 4.

(*j*) 51 & 52 Vict. c. 62, s. 1, sub-s. 1 (c).

(*k*) B. A. 1883, s. 41.

(*l*) 38 & 39 Vict. c. 60; B. A. 1883, s. 40, sub-s. 6.

(*m*) 28 & 29 Vict. c. 86, s. 5; B. A. 1883, s. 40, sub-s. 6.

(*n*) 45 & 46 Vict. c. 75, s. 3; B. A. 1883, s. 152.

(*o*) B. A. 1883, s. 40, sub-s. 4.

(*p*) *Ex parte Furneaux*, 2 Cox, 219; *Ex parte Hankey*, 3 Bro. C. C. 504; *Ex parte Williams*, 1 Rose, 399; *Ex parte Brooke*, cited 12 Ves. 128; *Dornford* v. *Dornford*, 12 Ves. 127; *Bromley* v. *Goodere*, 1 Atk. 79; *Ex parte Bennett*, 2 Atk. 527; *Ex parte Furber*, 17 Ch. D. 191.

debtor claiming interest (*q*). Interest after the receiving order can only be given if there is a surplus (*r*). Remedies of creditors.

Costs.—As the law formerly stood, costs in equity could not be proved unless taxed at the time of the bankruptcy (*s*). With respect to costs at law in actions *ex contractu*, where the debt for which the action was brought was originally provable, and the bankruptcy had occurred after verdict though before judgment, the costs *de incremento* are said to have been provable, being considered as incorporated by the verdict with the original debt, although not ascertained till judgment (*t*); and where interlocutory judgment had been signed against the drawer of a bill, who became bankrupt before a bill to compute had been carried out and costs taxed, the plaintiff was allowed to prove for the costs, the amount of the bill having been paid by the acceptor (*u*). But where the verdict was not obtained till after bankruptcy, the costs were not provable (*v*). Now, however, a liability to pay costs accruing from debts or demands for unliquidated damages arising by reason of a contract or promise before the date of the adjudication, or to which the bankrupt may even become subject during the continuance of the bankruptcy, by reason of any obligation incurred previously to that date, appears to be provable (*w*). But in actions *ex delicto*, in case of a bankruptcy before judgment, though after verdict, there being no debt with which the costs could be incorporated, they could not be proved (*x*). And now, if judgment have not been signed before the adjudication in actions of tort or for

(*q*) B. A. 1883, Sched. II., r.20; *Re European Central Rail. Co.*, 4 Ch. D. 33; *Ex parte Fewings, Re Sneyd*, 25 Ch. D. 338.

(*r*) B. A. 1883, s. 40, sub-s. 5; *Ex parte Bath, Re Phillips*, 22 Ch. D. 450; 27 Ch. D. 509.

(*s*) Co. B. L. 195; *R.* v. *Davis*, 9 East, 318; *Ex parte Eicke*, 1 G. & J. 261.

(*t*) See *Ex parte Poucher*, 1 G. & J. 385; *Aylett* v. *Harford*, 2 W. Bl. 1317; *Ex parte Helm*, 1 Mont. & M. 70.

(*u*) *Ex parte Cocks*, De G. 446.

(*v*) *Ex parte Hill*, 11 Ves. 646; *Southgate* v. *Saunders*, 5 Exch. 565. But see *Simpson* v. *Mirabita*, L. R. 4 Q. B. 257.

(*w*) *Ex parte Peacock, Re Duffield*, L. R. 8 Ch. 682.

(*x*) *Ex parte Newman, Re Brooke*, 3 Ch. D. 494; *Buss* v. *Gilbert*, 2 M. & S. 70. See *Ex parte Poucher*, 1 G. & J. 385; *Biré* v. *Moreau*, 4 Bing. 57; *Oxlade* v. *N. E. R. Co.*, 15 C. B. N. S. 695.

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demands in the nature of unliquidated damages arising otherwise than by reason of some contract or promise, proof cannot be made for costs. But if judgment has been signed before adjudication the costs may be proved as part of the judgment (*y*). So where an action was compromised, the defendant apologising and agreeing by rule of Court to pay the plaintiff's costs, it was held that the Master's allocatur rendered these costs provable under the defendant's bankruptcy, which afterwards took place (*z*); and so were interlocutory costs held provable which were awarded and taxed against the bankrupt for not proceeding to trial before his bankruptcy (*a*). Proof may be made for costs before taxation if the creditor swear to a certain amount "and upwards" (*b*).

Partnership Debts.—There are some peculiar considerations applicable to the proof of debts where a firm has wholly or in part become involved in bankruptcy. These considerations relate either to demands by third persons against the firm or some of its members, or else to demands made by the partners or their respective representatives against each other. We will consider these two cases successively; and, first, with respect to demands by third persons upon a partnership or its individual members.

All the partners in a firm may become bankrupt together, or some or one only may become bankrupt, the rest remaining solvent. For acts of bankruptcy are, we have seen, not to be raised by implication, and a partner cannot become a bankrupt unless he personally commit an act of bankruptcy (*c*); therefore, when the resident partner in a bank shut up the house and absented himself and the bank stopped payment, this was held evidence of his own bankruptcy, not of that of the non-resident partner (*d*). Of course the separate creditor of one partner

(*y*) *Ex parte Newman, Re Brooke*, 3 Ch. D. 494.

(*z*) *Riley* v. *Byrne*, 2 B. & Ad. 779; *Ex parte Harding, Re Pickering*, 5 De G. M. & G. 367.

(*a*) *Jacobs* v. *Phillips*, 1 C. M. & R. 195.

(*b*) *Ex parte Ruffle, Re Dummelow*, L. R. 8 Ch. 997. See *Ex parte Ditton, Re Woods*, 13 Ch. D. 318.

(*c*) See ss. 115, 148, rr. 259—264.

(*d*) *Mills* v. *Bennett*, 2 M. & S. 555; *Ex parte Mayor*, 19 Ves. 538. For cases where the whole firm became

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cannot present a joint petition (*e*), but we have seen that a creditor of the firm may present a joint petition against all the partners, or against one or more of the partners without including the others (*f*). Where a receiving order has been made against one partner, a petition against another partner is to be filed in or transferred to the same Court, and the same receiver or trustee shall be appointed, unless it be otherwise ordered, and the proceedings may be consolidated (*g*). A receiving order against a firm will operate as a receiving order against each of the persons who was a partner at the date of the order (*h*); and no order of adjudication is to be made in the firm name, but it must be made individually against the partners (*i*).

Where the whole firm has become bankrupt and a petition has been presented by or against it, the whole of the joint property of the firm, and of the separate property of each of its members, is to be administered and passes to the trustee (*j*). But under a separate bankruptcy the property to be administered consists of the separate estate of the bankrupt, together with such part of the joint property as the bankrupt himself would be entitled to (*k*). And as the bankruptcy occasions a dissolution of the partnership, the trustee of the bankrupt partner becomes tenant in common with the solvent partner of the partnership effects, and holds the bankrupt's undivided share thereof, subject to the state of the partnership accounts (*l*).

bankrupt, see *Speneer* v. *Billing*, 3 Camp. 310; *Capper* v. *Desanges*, 3 Moore, 4; *Deffle* v. *Desanges*, 8 Taunt. 671; *Ex parte Gardner*, 1 V. & B. 74; *Eckhardt* v. *Wilson*, 8 T. R. 140; *Dutton* v. *Morrison*, 17 Ves. 193.

(*e*) *Prosser* v. *Smith*, Holt, 442.

(*f*) B. A. 1883, ss. 110, 115.

(*g*) B. A. 1883, s. 112. *Ex parte Green*, 3 De G. & J. 50; *In re Trott*, 7 L. T. N. S. 699.

(*h*) B. R. 1886, r. 262.

(*i*) B. R. 1886, r. 264, and see generally, rr. 259—270.

(*j*) See *Ex parte Cook*, 2 P. Wms. 500; *Ex parte Baudier*, 1 Atk. 98; *Hague* v. *Rolleston*, 4 Burr. 2174; *Jervis* v. *Tayleur*, 3 B. & Ald. 557.

(*k*) *Horsey's case*, 3 P. Wms. 23; *Eddie* v. *Davidson*, Dougl. 627; *Bolton* v. *Puller*, 1 B. & P. 539; *Barker* v. *Goodair*, 11 Ves. 85.

(*l*) *West* v. *Skip*, 1 Ves. sen. 239; *Fox* v. *Hanbury*, Cowp. 445; *Taylor* v. *Field*, 4 Ves. 396; *Smith* v. *Stokes*, 1 East, 363; *Smith* v. *Oriel*, 1 East, 368; *Holderness* v. *Shackels*, 8 B. & C. 612; *Lewis* v. *Edwards*, 7 M. & W. 300; *Morgan* v. *Marquis*, 9 Exch. 145; *Ex parte Gordon*, *Re Dixon*, L. R. 8 Ch. 555; *Ex parte Owen*, 13 Q. B. D. 113; *Turquand* v. *Board of Trade*, 11 App. Cas. 286.

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Hence it follows that, in case of the bankruptcy of part of an entire firm, it is necessary to take an account of the whole state of the partnership affairs, in order to ascertain *what* is to be administered (*m*); and in case of the bankruptcy of an entire firm it is also, as we shall immediately see, necessary to take such an account, in order to ascertain *how* the assets are to be administered (*n*). For the rule as to the application of joint and separate property to the payment of creditors is, that the joint estate shall be applied to the joint debts, the separate to the separate debts, and the surplus of each reciprocally to the creditors remaining on the other (*o*).

This rule was qualified by some exceptions which established that in the following cases (*p*) a joint creditor might prove against the separate estate *pari passu* with the separate creditors. Whether these exceptions now exist is doubtful (*q*).

First. A joint creditor who was the petitioning creditor in a separate petition might so prove, for the petition was in the nature of an execution for his debt against the separate estate of the bankrupt partner (*r*), and this held, though he might have a separate debt due to him sufficient to support the petition, as well as the joint debt (*s*). But it was otherwise where a joint creditor presented a petition against A. as surviving partner of B., for then the above reason ceased to apply (*t*).

Secondly. Joint creditors might prove against the separate estate, where there was no joint estate *and* no solvent partner (*u*).

(*m*) B. R. 1886, r. 293.

(*n*) See *Ex parte Elton*, 3 Ves. 238; *Barker* v. *Goodair*, 11 Ves. 85; *Dutton* v. *Morrison*, 17 Ves. 193; *Ex parte Farlow*, 1 Rose, 421.

(*o*) B. A. 1883, s. 40, sub-s. 3; *Ex parte Cook*, 2 P. Wms. 500; *Ex parte Elton*, 3 Ves. 238; *Ex parte Wilson*, 3 M. D. & De G. 57. See *Ex parte Clay*, 6 Ves. 814; *Ex parte Alcock*, 11 Ves. 603; *Ex parte Taitt*, 16 Ves. 193; *Ex parte Wood*, 2 M. D. & De G. 283; *Ex parte Christie*, 3 M. D. & De G. 736; *Ex parte Dear*, 1 Ch. D. 514; *Re Collie*, 3 Ch. D. 481.

(*p*) As to double proof in cases of breach of trust, see *Ex parte Barnewall*, 6 De G. M. & G. 801, Id. 795.

(*q*) See ss. 40 (3), 59.

(*r*) *Ex parte Hall*, 9 Ves. 349; *Ex parte Aekermann*, 14 Ves. 604; *Ex parte De Tastet*, 1 Rose, 10.

(*s*) *Ex parte Burnett*, coram Lord *Lyndhurst*, C., on appeal 2 M. D. & De G. 357.

(*t*) *Ex parte Barned*, 1 G. & J. 309.

(*u*) *Ex parte Sadler*, 15 Ves. 52; *Ex parte Machell*, 2 V. & B. 216. See *Ex parte Wylie*, 2 Rose, 393; *Ex parte Nolte*, 2 G. & J. 295. See *Lodge* v.

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These two conditions must have been strictly observed, for the exception did not apply if there were a joint estate, however small (*v*), unless it were utterly incapable of being realized (*w*); nor if there were a solvent partner, *i.e.*, a partner who had not become bankrupt, even though there was no joint property (*x*), unless, indeed, it were impossible that he should be reached (*y*); the principle being, that, while there is any other fund, however small, to which they might resort, the joint creditors cannot compete with the separate ones.

Thirdly. Where there were no separate debts, or, which is the same thing, where the joint creditors undertook to pay them (*z*).

However, though the above are the rules respecting proof in order to a dividend, if a receiving order is made against one partner, any creditor of the firm may prove for the purpose of voting (*a*).

Where there are distinct contracts on which the bankrupt is liable, either as a member of two or more distinct firms, or as a sole contractor, and also as a member of a firm, proof may be made against the several estates liable in respect of such contracts (*b*). Thus, W. P., one of the firm of P. & P., placed trust funds in the hands of P. & P., and the firm wrongfully converted the money, it was held that, as the partners were jointly and severally liable, the proof might be made against both the joint and separate estate.

Proof between Partners.—The next case to be considered is

Prichard, 32 L. J. Chanc. 775. If a judgment had been obtained against one only, then he must have proved on that estate alone: *Ex parte Higgins*, 27 L. J. Bkcy. 27.

(*v*) *Ex parte Peake*, 2 Rose, 54; *In re Lee*, Ibid. n.; *Ex parte Kennedy*, 2 De G. M. & G. 228.

(*w*) Per Lord *Eldon*, 2 Rose, 54; *Ex parte Hill*, 2 B. & P. N. R. 191, n.

(*x*) *Ex parte Kenenington*, 14 Ves. 447; *Ex parte Janson*, 3 Madd. 229; Buck, 227. See *Ex parte Bauerman*, 3 Deac. 476. And this doctrine applies to the case of co-contractors as well as of partners: *Ex parte Field*, 3 M. D. & De G. 95.

(*y*) See *Ex parte Pinkerton*, 6 Ves. 814, n.

(*z*) *Ex parte Chandler*, 9 Ves. 35; *Ex parte Hubbard*, 13 Ves. 424.

(*a*) B. A. 1883, Sched. I., r. 13.

(*b*) B. A. 1883, Sched. II., r. 18. See *Ex parte Honey, Re Jeffery*, L. R. 7 Ch. 178; *Ex parte Stone, Re Welsh*, L. R. 8 Ch. 914; *Ex parte Wilson, Re Douglas*, L. R. 7 Ch. 490; *Banco de Portugal* v. *Waddell*, 5 App. Cas. 161; *Ex parte Shephard, Re Parker*, 4 Morrell, 135.

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that of demands by partners or their representatives upon each other. It sometimes happens, that a partner is indebted to the firm, or the firm to one of its partners; in such case, the rule is, that an individual partner cannot prove against the joint estate in competition with the joint creditors; for, as they are his own creditors also, he has no right to withdraw any part of the funds available for the payment of their debts, unless his separate estate has been fraudulently converted to the use of the joint estate (*c*), and the executor of a deceased partner is in no better position (*d*). But the rule only applies if a joint debt has been actually proved (*e*). Nor can those partners of a firm who remain solvent prove against the separate estate of a member of that firm, in competition with his separate creditors, unless the joint creditors be first paid twenty shillings in the pound and interest; for they might, by doing so, prevent a surplus of the separate estate from accruing, which surplus would be available towards payment of the joint creditors (*f*). Indeed, if the solvent partner will pay all the joint debts, he may then prove against the separate estate in competition with the separate creditors of his bankrupt copartner (*g*). But to bring him within this class of creditors, there must have been an actual satisfaction of the joint debts, either by payment of the whole, or part in discharge of the whole. Nothing less will be sufficient (*h*).

Where a solvent partner pays all the joint debts, and proves

(*c*) *Ex parte Ellis*, 2 Gl. & J. 312; *Ex parte Blyth*, 16 Ch. D. 620; *Ex parte Sillitoe*, 1 Gl. & J. 374; conversely where joint estate has been fraudulently converted into separate estate: *Read* v. *Bailey*, 3 App. Cas. 94.

(*d*) *Ex parte Carter*, 2 Gl. & J. 233; *Nanson* v. *Gordon*, 1 App. Cas. 195.

(*e*) *Ex parte Andrews*, *Re Wilcoxon*, 25 Ch. D. 505; *Re Hepburn*, *Ex parte Smith*, 14 Q. B. D. 394.

(*f*) *Ex parte Reeve*, 9 Ves. 588; *Ex parte Ogle*, Mont. 350; *Ex parte Broome*, 1 Rose, 69; *Ex parte Rawson*, Jac. 277; Co. B. L. 503, 505; *Ex parte Collings*, 33 L. J. Bktcy. 9; *Ex parte Maude*, L. R. 2 Ch. 550.

(*g*) *Ex parte Bass*, 36 L. J. Bktcy. 39. But see an exception, *Ex parte Topping*, 34 L. J. Bktcy. 13; *Ex parte Watson*, 4 Madd. 477; *Wood* v. *Dodgson*, 2 M. & S. 195; *Aflalo* v. *Fourdrinier*, 6 Bing. 306; *Ex parte King*, 17 Ves. 115; *Ex parte Rix*, Mont. 237; *Ex parte Taylor*, 2 Rose, 175; *Ex parte Young*, 2 Rose, 40; 3 V. & B. 31.

(*h*) *Ex parte Moore*, 2 G. & J. 166; *Ex parte Carter*, 2 G. & J. 233; *Ex parte Ellis*, 2 G. & J. 312; *Ex parte Collinge*, 33 L. J. Bktcy. 9; *In re Dixon*, L. R. 10 Ch. 160.

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against the separate estates of his copartners (more than one having become bankrupt) for the respective sums each is bound to contribute, it has been made a question whether, if the estate of one of the bankrupts is insufficient to pay his share of the debts, the solvent partner can come upon the other bankrupt's estates for his proportion of the deficiency. Sir *John Leach* decided in the negative (*i*), on the ground that proof is equivalent to payment; and, therefore, that the solvent partner, having proved for each bankrupt's whole quota, must be regarded as having been paid it. Lord *Eldon* dissented from this case (*k*), and from the reason on which it was founded, saying, he agreed that proof was equivalent to payment when it produced payment, but doubted whether it was payment when it produced nothing.

Proof between Estates.—In analogy to the rule above stated, it is also held, that where all the members of a firm become bankrupt, the separate estate of one partner cannot claim against the joint estate of the firm in competition with joint creditors; nor the joint estate against the separate estate in competition with separate creditors (*l*). Where money or effects have been fraudulently abstracted from one estate to benefit the others, there is, as we have seen, an exception: for instance, if one partner were, in violation of the partnership articles, to draw more than his share out of a bank in which the money of the firm had been deposited, the sum so drawn by him in fraud of the partnership articles would be considered in the light of property stolen from the joint estate, and would be provable by the joint estate against his separate estate, the question, whether a case be one of fraud, of course, depending upon its peculiar circumstances (*m*).

(*i*) *Ex parte Watson*, Buck, 449; *Ex parte Smith*, Id. 492.

(*k*) *Ex parte Hunter*, Buck, 552; *Ex parte Moore*, 2 G. & J. 166.

(*l*) *Ex parte Burrell*, *Ex parte Pine*, Co. B. L. 532; *Ex parte Grill*, Id. 534; *Ex parte Ogle*, Mont. 350.

(*m*) *Ex parte Cust*, Co. B. L. 535. See *Ex parte Harrie*, 2 V. & B. 210; *Ex parte Emly*, 1 Rose, 61; *Ex parte Aesignees of Lodge and Fendall*, 1 Ves. jun. 166; *Ex parte Yonge*, 3 V. & B. 31; *Ex parte Smith*, 1 G. & J. 74; *Ex parte Watkins*, Mon. & Mac. 57. See also *Ex parte Graham*, 2 M. D. & De G. 781; *Ex parte Walker*, 31 L. J.

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Where one or more members of a firm carry on a distinct trade, proof will be admitted between the estates of the general and particular firm *pari passu* with the creditors, when the debt sought to be proved is for goods furnished in the same way as if they had been wholly unconnected in trade, by the one firm to the other (*n*), at least if the estate, against which proof is admitted, is not liable with that of the firm proving to any joint debts. But, excepting in the case of bankers (*o*), this rule will not be applicable where the debt has arisen only from money advanced by the one firm to the other (*p*).

By sect. 3 of the Married Women's Property Act, the claim of a wife for money lent to her husband for purposes of trade or business carried on by him, or otherwise, is postponed until the claims of all other creditors for value are satisfied. But she may, it would seem, receive a dividend concurrently with other creditors where the money has been lent for private purposes (*q*).

Contributions between Estates.—As there may be proof between estates, so there may be contribution between them, where one has been subjected to an undue proportion of a charge, which ought to have fallen equally on both (*r*).

(B.) *Remedies without Proof.*

Having now touched on the principal rules concerning *proof*, let us proceed to notice certain cases in which the creditor has a remedy without proving. Under this head we comprehend the cases, 1. of a creditor who owes to the bankrupt's estate a debt

Bktcy. 69; *Read* v. *Bailey*, 3 App. Cas. 94.

(*n*) B. R. 1886, r. 269; *Cases of Shakeshaft, Stirrup, and Salisbury*, 6 Ves. 123, 743, 747; *Ex parte Hargreaves*, 1 Cox, 440; *Ex parte St. Barbe*, 11 Ves. 413; *Ex parte Johns*, Co. B. L. 538; *Ex parte Castell*, *Ex parte Stroud*, 2 G. & J. 124, at p. 127; *Ex parte Sillitoe*, 1 G. & J. 374; *Ex parte Cook*, Mont. 228; *Ex parte Williams*, 3 M. D. & De G. 433; *Ex parte Maude*, L. R. 2 Ch. 550; *Ex parte Glidden*, 13 Q. B. D. 43.

(*o*) *Ex parte Castell*, ubi sup. But the case of bankers will only form an exception where money has been advanced by them in the course of their business as such: *Ex parte Williams*, ubi sup.

(*p*) *Ex parte Sillitoe*, ubi supra.

(*q*) *Ex parte Tidswell*, *In re Tidswell*, 4 Morrell, 219.

(*r*) *Ex parte Willock*, 2 Rose, 392; *Ex parte Wylie*, Id. 393. See *Rogers* v. *Mackenzie*, 4 Ves. 752. As to costs, see B. R. 1886, r. 128.

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which is entitled to set off against his demand upon it. 2. Of a creditor who is in possession of a security or lien upon some portion of the bankrupt's property. 3. That of a landlord availing himself of his right of distress in order to obtain payment of his rent. We will consider these in order.

1. *Set-off.*—Sect. 38 of the Bankruptcy Act, 1883, provides that:—

"Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall be made under this Act and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had, at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor, and available against him."

It will be perceived that the right of set-off given by this section is not confined to cases where there are *mutual debts*, but comprehends cases of *mutual credits*, including not only pecuniary demands, but also cases where that which will terminate in a debt exists on both sides (*s*), and the still wider class of "*other mutual dealings*" (*t*). And if the credit given

(*s*) *Gibson* v. *Bell*, 1 Bing. N. C. 743; *Rose* v. *Hart*, 8 Taunt. 449; *Groom* v. *West*, 8 Ad. & E. 758; *Eaeum* v. *Cato*, 5 B. & Ald. 861, *Smith* v. *Hodson*, 4 T. R. 211; *Hankey* v. *Smith*, 3 T. R. 507; *Ex parte Prescott*, 1 Atk. 230; *Olive* v. *Smith*, 5 Taunt. 56; *Ex parte Deeze*, 1 Atk. 228; *Atkinson* v. *Elliott*, 7 T. R. 378; *Naoroji* v. *Chartered Bank of India*, L. R. 3 C. P. 444; *Astley* v. *Gurney*, L. R. 4 C. P. 714; *Young* v. *Bank of Bengal*, 1 Moo. P. C. C. 150.

(*t*) See, as to what claims fall within these words, *Krehl* v. *Great Central S. C.*, L. R. 5 Ex. 289. See *Makeham* v. *Crow*, 15 C. B. N. S. 847; *Booth* v. *Hutchinson*, L. R. 15 Eq. 30; *Peat* v. *Jones*, 8 Q. B. D. 147; *Jack* v. *Kipping*, 9 Q. B. D. 113; *Mersey Steel and Iron Co.* v. *Naylor*, 9 App. Cas. 434; *Ex parte Price*, *Re Lankester*, L. R. 10 Ch. 648; *Re Winter*, *Ex parte Bolland*, 8 Ch. D. 225; *Ex parte Keys*, 25 Ch. D. 587; *Ex parte Caldicott*, *Re Hart*, 25 Ch. D. 716; *Ex parte Morier*, *Re Willis*, *Percival & Co.*, 12 Ch. D. 491; *Eberle's Hotels and Restaurant Co.* v. *Jonas*, 18 Q. B. D. 459. At p. 465, *Brett*,

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by the bankrupt existed before the bankruptcy, or before notice of an act of bankruptcy available for adjudication, it is sufficient, although the debt to the bankrupt's estate arising from such credit may not have accrued till afterwards (*u*). Whoever takes a bill is to be considered as giving a credit to the acceptor, and whoever takes a note, a credit to the maker (*x*). But, under the terms mutual debts and mutual credits in a similar provision, it was held otherwise where a bill was deposited with the party who attempted to set it off, not in order to create a debt, but for some specific purpose (*y*); and that no case was within those in which there was not either a debt, or something which was, from its nature, likely to end in a debt (*z*). It was further held that the Act (*a*) did not authorize a set-off "where the debt, though *legally* due to the debtor from the bankrupt, was really due to him as a trustee for another, and, though recoverable in a cross-action, would not have been recovered for his own benefit" (*b*). But, on the other hand, a person who has an equitable debt due to him is as much entitled to set it off as a legal demand (*c*). Moreover, in order to constitute such a *mutuality* as this section intends, the debts from and to the bankrupt must be due *in the same right* (*d*). Thus, there can be no set-off between joint and separate debts (*e*). So

M. R., says, "In my opinion, wherever in the result the dealings on each side would end in a money claim, its provisions would be applicable."

(*u*) *Bittlestone* v. *Timmis*, 1 C. B. 389; *Hulme* v. *Mugglestone*, 3 M. & W. 30.

(*x*) Per *Bayley*, J., in *Collins* v. *Jones*, 10 B. & C. 777.

(*y*) *Key* v. *Flint*, 8 Taunt. 21. And see *Belcher* v. *Lloyd*, 10 Bing. 310; and *Forster* v. *Wilson*, 12 M. & W. 191; and the observations of *Parke*, B., in *Alsager* v. *Currie*, 12 M. & W. at p. 758.

(*z*) *Rose* v. *Sims*, 1 B. & Ad. 521; *Sampson* v. *Burton*, 2 B. & B. 82; *Rose* v. *Hart*, 8 Taunt. 499; *Ex parte Oekenden*, 1 Atk. 235; *Bell* v. *Carey*, 8 C. B. 887.

(*a*) 6 Geo. 4, c. 16, s. 50.

(*b*) *Forster* v. *Wilson*, 12 M. & W. 191, see p. 204; *Belcher* v. *Lloyd*, 10 Bing. 310; *De Mattos* v. *Saunders*, L. R. 7 C. P. 570; *Lackington* v. *Combes*, 6 Bing. N. C. 71; *De Pass* v. *Bell*, 10 C. B. N. S. 517; *Ex parte Kingston*, L. R. 6 Ch. 632.

(*c*) *Ex parte Deeze*, 1 Atk. 228; *Bailey* v. *Johnson*, L. R. 6 Ex. 279; 7 Ex. 263; *Elkin* v. *Baker*, 11 C. B. N. S. 526; *Thornton* v. *Maynard*, L. R. 10 C. P. 695; *Bailey* v. *Finch*, L. R. 7 Q. B. 34.

(*d*) *Ex parte Whitehead*, 1 G. & J. 39; *West* v. *Pryce*, 2 Bing. 455; *The New Quebrada Co.* v. *Carr*, L. R. 4 C. P. 651.

(*e*) *Ex parte Christie*, 10 Ves. 105; *Ex parte Twogood*, 11 Ves. 517; *Ex parte Ross*, Buck, 125.

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in an action by a trustee upon a note given to the bankrupt's wife *dum sola*, a debt due from the bankrupt cannot be set off (*f*); nor can a debt arising after bankruptcy to or from the trustee be set off against a debt from or to the bankrupt before bankruptcy (*g*), even though the debt on which the trustee claims, though arising after bankruptcy, was founded on a contract made by the bankrupt before bankruptcy (*h*). The set-off is equivalent to payment, and will put an end to a lien for a sum so set off (*i*).

The only qualification imposed on the right of set-off by sect. 38 of the Act of 1883 is contained in the words, "*but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had at the time of giving credit to the debtor notice of an act of bankruptcy committed by the debtor and available against him*" (*j*). Notice of the act of bankruptcy is, therefore, the criterion; so that where the defendant, in an action brought by the assignees of certain bankers, claimed to set off notes which he had industriously obtained after the bank had stopped payment, it was held that he had a right to do so, the notes having been taken before he knew of the commission of an act of bankruptcy (*k*). But a debtor to the firm was not allowed to set off notes which he had taken after notice that three out of four partners had committed acts of bankruptcy (*l*). The act of bankruptcy, too, of which the claimant had notice, must be "available," *i. e.*, it must have been committed within three months next before the presentation of the petition on which the receiving order is made, and during the subsistence of a sufficient debt. The mutual account ought, as a rule, to be taken down to the commencement of the bankruptcy (*m*), but if the act of bank-

(*f*) *Yates* v. *Sherrington*, 11 M. & W. 42.

(*g*) *West* v. *Pryce*, 2 Bing. 455; *Alloway* v. *Steere*, 10 Q. B. D. 22; *Sankey Brook Coal Co.* v. *Marsh*, L. R. 6 Ex. 185.

(*h*) *Ince Hall Rolling Mills Co.* v. *Douglas Forge Co.*, 8 Q. B. D. 179.

(*i*) *Ex parte Barnett*, L. R. 9 Ch. 293.

(*j*) B. A. 1883, s. 38.

(*k*) *Hawkins* v. *Whitten*, 10 B. & C. 217; *Dickson* v. *Cass*, 1 B. & Ad. 343. See also *Forster* v. *Wilson*, 12 M. & W. 191.

(*l*) *Dickson* v. *Cass*, 1 B. & Ad. 343.

(*m*) *Re Milan Tramways Co.*, 25 Ch. D. 587; *Re Gillespie, Ex parte Reid*, 14 Q. B. D. 963.

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ruptcy is secret, down to the time when the person claiming to set off had notice of it (*n*). It may be doubted whether any agreement can exclude the operation of this section (*o*).

The effect of this provision is to confer a much more comprehensive right of set-off than the party would otherwise have, and also to give effect to it, notwithstanding an available act of bankruptcy, if he had not notice of it.

2. *Securities and Liens on the Bankrupt's Property.*—There are certain cases in which a creditor is allowed to satisfy himself out of some part of the bankrupt's property on which he has obtained a security. These cases will be dealt with separately, first observing that the statute gives validity to many transactions entered into by or with a bankrupt before the date of the receiving order by a person dealing *bonâ fide*, and without notice of a prior available act of bankruptcy (*p*).

Executions.—To entitle a creditor to retain, as against the trustee, the benefit of an execution issued by him against the goods or land of a debtor, he must, before the receiving order, and before notice of the presentation of a petition by or against the debtor, or of the commission of any available act of bankruptcy by him, have completed his execution; *i.e.*, in the case of goods he must have seized and sold; and in the case of land, he must have seized (*q*).

As to what "seizure" is, there is sometimes doubt; the delivery of land in execution under a writ of *elegit* appears to be sufficient (*r*).

Although seizure and sale for any amount is an act of bankruptcy (*s*), the creditor will be entitled to retain the benefit of his execution; although an act of bankruptcy, the sale is valid (*t*).

(*n*) *Elliott* v. *Turquand*, 7 App. Cas. 79.

(*o*) *Ex parte Fletcher*, *Re Vaughan*, 6 Ch. D. 350; *Ex parte Barnett*, *Re Deveze*, L. R. 9 Ch. 293.

(*p*) B. A. 1883, s. 49; *Ex parte Holder*, 24 Ch. D. 339.

(*q*) B. A. 1883, s. 45; *Mackay* v. *Merrit*, 34 W. R. 433.

(*r*) *In re Hobson*, 33 Ch. D. 493. As to equitable executions, see *In re Dickson*, 6 Morrell, 1.

(*s*) B. A. 1883, s. 4, sub-s. (1) (e).

(*t*) B. A. 1883, s. 46, sub-s. (3); *Ex parte Villars*, *Re Rogers*, L. R. 9 Ch. 432.

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Mere notice that an available act of bankruptcy has been committed by the debtor is enough, though the creditor may not have notice of the particular act relied on (*u*); but this notice must be to the person on whose account the execution was issued; and notice to the sheriff's officer in possession under an execution is not equivalent to notice to him (*v*). Notice, however, to the solicitor, or his clerk or agent issuing, or having the conduct of the execution, is, it appears, sufficient (*x*).

A sheriff who has seized goods, and who has before sale been served with notice of a receiving order made against the debtor, must deliver the goods to the official receiver; and the costs of the execution will be a charge on them (*y*). If, however, the goods are sold in respect of execution on a judgment for a sum exceeding twenty pounds, the sheriff, after deducting costs, must retain the balance for fourteen days; and if within that time he is served with notice of a bankruptcy petition by or against the debtor, and the debtor is adjudged bankrupt on that or any other petition of which the sheriff has notice, he must pay such balance to the trustee instead of to the creditor (*z*).

The sale, as we have seen, is valid; and if no notice of a petition be served at the end of the fourteen days, the sheriff may hand over the proceeds to the creditor, who will be entitled to retain them (*a*), if he had not notice of any prior act of bankruptcy (*b*). The notice thus given should afford sufficient information to the sheriff that the person against whom the petition is presented is the execution debtor, and must be served on the sheriff or his recognized agent for such purpose (*c*). If, in order to prevent a seizure or a sale, the debtor pay money to

(*u*) *Ramsey* v. *Eaton*, 10 M. & W. 22; *Udal* v. *Walton*, 14 M. & W. 254; *Turner* v. *Hardcastle*, 11 C. B. N. S. 683.

(*v*) *Ramsay* v. *Eaton*, supra.

(*x*) *Bird* v. *Bass*, 6 M. & G. 143; *Rothwell* v. *Timbrell*, 1 Dowl. N. S. 778; *Pike* v. *Stephens*, 12 Q. B. 465; *Brewin* v. *Briscoe*, 2 E. & E. 116; *Pennell* v. *Stephens*, 7 C. B. 987.

(*y*) B. A. 1883, s. 46, sub-s. (1).

(*z*) B. A. 1883, s. 46, sub-s. (2).

(*a*) *Ex parte Villars, Re Rogers*, L. R. 9 Ch. 432; *Ex parte James*, L. R. 9 Ch. 609.

(*b*) *Ex parte Dawes*, L. R. 19 Eq. 438.

(*c*) *Ex parte Spooner*, L. R. 10 Ch. 168; *Ex parte Warren, Re Holland*, 15 Q. B. D. 48.

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the sheriff, with the assent of the creditor, the latter is entitled to it (*d*).

The creditor may abandon part of his claim, so as to avoid the operation of the section (*e*). The fourteen days are to be reckoned from the completion of the whole sale (*f*). An execution is not invalid by reason of its being an act of bankruptcy; and a purchaser in good faith of the goods under a sale by the sheriff in all cases acquires a good title against the trustee (*g*).

The provisions as to remedies against the property of a debtor are binding on the Crown (*h*).

Mortgages and Pledges.—A legal mortgage gives the mortgagee a right to retain the property mortgaged until his debt is satisfied, nor can the trustee redeem without paying interest up to the time of redemption (*i*). And an equitable mortgage by agreement, or by deposit of title deeds, is in like manner upheld in Courts of Bankruptcy (*j*). A mortgagee of leasehold premises is not affected by disclaimer (*k*).

In one case, where the bankrupt, not then being insolvent or in contemplation of insolvency, had given a voluntary bond, and had afterwards deposited title deeds as a security for the amount of the bond, Vice-Chancellor *Knight Bruce* held, that parties who had made the bond a subject of settlement were entitled to the benefit of the deposit (*l*). A pledge of personal property is

(*d*) *Stock* v. *Holland*, L. R. 9 Ex. 147; *Ex parte Brooke*, *Re Hassall*, L. R. 9 Ch. 301. See, however, *Ex parte Pearson*, *Re Mortimer*, L. R. 8 Ch. 667.

(*e*) *Ex parte Rega*, *Re Salinger*, 6 Ch. D. 332; *Re Hinks*, *Ex parte Berthier*, 7 Ch. D. 882; *Turner* v. *Bridgett*, 8 Q. B. D. 392; *Mostyn* v. *Stock*, 9 Q. B. D. 432.

(*f*) *Jones* v. *Parcell*, 11 Q. B. D. 430.

(*g*) B. A. 1883, s. 46, sub-s. (3).

(*h*) B. A. 1883, s. 150; *Ex parte Postmaster-General*, 10 Ch. D. 595; *Ex parte Commissioners of Woods and Forests*, 21 Q. B. D. 380.

(*i*) See *Ex parte Barnes*, 3 Deac. 223; *Ex parte Bignold*, Ibid. 121; 7 Vin. Abr. 100. As to the mode and terms by and on which a mortgagee may procure a sale of the property, see B. R. 1886, rr. 73—77.

(*j*) *Ex parte Orett*, 3 M. & A. 153; *Ex parte Whitbread*, 19 Ves. 209. But see *Ex parte Perry*, De Gex, 252; *Ex parte Rogers*, 25 L. J. Bank. 41; *Ex parte Littledale*, 24 L. J. Bank. 9; *Ex parte Union Bank of Manchester*, L. R. 12 Eq. 354.

(*k*) *Ex parte Watton*, 17 Ch. D. 746, 753.

(*l*) *Meggison* v. *Forster*, 2 Y. & C. C. C. 336.

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in the nature of a mortgage, and can only be redeemed by payment of the sum advanced upon it (*m*). Mortgages of personal chattels are generally effected by bills of sale, which are now subject to special enactments (*n*).

Liens.—A *lien*, such as we have described in the preceding chapter, is available against the trustee (*o*); so is a vendor's legal lien on a thing sold but not paid for, and his right of stoppage *in transitu* (*p*); so also is the equitable right of a vendor of real estate to a lien for his unpaid purchase-money (*q*) against the vendee, volunteers, purchasers with notice, or persons claiming equitable interests under the vendee (*r*).

An equitable assignment of an interest in personalty (not being a fraudulent preference) is available against the trustee. A distinction, however, must be drawn between an equitable assignment and a mere licence to seize (*s*). Where the agreement to assign does not come into existence till after bankruptcy, the creditor will get no title and be left to prove for breach of the contract to assign (*t*); but a charge on money earned before but not payable till after bankruptcy will be

(*m*) *Demandray* v. *Metcalf*, Prec. Chanc. 419; 2 Vern. 691; *Maughan* v. *Sharpe*, 17 C. B. N. S. 443.

(*n*) 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43.

(*o*) *Ex parte Underwood*, De Gex, 190. It would seem that a general lien on goods coming into the hands of a party before the fiat, without notice, was protected by Stat. 2 & 3 Vict. c. 29: *Bowman* v. *Malcolm*, 11 M. & W. 833. Neither a security arising by seizure of bills, notes, or bonds, under 1 & 2 Vict. c. 110, nor an order binding a debt under the garnishee clause of the Common Law Procedure Act, 1854, or the Rules of Court, 1883, constitutes a lien: *Holmes* v. *Tutton*, 5 E. & B. 65; *Tilbury* v. *Brown*, 30 L. J. Q. B. 46; *Wood* v. *Dunn*, L. R. 1 Q. B. 77; 2 Q. B. 73.

(*p*) *Ex parte Chalmers, Re Edwards*, L. R. 8 Ch. 289; *Valpy* v. *Oakeley*, 16 Q. B. 941; *Kendal* v. *Marshall & Co.*, 11 Q. B. D. 356; *Ex parte Miles, Re Isaacs*, 15 Q. B. D. 39.

(*q*) *Ex parte Loaring*, 2 Rose, 79; *Ex parte Peake*, 1 Mad. 346; *Ex parte Parkes*, 1 G. & J. 228; *Ex parte Dicken*, Buck, 115; *Rose* v. *Watson*, 33 L. J. Ch. 385.

(*r*) See Sugden, V. & P. Chap. 12; *Blackburne* v. *Gregson*, 1 Bro. C. C. 419.

(*s*) *Holyroyd* v. *Marshall*, 10 H. of L. Cas. 191; *Reeve* v. *Whitmore*, 33 L. J. Ch. 63; *Brown* v. *Bateman*, L. R. 2 C. P. 272; *Thompson* v. *Cohen*, L. R. 7 Q. B. 527; *Cole* v. *Kernot*, L. R. 7 Q. B. 534; *Clements* v. *Mathews*, 11 Q. B. D. 808; *Tailby* v. *Official Receiver*, 13 App. Cas. 523.

(*t*) *Collyer* v. *Isaacs*, 19 Ch. D. 342; *Ex parte Nichols, Re Jones*, 22 Ch. D. 782.

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good (*u*). If the assignment is conditional, and the condition has not happened before the bankruptcy, the assignment will be defeated by that event, and will not take effect even though the condition afterwards happen (*v*); and if the condition be the occurrence of a bankruptcy, it appears to be void as against public policy (*x*). With regard to money, the rule seems to be, that it is sufficient to render the assignment valid if the debt assigned be not larger than the sum due from the party assigning (*y*). But it would appear that a contract entered into by a bankrupt that certain of his goods should, *in case of his bankruptcy*, become the property of other persons, if they should so choose, would not be binding on his trustee, for that he cannot make a contract which would have the effect of vesting in others *after his bankruptcy* the property which *on* his bankruptcy had vested in his trustee (*z*).

The Bills of Sale Act, 1882 (*a*), renders a bill of sale void, as to all goods (save certain growing crops and substituted plant and machinery) which are not specifically described in the schedule thereto, or of which the grantor was not the true owner at the time of its execution.

3. *Distress.*—A landlord or other person to whom any rent is due from the bankrupt may distrain therefor either before or after the commencement of the bankruptcy (*b*). Debts, however, entitled to preferential payment are a first charge on the goods distrained or their proceeds (see ante, p. 739). If the distress is made after the commencement of the bankruptcy, it will only be available for one year's rent due prior to the adju-

(*u*) *Ex parte Moss, Re Toward*, 14 Q. B. D. 310.

(*v*) *Burn* v. *Carvalho*, 1 Ad. & E. 883.

(*x*) See *Tripp* v. *Armitage*, 4 M. & W. 687, per Ld. *Abinger*. But see *Ex parte Wright*, 2 Deac. 551.

(*y*) *Crowfoot* v. *Gurney*, 9 Bing. 372; *Tibbits* v. *George*, 5 Ad. & E. 107; *Hutchinson* v. *Heyworth*, 9 Ad. & E. 375; *Walker* v. *Rostron*, 9 M. & W. 411.

(*z*) Per Lord *Abinger* in *Tripp* v. *Armitage*, 4 M. & W. 687; *Whitmore* v. *Mason*, 2 J. & H. 204. But see *Hawthorne* v. *Newcastle and South Shields Rail. Co.*, 3 Q. B. 734, n.; *In re Waugh*, 4 Ch. D. 524; *Ex parte Newitt, Re Garrud*, 16 Ch. D. 522.

(*a*) 45 & 46 Vict. c. 43, ss. 4, 5, 6.

(*b*) Sect. 42 (1).

dication, and the landlord must prove for the surplus (*c*). The rent must be a real rent (*d*), although it may be one reserved by an attornment clause in a mortgage deed (*e*). A distress is not liable to be restrained (*f*). A company with statutory powers similar to those of a landlord may distrain in the same way as a landlord under this section (*g*). Remedies of creditors.

If the distress be made before the commencement of the bankruptcy, the landlord is, subject to the provisions of the Agricultural Holdings Act, 1883 (*h*), entitled to six years' rent, if so much be in arrear, though *the sale* be made after the tenant has been adjudged a bankrupt (*i*).

It has been held that if the goods distrained be a stranger's, the landlord may hold them as a security for more than a year's rent; inasmuch as the rent is not released by the bankrupt's discharge, and the bankrupt's discharge from it is merely personal (*k*). If, too, the landlord, having made a distress, withdraw from possession of the goods upon being paid the entire rent by a person who claims them under a bill of sale, the trustee cannot sue the landlord for money had and received (*l*).

Section VII.—*Official Receivers and Trustees.*

Official Receivers.—On the making of a receiving order, an official receiver of the debtor's property (*m*) is, as we have seen, Official receivers and trustees.

(*c*) B. A. 1883, s. 42. See, as to rent accruing due *after* the adjudication, *Ex parte Hale*, 1 Ch. D. 285.

(*d*) *Ex parte Williams, Re Thompson*, 7 Ch. D. 138; *Re Stockton Iron Furnace Co.*, 10 Ch. D. 335; *Ex parte Jackson, Re Bowes*, 14 Ch. D. 725; *Ex parte Voisey, Re Knight*, 21 Ch. D. 442.

(*e*) *Ex parte Punnett, Re Kitchin*, 16 Ch. D. 226; *Ex parte Queen's Benefit Building Society, Re Threlfall*, 16 Ch. D. 274; *Ex parte Voisey, Re Knight*, 21 Ch. D. 442; *In re Tryman's Estate*, 38 Ch. D. 468.

(*f*) *Ex parte Birmingham Gas Co., Re Fanshaw*, L. R. 11 Eq. 615.

(*g*) *Ex parte Birmingham Gas Co., Re Fanshaw*, supra; *Ex parte Harrisen, Re Peake*, 13 Q. B. D. 753; and see *Ex parte Hill, Re Roberts*, 6 Ch. D. 63.

(*h*) 46 & 47 Vict. c. 61, s. 44.

(*i*) *Ex parte Bayly*, 22 L. J. Bank. 26.

(*k*) *Brocklehurst* v. *Lawe*, 7 E. & B. 176. See *Newton* v. *Scott*, 9 M. & W. 434; 10 M. & W. 471. The words, too, of B. A. 1883, s. 42, are limited to the goods of the bankrupt.

(*l*) *Lackington* v. *Elliott*, 7 M. & G. 538.

(*m*) B. A. 1883, s. 9.

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appointed. Official receivers are officers of, and appointed by, the Board of Trade (*n*), who may also appoint deputies (*o*). Their duties relate both to the conduct of the debtor and the administration of his estate (*p*). As regards the debtor, the official receiver is to investigate his conduct, and report thereon to the Court, and to take part in his public examination, and in the prosecution of a fraudulent debtor (*q*). As regards the debtor's estate, the official receiver's duty is to act as trustee pending the appointment of trustee during any vacancy in the office of trustee; and, in small bankruptcies (*r*), to summon and preside at the first meeting, to issue proxies, to report to the creditors any proposal made by the debtor, and to advertise the receiving order, &c. (*s*). He has the powers of a receiver of the High Court. He is bound, as far as possible, to consult the wishes of creditors (*t*). He must assist the debtor in preparing his statements of affairs (*u*), and may, if he see fit, appoint a special manager of the estate, and authorize him to raise money (*v*), and apply to the Court without formality for directions (*w*). The costs and expenses to which he is put will be provided for out of the debtor's estate (*x*). He may make an allowance out of the estate for the subsistence of the debtor and his family (*y*). After adjudication, the official receiver possesses the powers of a trustee until one is appointed, and may, under s. 56 (1), sell any portion of the debtor's property (*z*).

Having seen towards the payment of what debts the bankrupt's property is applicable, let us inquire by whom it is to be collected, and in whom vested, for the purpose of such

(*n*) B. A. 1883, s. 66; B. R. 1886, r. 321.

(*o*) B. A. 1883, s. 67; B. R. 1886, r. 329.

(*p*) B. A. 1883, s. 68.

(*q*) B. A. 1883, s. 69.

(*r*) B. A. 1883, s. 70, sub-ss. 1 (a) and (g); s. 87, sub-s. 4; s. 121.

(*s*) B. A. 1883, s. 70, sub-ss. 1 (b) to (f).

(*t*) B. A. 1883, s. 70, sub-s. 2.

(*u*) B. R. 1886, rr. 324, 326; B. A. 1883, s. 70, sub-s. 2.

(*v*) B. A. 1883, ss. 12, 70, sub-s. 1 (b). The official receiver has complete discretion as to the appointment: *Re Whittaker*, 50 L. T. 510.

(*w*) B. R. 1886, rr. 332—334.

(*x*) See B. R. 1886, rr. 108, 125, 231, 339.

(*y*) B. R. 1886, r. 325.

(*z*) *Turquand* v. *Board of Trade*, 11 App. Cas. 286.

application. This brings us to the office, rights, and duties of the trustee.

Official receivers and trustees.

Trustees.—When the debtor is adjudged bankrupt, or the creditors have resolved on adjudication, they may by ordinary resolution, appoint a trustee (*a*). The trustee will have to give security to the Board of Trade, who may, subject to the decision of the High Court (*b*), object to the appointment. The Board of Trade will, if they do not object to the trustee, give him a certificate, which will be conclusive evidence of his appointment (*c*). They have power, in case of neglect by the creditors, to appoint a trustee, subject to the right of the creditors subsequently to appoint their own trustee in his place (*d*). The creditors have also the power to appoint a committee of inspection, consisting of not more than five or less than three persons chosen from the creditors entitled to vote, or the holders of general proxies or powers of attorney from such creditors (*e*). Joint trustees may be appointed; the creditors declaring whether any act is to be done by one or more of such persons. They will be joint tenants of the bankrupt's property. And persons may be appointed to act as trustees in succession in case of the one first named declining to act or failing to satisfy the Board of Trade (*f*).

The remuneration of the trustee will be fixed by an ordinary resolution of the creditors, and must be in the form of a percentage, half on the amount realized and half on the amount distributed in dividend (*g*). No vote of the trustee or his partner, clerk, solicitor, or solicitor's clerk, either as creditor or proxy, is to be reckoned in the majority required for passing any resolution affecting his remuneration or conduct (*h*). The Court may order any trustee who has solicited proxies or the office of trustee to be deprived of his remuneration (*i*). There are special provisions as to a trustee's costs (*k*), receipts, payments, and

(*a*) B. A. 1883, s. 21, sub-s. 1.
(*b*) B. A. 1883, s. 21, sub-ss. 2, 3.
(*c*) B. A. 1883, s. 21, sub-ss. 2, 4.
(*d*) B. A. 1883, s. 21, sub-ss. 6, 7.
(*e*) B. A. 1883, s. 22.
(*f*) B. A. 1883, s. 84.
(*g*) B. A. 1883, s. 72; B. R. 1886, rr. 305—307.
(*h*) B. A. 1883, s. 88.
(*i*) B. A. 1883, Sched I. r. 20.
(*k*) B. A. 1883, s. 73; B. R. 1886, rr. 108, 125.

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accounts (*l*), as to the books to be kept by him (*m*), the control which the creditors (*n*) and the Board of Trade (*o*) have over him, his release on the termination or resignation of his office (*p*), and his removal from office (*q*).

A trustee may sue and be sued in his official name (*r*). He may apply to the Court for directions (*s*). Any decision or act of his may be the subject of an appeal to the Court by any person aggrieved thereby (*t*).

A trustee has power to sell the property, give receipts, prove for any debt due to the bankrupt, exercise powers, and deal with property to which the bankrupt is beneficially entitled as tenant in tail (*u*). He may not, without leave of the Court, nor may any member of the committee of inspection, purchase the estate or any part of it (*x*). He has power further, but only with the leave of the committee of inspection given for the specific purpose in each case, to carry on the bankrupt's business, to bring or defend actions, to employ a solicitor or agent, to sell the property for a sum to be paid at a future time, to mortgage the property, to refer disputes to arbitration, and make compromises, and to divide property in its existing form among creditors. And it is his duty, as soon as may be, to take possession of the bankrupt's deeds, books, and documents, and all other parts of his property capable of manual delivery (*y*).

Interest of Trustee in Bankrupt's Property.—Such being the duties and rights of the trustee, it remains to ascertain about what *property* these duties and rights are to be exercised, and the manner in which it is to be dealt with.

Upon the debtor being adjudged bankrupt his property

(*l*) B. A. 1883, ss. 74—78, 81; B. R. 1886, rr. 285—296, 314.
(*m*) B. A. 1883, s. 80; B. R. 1886, rr. 285—288.
(*n*) B. A. 1883, s. 89; B. R. 1886, rr. 311, 319.
(*o*) B. A. 1883, s. 91.
(*p*) B. A. 1883, s. 82; B. R. 1886, rr. 292, 304, 309, 310.
(*q*) B. A. 1883, s. 86; B. R. 1886, rr. 302, 303.
(*r*) B. A. 1883, s. 83.
(*s*) B. A. 1883, s. 89, sub-s. 3; B. R. 1886, r. 213.
(*t*) B. A. 1883, s. 90.
(*u*) B. A. 1883, s. 56.
(*x*) B. R. 1886, r. 316.
(*y*) B. A. 1883, s. 50, sub-s. 1; s. 57; B. R. 1886, r. 349.

becomes divisible among his creditors and vests in the trustee (*z*). The property passes from trustee to trustee, including in this term the official receiver, and vests in the trustee for the time being without any conveyance, assignment, or transfer (*a*). Official receivers and trustees.

Let us therefore inquire—1st. What property of the bankrupt vests in the trustee. 2nd. What property, belonging at the time of the bankruptcy to other persons, vests in him.

The word "property" includes money, goods, things in action, land, and every description of property, whether real or personal, and whether situate in England or elsewhere; also, obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined (*b*). It is further provided that it shall comprise *all* such property as may belong to, or be vested in, the bankrupt at the commencement of the bankruptcy, or may be acquired by, or devolve on, him before his discharge, and the capacity to exercise, and take proceedings for exercising, all such powers in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of the bankruptcy, or before his discharge, except the right of nomination to a vacant ecclesiastical benefice (*c*). There are two exceptions—viz., of trust property, and tools, apparel and bedding—to which attention will be presently called.

We will now advert to some special portions of this property.

Estates Tail and Base Fees.—The trustee is entitled "to deal with any property to which the bankrupt is beneficially entitled as tenant in tail in the same manner as the bankrupt might have dealt with it; and sections 56 to 73 (both inclusive) of the Act of the session of the 3rd and 4th years of the reign of King William the Fourth, chapter 74, 'for the abolition of

(*z*) B. A. 1883, s. 20, sub-s. 1; s. 54, sub-s. 1.

(*a*) B. A. 1883, s. 54, sub-s. 3.

(*b*) B. A. 1883, s. 168, sub-s. 1; *Ex parte Rogers*, 16 Ch. D. 665.

(*c*) B. A. 1883, s. 44.

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fines and recoveries, and the substitution of more simple modes of assurance,' shall extend and apply to proceedings under this Act as if those sections were here re-enacted and made applicable in terms to those proceedings" (*d*).

Copyholds.—With regard to these, the statute enacts that, "where any part of the property of the bankrupt is of copyhold or customary tenure, or is any like property passing by surrender and admittance, or in any similar manner, the trustee shall not be compellable to be admitted to the property, but may deal with it in the same manner as if it had been capable of being and had been duly surrendered or otherwise conveyed to such uses as the trustee may appoint; and any appointee of the trustee shall be admitted to or otherwise invested with the property accordingly" (*e*).

Contingent Interests.—These pass under the express words contained in the statute; but the possibility of an heir during the lifetime of his ancestor does not (*f*). So the possibility of a husband becoming entitled as tenant by the curtesy to real property left contingently to his wife (*g*).

Advowsons—Benefices.—The advowson itself may be sold for the benefit of the creditors; but if the church fall void before the sale, the bankrupt shall present, for the law does not consider the void turn as of any pecuniary value (*h*), and the Act therefore excepts from its operation "the right of nomination to a vacant ecclesiastical benefice" (*i*). If the bankrupt be the incumbent he cannot be removed. The profits, however, of the living are rendered available for the payment of his creditors by sect. 52, which enables the trustee to obtain a sequestration of

(*d*) B. A. 1883, s. 56, sub-s. 5.

(*e*) B. A. 1883, s. 50, sub-s. 4.

(*f*) *Moth* v. *Frome*, Amb. 394. See *Carleton* v. *Leighton*, 3 Mer. 667; *Re Vizard's Trust*, L. R. 1 Ch. 588.

(*g*) *Gibbins* v. *Eyden*, L. R. 7 Eq. 371.

(*h*) Co. B. L. 297; *Ex parte Meymot*, 1 Atk. 200; *Gally* v. *Selby*, 1 Str. 403.

(*i*) B. A, 1883, s. 44.

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the profits of the benefice, subject to the right of the bishop to appoint a stipend to the bankrupt in respect of the performance of the duties of the benefice, and to the claim of any licensed curate for salary for duties performed during four months prior to the receiving order, not exceeding fifty pounds (*k*).

Officers—Half-pay—Pensions—Salary, &c.—Where the bankrupt is an officer in the army or navy, or an officer or clerk or civil servant of the Crown, the trustee may obtain an order for the payment to him of such portion of the bankrupt's pay or salary as the Court, with the concurrence of the chief officer of the department, may direct; and where he is in receipt of a salary or income other than these, or is entitled to any half-pay or pension, or compensation granted by the Treasury, the trustee may, in like manner, obtain an order for payment to him of such portion thereof as the Court may direct (*m*). Where the allowance is purely voluntary, the section does not apply.

Choses in Action.—The trustee takes all the bankrupt's choses in action and obligations as part of the bankrupt's property (*n*). He has thus a right to sue upon beneficial contracts made with the bankrupt, where pecuniary loss is the substantial and primary cause of action, and for injuries affecting his property, so far as they do not involve a claim for personal damages for which he would be entitled to a remedy whether his property was impaired or not (*o*). Under former statutes, which transferred to the assignees all the personal estate, effects, and debts due to the bankrupt, it was held that actions for mere personal wrongs (*p*), or breaches of contracts having relation to the bank-

(*k*) See *Hopkins* v. *Clarke*, 5 B. & S. 753.

(*m*) B. A. 1883, s. 53; *Ex parte Huggins*, 21 Ch. D. 85; *Ex parte Benwell, Re Hutton*, 14 Q. B. D. 301; *Ex parte Wicks*, 17 Ch. D. 70; *In re Webber*, 3 Morrell, 288.

(*n*) B. A. 1883, s. 44 (i), and sect. 168.

(*o*) *Rogers* v. *Spence*, 12 C. & F. 700; *Brewer* v. *Dew*, 11 M. & W. 625.

(*p*) *Wright* v. *Fairfield*, 2 B. & Ad. 727; *Hancock* v. *Caffyn*, 8 Bing. 358; *Porter* v. *Vorley*, 9 Bing. 93 (disapproved, *Ashdown* v. *Ingamells*, 5 Ex. D. 280); *Whitworth* v. *Davis*, 1 V. &

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rupt's person and the breach of what would affect him personally, and not by way of diminishing his personal estate, such, for instance, as a contract to marry him or to cure him of a wound or disease (*q*), or contracts from which his estate could derive no possible advantage, did not pass (*r*).

There are some cases in which the trustee may elect whether he will affirm a contract made with the bankrupt, and sue on it, or proceed in his own right in tort; for instance, where the defendant sold the bankrupt's goods after an act of bankruptcy, and with notice of it, the assignees in bankruptcy were allowed to sue for the price as money had and received to their use (*s*); but could also have sued in trover for the goods.

A trustee who carries out a contract of the bankrupt is entitled at any time, on finding it unprofitable, to cease to continue it; the other party to the contract being left to his remedy by proof for damages for the breach (*t*). Contracts involving the personal skill of the bankrupt (*u*), and, as a rule, his personal earnings (*x*), do not pass to the trustee, though the latter might possibly be made the subject of an order of the Court, as being salary or income (*y*). Personal earnings, however, of the bankrupt, arising from a trade carried on by him after bankruptcy, and before discharge, will, if the trustee chooses to interfere, and to that

B. 545; *Sloper* v. *Fish*, 2 V. & B. 145; *Howard* v. *Crowther*, 8 M. & W. 601; *Ex parte Vine, Re Wilson*, 8 Ch. D. 364.

(*q*) *Beckham* v. *Drake*, 2 H. of L. Cas. 579; *Boddington* v. *Castelli*, 1 E. & B. 879; *Wetherell* v. *Julius*, 10 C. B. 267; *North* v. *Gurney*, 1 J. & H. 509; *Morgan* v. *Steble*, L. R. 7 Q. B. 611; but see *Hodgson* v. *Sidney*, L. R. 1 Ex. 313; *Wadling* v. *Oliphant*, 1 Q. B. D. 145.

(*r*) *Trott* v. *Smith*, 12 M. & W. 688; *Wright* v. *Fairfield*, 2 B. & Ad. 727; and see *Hill* v. *Smith*, 12 M. & W. 618; *Alder* v. *Keighley*, 15 M. & W. 117.

(*s*) *King* v. *Leith*, 2 T. R. 141; *Clark* v. *Gilbert*, 2 Bing. N. C. 343. See *Gye* v. *Hitchcock*, 4 Ad. & E. 84; *Russell* v. *Bell*, 10 M. & W. 340; *Gibson* v. *Carruthers*, 8 M. & W. 321.

(*t*) *Re Sneezum, Ex parte Davis*, 3 Ch. D. 463 (on B. A. 1869). But any person interested may require him to give notice within twenty-eight days whether he will disclaim the contract or not, and if he does not do so, he will be deemed to have adopted it: B. A. 1883, s. 55, sub-s. 4.

(*u*) *Knight* v. *Burgess*, 33 L. J. Ch. 727.

(*x*) *Chippendale* v. *Tomlinson*, 1 Co. B. L. 431.

(*y*) See B. A. 1883, s. 53, sub-s. 2.

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extent only, pass to the trustee (*z*), as will damages in lieu of notice of dismissal (*a*).

When bills belonging to a bankrupt were at the time of the bankruptcy in the hands of an agent, it was held that the agent was not guilty of a conversion by receiving the money due upon them; for though the title to the bills, as well as to the bankrupt's other choses in action, had passed to the assignees, yet it was the duty of the agent to receive the money when due, to whomsoever it might belong (*b*); but it would have been otherwise if he had renewed or changed the acceptances—that would have amounted to a conversion for which he would have been liable in trover (*c*).

As the right to bring an action at law upon the bankrupt's contract passes to his trustee, so does the right to have specific performance decreed by equity (*d*).

Foreign Property.—According to the law of England, and of almost every other country, personal property has no locality, but is subject to the law governing the person of the owner. It follows that, unless there be a positive law there to prevent it, the bankrupt's personal property in foreign countries passes to his trustee (*e*). His real property, so situated, will pass only according to the law of the country where it is situated (*f*). "Property" now includes all real and personal property, whether in England or elsewhere, and it may be that the Court would, where the bankrupt is within its jurisdiction, order him to execute a conveyance of the property sufficient to vest it in the trustee, according to the law of the country where it is

(*z*) *Ex parte Banks, Re Dowling*, 4 Ch. D. 689; *Emden* v. *Carte*, 17 Ch. D. 768; *Jameson* v. *Brick and Stone Co.*, 4 Q. B. D. 208.

(*a*) *Wadling* v. *Oliphant*, 1 Q. B. D. 145.

(*b*) *Jones* v. *Fort*, 9 B. & C. 764.

(*c*) *Robson* v. *Rolls*, 1 M. & Rob. 239.

(*d*) See *Whitworth* v. *Davis*, 1 V. & B. 545; *Sloper* v. *Fish*, 2 V. & B. 145; *Brooke* v. *Hewitt*, 3 Ves. 253.

(*e*) See *Sill* v. *Worswick*, 1 H. Bl. at p. 690; Cullen, 240; 2 Bell's Comm. 685; Story on Conflict of Laws; *Hunter* v. *Potts*, 4 T. R. 182; *Phillips* v. *Hunter*, 2 H. Bl. 402; *Selkrig* v. *Davies*, 2 Rose, 291; 2 Dow. 230; *Cockerell* v. *Dickens*, 1 M., D. & De G. 45.

(*f*) *Ex parte Rogers, Re Boustead*, 16 Ch. D. 665.

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situated (*g*). Conversely, real estate in England will not vest in a foreign assignee or trustee (*h*).

The capacity to exercise, and to take proceedings for exercising, the powers which the bankrupt might have exercised for his own benefit at the commencement of the bankruptcy or before discharge (except the right of nomination to a vacant ecclesiastical benefice), vests in the trustee (*i*).

Onerous property.—This class of property vests in the trustee, but it may be disclaimed by him (*j*). This right of disclaimer extends to land of any tenure burdened with onerous covenants, shares or stock in companies, unprofitable contracts, and any property unsaleable or not readily saleable, by reason of its binding the possessor thereof to the performance of onerous acts, or to payment of any sum of money. It may be exercised by written notice of disclaimer, signed by the trustee (*k*), notwithstanding any act of ownership, within three months from his appointment, or within two months from his becoming aware of the existence of the property, if it first comes to his knowledge more than a month after his appointment (*l*).

To make a valid disclaimer of a lease, the leave of the Court, except in certain specified cases, is required (*m*), and the trustee may be required by any person interested in the property, to give notice within twenty-eight days whether he disclaims or not, on pain of losing his right to disclaim (*n*). Various powers are given enabling the Court to make orders, as, for instance, an order vesting the disclaimed property in any person entitled thereto, or giving compensation to a landlord to prevent the disclaimer working injustice to other persons (*o*). Any person who is injured by a disclaimer has a right of proof against the estate in respect of such injury (*p*). The effect of a disclaimer

(*g*) See B. A. 1883, s. 168, sub-s. 1, and s. 24.

(*h*) *Waite* v. *Bingley*, 21 Ch. D. 674.

(*i*) B. A. 1883, s. 44 (ii).

(*j*) B. A. 1883, s. 55.

(*k*) *Wilson* v. *Wallani*, 5 Ex. D. 155.

(*l*) B. A. 1883, s. 55, sub-s. 1.

(*m*) B. A. 1883, s. 55, sub-s. 3; B. R. 1886, r. 320.

(*n*) B. A. 1883, s. 55, sub-s. 4.

(*o*) B. A. 1883, s. 55, sub-ss. 3, 5, 6. See *Re Morgan*, 22 Q. B. D. 592, as to service of notice of application for vesting order.

(*p*) B. A. 1883, s. 55, sub-s. 7.

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will be to determine, as from its date, the rights, interests, and liabilities of the bankrupt and his property in relation to the disclaimed property, to relieve the trustee from all personal liability in respect thereof as from the date when the property vested in him, but will not affect the rights or liabilities of others, except so far as necessary to release the bankrupt and his property and the trustee from liability (*q*).

If the trustee has omitted to disclaim a lease, he can relieve himself from future liability by assignment to a pauper (*r*). In ordering compensation to a landlord, the Court will consider two things, whether the occupation by the trustee has either in fact produced a benefit to the bankrupt's estate, or was contemplated as likely to produce a benefit (*s*).

Stock—Shares, &c.—The right to transfer stock, shares in ships, shares, or other property transferable in the books of any company, office, or person, belonging to the bankrupt, is absolutely vested in the trustee to the same extent as the bankrupt could have exercised it (*t*).

Trust Property.—Property held by the bankrupt in trust for others does not pass to his trustee, it being provided that the property referred to in the Act as divisible among his creditors shall not include "property held by the bankrupt on trust for any other person" (*u*). This will include *bonâ fide* express or implied trusts, cases where the bankrupt is legal owner, or has no interest, or only a partial beneficial interest (*x*), and where the bankrupt holds property as an agent or factor (*y*).

(*q*) B. A. 1883, s. 55, sub-s. 2. See *Lowrey* v. *Barker*, 5 Ex. D. 170.

(*r*) *Hopkinson* v. *Lovering*, 11 Q. B. D. 92.

(*s*) *Ex parte Isherwood, Re Knight*, 22 Ch. D. 384; *Ex parte Arnal, Re Witton*, 24 Ch. D. 26; *Ex parte Good, Re Salkeld*, 13 Q. B. D. 731.

(*t*) B. A. 1883, s. 50, sub-s. 3.

(*u*) B. A. 1883, s. 44, sub-s. 1.

(*x*) *Ex parte Gennys*, Mont. & M'A. 258; *Carvalho* v. *Burn*, 4 B. & Ad. 382; *Winch* v. *Keely*, 1 T. R. 619; *Boddington* v. *Castelli*, 1 E. & B. 879; *Ex parte Cooke, Re Strachan*, 4 Ch. D. 123; *Re Hallett's Estate*, 13 Ch. D. 696; *Re Blakeway and Thomas, Ex parte Rankart*, 52 L. T. 630; *Harris* v. *Truman & Co.*, 9 Q. B. D. 264.

(*y*) *Whiteomb* v. *Jacob*, 1 Salk. 160; *Scott* v. *Surnam*, Wils. 400; *Frith* v. *Cartland*, 34 L. J. Ch. 301; *Pennell* v. *Deffell*, 23 L. J. Ch. 115; *Taylor* v. *Plumer*, 3 M. & S. 562.

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Tools of Trade, Apparel, and Bedding.—By sect. 44 (2), are excepted, "the tools (if any) of his trade and the necessary wearing apparel and bedding of himself, his wife and children, to a value, inclusive of tools and apparel and bedding, not exceeding twenty pounds in the whole."

Property in Right of Wife.—Whatever beneficial interest the bankrupt has in his wife's property goes to his trustee (*a*). But property which she possesses as a sole trader by the custom of London (*b*), or which is settled to her separate use (*c*), or falls within the provisions of the Married Women's Property Act, 1882, does not come within that denomination. As the trustee takes the same beneficial interest which the bankrupt possessed, it follows that if the bankrupt die before he has reduced the wife's choses in action into possession, the wife will take those by survivorship (*d*). The right to bring an action for the recovery of real property in right of the wife passes to the trustee, and he may join her in an action for the recovery of damages done to her personal property before her marriage (*e*). If the trustee be able to obtain the wife's property at law, equity will not interfere with the legal title, but if he be obliged to apply to equity for its assistance, the Court will impose terms upon him, by stipulating that a provision be made for her out of the fund (*f*). This equity is personal to her; she may, if she think fit, waive it, and defeat her children, but if she do not, it will enure for their benefit also (*g*).

(*a*) *Mitchell* v. *Hughes*, 6 Bing. 689; *Caunt* v. *Ward*, 7 Bing. 608; *Pringle* v. *Hodson*, 3 Ves. 617; *Robinson* v. *Taylor*, 2 Bro. C. C. 589; *Doe* d. *Shaw* v. *Steward*, 1 Ad. & E. 300.

(*b*) *Lavie* v. *Phillips*, 3 Burr. 1776.

(*c*) *Vandenanker* v. *Desbrough*, 2 Vern. 96; *Bennet* v. *Davis*, 2 P. Wms. 316; *Parnham* v. *Hurst*, 8 M. & W. 743.

(*d*) *Mitford* v. *Mitford*, 9 Ves. 87; *Hornsby* v. *Lee*, 2 Madd. 16; *Purdew* v. *Jackson*, 1 Russ. 1; *Sherrington* v. *Yates*, 12 M. & W. 855; *Pierce* v. *Thornley*, 2 Sim. 167; *Nicholson* v. *Drury Buildings Co.*, 7 Ch. D. 48.

(*e*) *Richbell* v. *Alexander*, 10 C. B. N. S. 324; *Mitchell* v. *Hughes*, 6 Bing. 689; *Smith* v. *Coffin*, 2 H. Bl. 444.

(*f*) *Worrall* v. *Marlar*, 1 Cox, 153; *Burdon* v. *Dean*, 2 Ves. jun. 607; *Brown* v. *Clark*, 3 Ves. 166; *Lumb* v. *Milnes*, 5 Ves. 517; *Carr* v. *Taylor*, 10 Ves. 574; *Elibank* v. *Montolieu*, 5 Ves. 737; *Basevi* v. *Serra*, 3 Meriv. 674; *Scott* v. *Spashett*, 21 L. J. Chanc. 349; *Lloyd* v. *Mason*, 5 Hare, 149; *In re Cutler's Trust*, 20 L. J. Chanc. 504; *Ex parte Norton*, 25 L. J. Bank. 43.

(*g*) *Murray* v. *Lord Elibank*, 10 Ves.

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Future Property.—The trustee takes not merely the bankrupt's present property, but also all such "as may be acquired by or devolve on him before his discharge" (*h*).

As to the time from which the bankrupt's property vests in his trustee, although the trustee has no title till his appointment, when he is appointed, his title relates back to the commencement of the bankruptcy; that is, to the time of the act of bankruptcy being committed on which the receiving order is made, or if the bankrupt is proved to have committed more acts of bankruptcy than one, to the first act of bankruptcy proved to have been committed within three months next preceding the date of the presentation of the petition (*i*). Subject, however, to the provisions in the act relating to executions, settlements and fraudulent preferences (*k*), there are certain transactions which, although within the period of relation back, are protected and valid as against the trustee. These are:—any payment by the bankrupt to any of his creditors; any payment or delivery to the bankrupt; any conveyance or assignment by, or contract, dealing, or transaction by or with the bankrupt for valuable consideration; provided that the payment, delivery, conveyance, &c., takes place before the receiving order, and before the party to the transaction, other than the debtor, has notice of any prior available act of bankruptcy (*l*).

With regard to payments, it was held that when A. lent the bankrupt his acceptance, and afterwards purchased four horses from him, agreeing that their price should be set off against the amount of the acceptance, this was not a payment (*m*); nor was the loan of a sum of money to the bankrupt upon a mortgage of

at pp. 88 and 91; *Scriven* v. *Tapley*, 2 Eden, 337; *Lloyd* v. *Williams*, 1 Madd. 450. But see *Fenner* v. *Taylor*, 1 Sim. 169; *Steinmetz* v. *Halthin*, 1 G. & J. 64; *Rowe* v. *Jackson*, 2 Dick. 604; *Carter* v. *Taggart*, 21 L. J. Chanc. 216.

(*h*) B. A. 1883, s. 44. *Ex parte Ansell*, 19 Ves. 208; *Re Birch's Legacy*, 2 Kay & J. 328.

(*i*) B. A. 1883, s. 43.

(*k*) B. A. 1883, ss. 45, 47, 48.

(*l*) B. A. 1883, s. 49.

(*m*) *Carter* v. *Breton*, 6 Bing. 617; *Wilkins* v. *Casey*, 7 T. R. 711; *Bishop* v. *Crawshay*, 3 B. & C. 415; *Copland* v. *Stein*, 8 T. R. 199; *Hurst* v. *Gwennap*, 2 Stark. 306.

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his property (*q*). A payment may be a fraudulent preference (*r*) and not made in good faith within this clause, though it was not the intention of the bankrupt to benefit the person to whom it was made, but some other person, *e.g.*, relieving an estate settled on his wife from incumbrance, or exonerating a surety (*s*).

With regard to *conveyances*, it was held, under 6 Geo. 4, c. 16, s. 81, that a voluntary transfer, which was in itself an act of bankruptcy, could not be considered *bonâ fide* so as to be protected (*t*).

The most extensive exception to the general rule is that which comprises any *contract*, *dealing* or *transaction* by or with the bankrupt for a valuable consideration. These terms are extremely large (*u*).

The protection afforded by these provisions, it will be observed, is upon the condition that the person so dealing had not, at the time, notice of any prior available act of bankruptcy; and under this section the onus of proof is on the person relying on the want of notice (*x*).

In the first place, therefore, the person whose interest is to be affected must have this notice. Now, it has been held that, in the case of an execution, it must be brought home to the execution creditor or his solicitor (*y*) employed in issuing it, and that

(*q*) *Cannan* v. *Denew*, 10 Bing. 292; *Crowfoot* v. *London Dock Co.*, 4 Tyr. 986; *Wright* v. *Fearnley*, 5 Bing. N. C. 89; *Fearnley* v. *Wright* (in error), 6 Bing. N. C. 446. See further as to the meaning of payment, *Ferrall* v. *Alexander*, 1 Dowl. 132; *Cannan* v. *Wood*, 2 M. & W. 465. See *Bowes* v. *Foster*, 2 H. & N. 779; *Hill* v. *Farnell*, 9 B. & C. 45. See *Cash* v. *Young*, 2 B. & C. 413; *Willis* v. *Bank of England*, 4 Ad. & E. 21; *Shaw* v. *Batley*, 4 B. & Ad. 801; *Tope* v. *Hockin*, 7 B. & C. 101; *Kynaston* v. *Crouch*, 14 M. & W. 266; *Gibson* v. *Muskett*, 4 M. & G. 170.

(*r*) See *Groom* v. *Watts*, 4 Exch. 727.

(*s*) *Marshall* v. *Lamb*, 5 Q. B. 115.

(*t*) *Bevan* v. *Nunn*, 9 Bing. 107. See *Hall* v. *Wallace*, 7 M. & W. 356; *Belcher* v. *Magnay*, 12 M. & W. 102.

(*u*) *Krehl* v. *Great Central Gas Co.*, L. R. 5 Ex. 289, 295. See *Young* v. *Hope*, 2 Exch. 105; *Brewin* v. *Short*, 5 E. & B. 227; *Ex parte Norton*, L. R. 16 Eq. 397.

(*x*) *Ex parte Schulte*, *Re Matanle*, L. R. 9 Ch. 409; *Ex parte Cartwright*, *Re Joy*, 44 L. T. 883; *Ex parte Revell*, *Re Tollemache*, 13 Q. B. D. 727.

(*y*) *Bird* v. *Bass*, 6 M. & G. 143; *Green* v. *Steer*, 1 Q. B. 707; *Pennell* v. *Stephens*, 7 C. B. 987; *Rothwell* v. *Timbrell*, 1 Dowl. N. S. 526; *Ex parte Schulte*, *Re Matanle*, supra; *Pike* v. *Stephens*, 12 Q. B. 465.

notice to the sheriff or sheriff's officer in possession is insufficient (*z*). It has also been questioned whether notice to the bailiff of a landlord in possession under a distress for rent would be enough (*a*). Official receivers and trustees.

Secondly, there must be notice of an act of bankruptcy prior to the transaction (*b*), not simply of facts which possibly may not constitute it (*c*). The word "notice" here means knowledge, and not the mere means of knowledge; therefore the bare receipt of a letter containing a notice, which the party has not read, does not satisfy the statute (*d*). Notice may be given by telegram (*e*).

Thirdly, the notice must be of a prior act of bankruptcy by such bankrupt committed. A knowledge, therefore, that the trader was in embarrassed circumstances, if a sale were *bonâ fide*, will not invalidate it (*f*). Notice that a trader has executed a bill of sale of all his property for the benefit of his creditors, is enough (*g*). But it is not necessary that there should be notice of any specific act; and, therefore, a general notice (*h*) that the trader has committed an act of bankruptcy, given to the party, if true, will avoid any such subsequent dealing. It has also been held that a person having notice of a previous act of bankruptcy, obtains no title by an assignment from the sheriff under an execution by a creditor who had no notice (*i*).

Fourthly, the notice must be of a prior act of bankruptcy available for a bankruptcy petition at the date of the pre-

(*z*) *Ramsey* v. *Eaton*, 10 M. & W. 22; *Brewin* v. *Briscoe*, 2 E. & E. 116; *Ex parte Schulte*, *Re Matanle*, L. R. 9 Ch. 409.

(*a*) *Lackington* v. *Elliott*, 7 M. & G. 539.

(*b*) *Ex parte Schulte*, *Re Matanle*, supra.

(*c*) *Evans* v. *Hallam*, L. R. 6 Q. B. 713; *Ex parte Snowball*, *Re Douglas*, L. R. 7 Ch. 534. Notice that a petition has been filed is sufficient: *Lucas* v. *Dicker*, 6 Q. B. D. 84.

(*d*) *Bird* v. *Bass*, 6 M. & G. 143.

(*e*) *Ex parte Langley*, *Re Bishop*, 13 Ch. D. 110.

(*f*) *Tucker* v. *Barrow*, M. & M. 137; *Spratt* v. *Hobhouse*, 4 Bing. 173.

(*g*) *Lindon* v. *Sharpe*, 6 M. & G. 895; B. A. 1883, s. 6, sub-s. 1; *Evans* v. *Hallam*, supra.

(*h*) *Hocking* v. *Acraman*, 12 M. & W. 170; *Ramsey* v. *Eaton*, 10 M. & W. 22; *Udal* v. *Walton*, 14 M. & W. 254; *Hope* v. *Meek*, 10 Exch. 829; *Turner* v. *Hardcastle*, 11 C. B. N. S. 683.

(*i*) *Fawcett* v. *Fearne*, 6 Q. B. 20.

Official receivers and trustees.

sentation of the petition on which the receiving order is made (*m*).

Where none of these statutory exceptions apply, the trustee takes the bankrupt's property by relation back to the commencement of the bankruptcy, but the relation will not be carried back to an act of bankruptcy committed more than three months before the date of presentation of the petition, nor will it be available against the Crown (*n*).

Money received by the solicitor of a petitioning creditor from the debtor pending proceedings, and by him handed over to his client, must be refunded to the trustee by the solicitor; but money paid to a solicitor by the debtor for the expenses of opposing bankruptcy proceedings (*o*), need not be so refunded.

Where one member of a firm has become bankrupt, he cannot afterwards transfer the partnership effects, or pay partnership debts out of the joint funds to a creditor with notice of his bankruptcy (*p*).

What Property other than the Bankrupt's passes to his Trustee.—Certain property which could not have been retained by the bankrupt himself, or could not have been claimed by him, had he continued solvent, may become vested in his trustee upon his bankruptcy. Thus, there will pass to the trustee all goods being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, except things in action other than debts due or growing due to the bankrupt in the course of his trade or business, which are not deemed goods within this provision (*q*).

It will be observed that the operation of this provision is confined to cases in which there is a reputed ownership of *goods*.

(*m*) B. A. 1883, s. 168, sub-s. 1.

(*n*) B. A. 1883, ss. 30, 43, 150; *Ex parte Postmaster-General, Re Bonham*, 10 Ch. D. 595.

(*o*) *Ex parte Edwards, Re Chapman*, 13 Q. B. D. 747; *Re Sinclair, Ex parte Payne*, 15 Q. B. D. 616.

(*p*) *Thomason* v. *Frere*, 10 East, 418; *Craven* v. *Edmondson*, 6 Bing. 734; *Burt* v. *Moult*, 1 Cr. & M. 525; *New Quebrada Co.* v. *Carr*, L. R. 4 C. P. 651.

(*q*) B. A. 1883, s. 44 (iii.).

Official receivers and trustees.

Such are ships (*r*), furniture (*s*), utensils in trade (*t*) (unless such furniture and utensils are let in conformity to a usage of trade (*u*)), and stock (*x*) and shares in a newspaper (*y*). Bonds, debentures, bills of exchange and promissory notes (*z*), policies of insurance (*a*), debts (*b*), and shares in companies (*c*), are choses in action within the terms of the proviso, unless they constitute debts due (*d*) or growing due to the bankrupt in the way of his trade or business, they will not vest in the trustee. Chattel interests in real property, fixtures, or shares in a company seised of real estate, have been held not to come within these words (*e*).

The section, it will be observed, only extends to goods which are in the bankrupt's possession, order or disposition in his trade or business (*f*).

(*r*) *Stephens* v. *Sole*, cited 1 Ves. sen. 352; *Ex parte Burn*, 1 J. & W. 378. But see in case of British ships, 17 & 18 Vict. c. 104, ss. 72, 80, and 81, in Appendix; and *Swainston* v. *Clay*, 32 L. J. Chanc. 503.

(*s*) *Lingham* v. *Biggs*, 1 B. & P. 82.

(*t*) *Lingard* v. *Messiter*, 1 B. & C. 808; *Sinclair* v. *Stevenson*, 2 Bing. 514; *Trappes* v. *Harter*, 2 Cr. & M. 153. See *Coombs* v. *Beaumont*, 5 B. & Ad. 72.

(*u*) *Horn* v. *Baker*, 9 East, 215, at p. 239; *Lingham* v. *Biggs*, 1 B. & P. at p. 88 (furniture in furnished house); *Storer* v. *Hunter*, 3 B. & C. 368; *Spackman* v. *Miller*, 12 C. B. N. S. 659; *In re Jensen*, 4 Morrell, 1 (custom to hire vans); *Crawcour* v. *Salter*, 18 Ch. D. 30 (custom to hire furniture); *Ex parte Turquand, Re Parker*, 14 Q. B. D. 636; but see *Ex parte Brooke, Re Fowler*, 23 Ch. D. 261.

(*x*) *Ex parte Richardson*, Buck, 480.

(*y*) *Longman* v. *Tripp*, 2 B. & P. N. R. 67.

(*z*) *Hornblower* v. *Proud*, 2 B. & Ald. 327; *Re Pryce, Ex parte Rensberg*, 4 Ch. D. 685; *Ex parte Ibbetson, Re Moore*, 8 Ch. D. 519; *Re Bainbridge, Ex parte Fletcher*, 8 Ch. D. 218.

(*a*) *Falkener* v. *Case*, 1 Bro. C. C. 125; *Edwards* v. *Scott*, 1 M. & G. 962; *West* v. *Reid*, 2 Hare, 249; *Thompson* v. *Speirs*, 13 Sim. 469; *In re Bromley*, Id. 475; *Green* v. *Ingham*, L. R. 2 C. P. 525.

(*b*) *Cooke* v. *Hemming*, L. R. 3 C. P. 334.

(*c*) *Colonial Bank* v. *Whinney*, 11 App. Cas. 426.

(*d*) *Ex parte Kemp, Re Fastnedge*, L. R. 9 Ch. 383; *Re Pryce, Ex parte Rensberg*, supra.

(*e*) *Ryall* v. *Rolle*, 1 Atk. 165; *Horn* v. *Baker*, 9 East, 215; *Ex parte Vauxhall Bridge Co.*, 1 G. & J. 101; *Clark* v. *Crownshaw*, 3 B. & Ad. 804; *Hubbard* v. *Bagshaw*, 4 Sim. 326; *Trappes* v. *Harter*, 3 Tyr. 603; *Coombs* v. *Beaumont*, 5 B. & Ad. 72. See also *Boydell* v. *M'Michael*, 1 C. M. & R. 177; *Ex parte Barclay*, 5 De G. M. & G. 403, 410; *Thompson* v. *Pettit*, 10 Q. B. 101; *Hitchman* v. *Walton*, 4 M. & W. 409; *Ex parte Scarth*, 1 M. D. & De G. 240; *Ex parte Heathcote*, 2 M. D. & De G. 711; *Whitmore* v. *Empson*, 23 Beav. 313; *Climie* v. *Wood*, L. R. 3 Ex. 257; 4 Ex. 328; *Ex parte Astbury*, L. R. 4 Ch. 630. But see *Waterfall* v. *Penistone*, 6 E. & B. 876.

(*f*) *Ex parte Nottingham Bank, Re*

Official receivers and trustees.

The goods must be in the possession, order, or disposition of the bankrupt alone (*g*), and that with the consent and permission, express or implied, of the true owner (*h*). And so the property of infants who cannot consent is not within this clause (*i*); nor is it enough that they were in the possession of the bankrupt with the consent of a person who himself held them only by the sufferance of the true owner (*k*). But goods belonging to the assignees under a former bankruptcy, remaining in the possession of the bankrupt at the time of a subsequent one, are within this section (*l*). Constructive possession of the bankrupt however—for instance, that of a servant—is sufficient to make the section apply (*m*). The wrongful seizure of the goods by a wrongdoer would seem sufficient to take the goods out of the possession, order, or disposition of the bankrupt (*n*). Moreover, such consent and permission, together with the possession of the bankrupt, must continue up to the commencement of the bankruptcy.

The circumstances must also be such that the bankrupt is the reputed, and not the real, owner of the goods, and the real owner must consent to the apparent ownership as such. Therefore, goods in the possession of an ostensible partner (*o*) of the bankrupt, under a purchase by him, which the vendors subsequently to the act of bankruptcy discovered to have been

Jenkinson, 15 Q. B. D. 441; *Ex parte McGeorge*, 20 Ch. D. 697; *Colonial Bank* v. *Whinney*, 30 Ch. D. 261, at pp. 274, 281 (reversed on other points, 11 App. Cas. 426); *Ex parte Sully, Re Wallis*, 14 Q. B. D. 950.

(*g*) *Ex parte Dorman, Re Lake*, L. R. 8 Ch. 51; *Ex parte Fletcher, Re Bainbridge*, 8 Ch. D. 218.

(*h*) *Ex parte Richardson*, Buck, 480; *Ex parte Dale*, Buck, 365; *Re Rawbone*, 3 Jur. N. S. 837 Ch.; *Ex parte Union Bank of Manchester*, L. R. 12 Eq. 354; *Re Bankhead's Trust*, 2 K. & J. 560; *Ex parte Cox, Re Reed*, 1 Ch. D. 302. See *Ex parte Hayman, Re Pulsford*, 8 Ch. D. 11; *Reynolds* v. *Bowley*, L. R. 2 Q. B. 474.

(*i*) *Viner* v. *Cadell*, 3 Esp. 88.

(*k*) *Fraser* v. *Swansea Canal Co.*, 1 Ad. & E. 354. But see *In re Thomas*, 1 Ph. 159.

(*l*) *Butler* v. *Hobson*, 5 Bing. N. C. 128. See *Re Rawbone*, 3 Jur. N. S. 837 Ch.

(*m*) *Ex parte Bolland, Re Gatehouse*, 24 L. T. 335; *Ex parte Roy, Re Silence*, 7 Ch. D. 70; *Hornsby* v. *Miller*, 28 L. J. Q. B. 99; *Hervey* v. *Liddiard*, 1 Stark. 123.

(*n*) *Meggy* v. *Imperial Discount Co.*, 3 Q. B. D. 711, at p. 716.

(*o*) *Reynolds* v. *Bowley*, L. R. 2 Q. B. 474; *Ex parte Hayman, Re Pulsford*, 8 Ch. D. 11.

fraudulent, and in consequence annulled, will not pass to the trustee (*p*). Official receivers and trustees.

The principal difficulty in deciding questions on this clause is that of ascertaining whether the bankrupt was or was not reputed owner, and this is a question of fact; nor is it easy to lay down rules for its solution. Where the bankrupt has once been the real owner of the property in question, the mere fact of possession may raise a presumption that he continues in possession as reputed owner. But where the bankrupt has never been the real owner, possession may not of itself show him to be reputed owner; some additional evidence may be requisite for that purpose (*q*). A servant's possession of goods has been held to be that of his master for the purposes of this clause (*r*); a carrier's that of his employer (*s*); and a factor's that of the principal, unless the relationship be notorious (*t*). But the pawnee's is not that of the pawnor (*u*). Where the purchaser transferred his purchase to a particular bin in the vendor's cellar, sealed it, and had an entry made in the vendor's books, the statute was held not to apply (*x*); but it was otherwise where he only marked the goods with his initials (*y*). A symbolical delivery will be sufficient to take the case out of this clause, if, from the nature of the goods, no other can be made (*z*); and so will the taking possession of a part (*a*). The usage of trade is sometimes of importance, and if the bankrupt's possession of another person's goods be consistent with such usage, they may be exempted from the operation of this clause, under circumstances which

(*p*) *Load* v. *Green*, 15 M. & W. 216; *Holderness* v. *Rankin*, 2 De G. F. & J. 258; *Smith* v. *Hudson*, 6 B. & S. 431.

(*q*) *Lingard* v. *Messiter*, 1 B. & C. 308; *Ex parte Castle*, 3 M. D. & De G. 117; *Hornsby* v. *Miller*, supra. But see *Re Wallworth*, 26 L. J. Bank. 61.

(*r*) *Jackson* v. *Irvin*, 2 Camp. 48; *Toussaint* v. *Hartop*, Holt, 335.

(*s*) *Hervey* v. *Liddiard*, 1 Stark. 123.

(*t*) *Re Fawcus, Ex parte Buck*, 3 Ch. D. 795; *Ex parte Bright, Re Smith*, 10 Ch. D. 566.

(*u*) *Greening* v. *Clark*, 4 B. & C. 316.

(*x*) *Ex parte Marrable*, 1 G. & J. 402; *Carruthers* v. *Payne*, 5 Bing. 270; *Sinclair* v. *Wilson*, 24 L. J. Ch. 537. See *Wilkins* v. *Bromhead*, 6 M. & G. 963.

(*y*) *Knowles* v. *Horsfall*, 5 B. & Ald. 134; *Lingard* v. *Messiter*, 1 B. & C. 308.

(*z*) *Manton* v. *Moore*, 7 T. R. 67; *Mair* v. *Glennie*, 4 M. & S. 240.

(*a*) *Re Eslick, Ex parte Phillips*, 4 Ch. D. 496.

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otherwise would have brought them within it (*b*). Thus, in *Ex parte Watkins; Re Couston* (*c*), the Court gave effect to a custom in the wine trade to allow wine to remain in the warehouse of the vendor or a third person (*d*). In such cases the question is, whether the custom be so general that all should know it who had dealings, or were likely to have dealings, with the bankrupt (*e*).

There are certain cases, also, where property which the bankrupt has parted with, by way of settlement, for the benefit of his wife or children, passes to the trustee, the Act providing (sect. 47) (*f*)—

(1.) "Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor (*g*) was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement (*h*), and

(*b*) See *Storer* v. *Hunter*, 3 B. & C. 368; *Hamilton* v. *Bell*, 10 Exch. 545; *Thackthwaite* v. *Cock*, 3 Taunt. 487; *Horn* v. *Baker*, 9 East, 215, at p. 239; *Watson* v. *Peache*, 1 Bing. N. C. 327; *Whitfield* v. *Brand*, 16 M. & W. 282; *Carruthers* v. *Payne*, 5 Bing. 270; *Re Terry*, 11 W. R. 113; *Ex parte Watkins, Re Couston*, L. R. 8 Ch. 520; *Crawcour* v. *Salter*, 18 Ch. D. 30; *Re Lay, Ex parte Woodward*, 54 L. T. 683; *Re Blanshard, Ex parte Hattersley*, 8 Ch. D. 601; *Ex parte Wingfield, Re Florence*, 10 Ch. D. 591; *Harris* v. *Truman & Co.*, 9 Q. B. D. 264; *Re Taylor, Ex parte Dyer*, 53 L. T. 768; *Ex parte Bright, Re Smith*, 10 Ch. D. 566.

(*c*) L. R. 8 Ch. 520; *Ex parte Vaux, In re Couston*, L. R. 9 Ch. 602.

(*d*) *Ex parte Turquand*, 14 Q. B. D. 636.

(*e*) *Watson* v. *Peache*, 1 Bing. N. C. 327; *Ex parte Watkins, Re Couston*, L. R. 8 Ch. 520; *Ex parte Vaux, Re Couston*, L. R. 9 Ch. 602. See *Re Wallworth*, 26 L. J. Bank. 61; *Ex parte Powell, Re Matthews*, 1 Ch. D. 501; *In re Hill*, ib. 503, n.; *Priestley* v. *Pratt*, L. R. 2 Ex. 101; *Ex parte Brooks*, 23 Ch. D. 201; *Crawcour* v. *Salter*, L. R. 18 Ch. D. 30.

(*f*) B. A. 1883, s. 47; see *Ex parte Mercer*, 17 Q. B. D. 290.

(*g*) *Ex parte Russell*, 19 Ch. D. 588; *Ex parte Huxtable*, 2 Ch. D. 54.

(*h*) "It seems to us that the section must be read to mean 'without the aid of the property which, by the settlement, passes to other persons'": *Ex parte Official Receiver, In re Lowndes*, 4 Morrell, 139, at p. 143.

that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof. Official receivers and trustees.

(2.) "Any covenant or contract made in consideration of marriage, for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder (*i*), and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy.

(3.) "'Settlement' shall for the purposes of this section include any conveyance or transfer of property" (*k*).

A voluntary settlement, though not impeachable under the above section, may be void under 13 Eliz. c. 5, as intended to defeat creditors.

This section, it would appear, is retrospective so far as regards "traders," to whom the corresponding section in the Act of 1869 applied, but not as regards non-traders (*l*).

Lastly, fraudulent preferences of particular creditors, which have been dealt with in an earlier part of this chapter as constituting an act of bankruptcy, are void as against the trustee if the debtor is adjudged bankrupt on a petition presented within three months after it is made (*m*).

Section VIII.—*Evidence.*

Every Court in bankruptcy has a seal of which judicial notice is taken (*n*), and a copy of any document used in a bankruptcy proceeding is, if sealed, or signed by the judge, receivable in evidence in all legal proceedings (*o*). A certificate by the Board of Trade is conclusive evidence of the appointment of a Evidence.

(*i*) *Ex parte Bishop*, L. R. 8 Ch. 718; *Ex parte Dawson*, L. R. 19 Eq. 433.

(*k*) *Ex parte Harvey*, 15 Q. B. D. 682.

(*l*) *In re Ashcroft, Ex parte Todd*, 4 Morrell, 209.

(*m*) B. A. 1883, s. 4, sub-s. 1 (c).

(*n*) B. A. 1883, s. 137; B. R. 1886, r. 14.

(*o*) B. A. 1883, s. 134.

Evidence.

trustee (*l*). A copy of the *London Gazette* is evidence of the facts stated in any notice therein, and it is conclusive evidence in the case of a receiving order or order of adjudication that the order is duly made and of its date (*m*). The proceedings at meetings of creditors are evidenced by a minute signed by the chairman (*n*).

Should the debtor or his wife, or any witness who has been examined by the Court, die, the deposition, sealed by the Court, is receivable in evidence (*o*). Deeds and other documents relating to the property of the bankrupt, or to any proceeding in the bankruptcy, are, except as regards the fees imposed by the Act and rules, exempt from stamp duty (*p*).

Section IX.—*Dividend and Audit.*

Dividend and audit.

The first dividend under a bankruptcy must be declared and distributed within four months from the conclusion of the first meeting, unless the trustee satisfies the committee of inspection that there is sufficient reason for postponing it. Subsequent dividends must, unless there be sufficient reason to the contrary, be declared and distributed at intervals of not more than six months (*q*). Notice of an intention to declare a dividend must be gazetted, and sent to any creditor mentioned in the statement of affairs who has not proved his debt (*r*). When the dividend has been declared, notice of the particulars of time and place of payment will be sent to each creditor who has proved (*s*). Dividends may, at the creditor's request and at his risk, be sent by post (*t*). In the case of joint and separate estates, dividends will, as a rule, be declared together (*u*). The trustee will make provision for creditors residing at a distance who have not had

(*l*) B. A. 1883, s. 138.
(*m*) B. A. 1883, s. 132.
(*n*) B. A. 1883, s. 133. As to evidence of orders, &c. by the Board of Trade, see s. 140.
(*o*) B. A. 1883, s. 136; see also B. R. 1886, rr. 61—71.
(*p*) B. A. 1883, s. 144; B. R. 1886, r. 60.
(*q*) B. A. 1883, s. 58, sub-ss. (2) and (3).
(*r*) B. R. 1886, r. 232.
(*s*) B. A. 1883, s. 58, sub-ss. (4) and (5).
(*t*) B. R. 1886, r. 234.
(*u*) B. A. 1883, s. 59.

Dividend and audit.

opportunity of establishing their debts, and also for undetermined and disputed claims (*u*). Any creditor who has not proved before dividend will be entitled to the amount out of any money in hand, but he cannot disturb the distribution of any dividend which has been declared (*x*).

Creditors will have notice of the final dividend (*y*) when the property has been realized. No action lies for a dividend; the remedy is by application to the Court (*z*). At least twice a year the trustee must submit his accounts to the Board of Trade for audit (*a*), and will have to submit, also, an annual statement of the proceedings in the bankruptcy (*b*).

Section X.—*Small Bankruptcies and Administration of Estates of deceased Insolvents.*

Small bankruptcies and administration of estates of deceased insolvents.

Where the Court is satisfied, or the official receiver reports, that the estate of the debtor is not likely to exceed in value 300*l.*, the Court will make an order for summary administration (*c*). The official receiver is trustee, unless the creditors otherwise determine, and there is no committee of inspection. Powers are also given to County Courts, in the case of a judgment-debtor whose whole indebtedness does not exceed 50*l.*, to make orders for the administration of his estate in lieu of an order for payment by instalments (*d*). The estates of deceased insolvents may also be administered by the Court on petition by any creditor whose debt would have been sufficient to support a bankruptcy petition had the debtor been alive (*e*); and all the provisions of Part III. of the Bankruptcy Act shall, so far as applicable, apply to such an administration

(*u*) B. A. 1883, s. 60.

(*x*) B. A. 1883, s. 61.

(*y*) B. A. 1883, s. 62.

(*z*) B. A. 1883, s. 63. See *Re Prager, Ex parte Societé Cockerill*, 3 Ch. D. 115; *Ex parte Carter, Re Ware*, 8 Ch. D. 731. As to unclaimed and undistributed dividends, see sect. 162.

(*a*) B. A. 1883, s. 78; B. R. 1886, rr. 289—291.

(*b*) B. A. 1883, s. 81.

(*c*) B. A. 1883, s. 121; B. R. 1886, rr. 272, 273.

(*d*) B. A. 1883, s. 122. Special rules are provided under this section.

(*e*) B. A. 1883, s. 125; B. R. 1886, rr. 274—279; *Ex parte May*, 13 Q. B. D. 552; *Higgs* v. *Weaver*, 29 Q. B. D. 236.

Small bankruptcies and administration of estates of deceased insolvents.

order. Such provisions do not include those relating to the property of persons other than the bankrupt; for example, sect. 47, relating to the avoidance of voluntary settlement (*f*).

Section XI.—*Consequences to Debtor himself—Examination—Punishment for Misconduct—Allowance—Surplus.*

Consequences to debtor himself, &c.

It has been explained that at any time after the making of a receiving order the Court may order the examination of the debtor or his wife touching his dealings or property, and the production of documents relating thereto (*g*). If he refuses to answer, the registrar will report such refusal to the judge who will deal with the matter as if the default had been made in answering before him (*h*). It will be no ground for a debtor to refuse to answer any question relating to his property that the answer would tend to criminate him (*i*). The Court may also, after a receiving order has been made, order a debtor's letters to be re-directed to the official receiver or trustee (*j*). A debtor may be arrested and his papers seized if, after the issue of a bankruptcy notice or presentation of a petition, it appears probable to the Court that he will abscond; or if after presentation of a petition it appears probable that he will remove, conceal, or destroy any of his goods; or if, after service of a petition on him or the making of a receiving order, he removes goods above the value of 5*l.* without leave; or if without good cause he fails to attend any examination ordered by the Court (*k*).

The debtor is bound to assist in every way in the discovery and realization of his property; and if he fails to do so, he will be guilty of a contempt of Court (*l*).

There are besides severe punishments which may be inflicted on him for misdemeanours in neglecting to make the proper

(*f*) *Ex parte Official Receiver, In re Gould*, 4 Morrell, 202.

(*g*) B. A. 1883, s. 27; *Reg.* v. *County Court of Surrey*, 13 Q. B. D. 963.

(*h*) B. R. 1886, r. 88.

(*i*) *Ex parte Schofield, Re Frith*, 6 Ch. D. 230.

(*j*) B. A. 1883, s. 26.

(*k*) B. A. 1883, s. 25.

(*l*) B. A. 1883, s. 24.

Consequences to debtor himself, &c.

disclosures, as well as for fraudulent and dishonest conduct, either after his bankruptcy or within a limited period before the presentation of the petition, which are enumerated in sects. 11, 12, and 13, of the Debtors Act, 1869 (32 & 33 Vict. c. 62), which enacts—

Sect 11. "Any person adjudged bankrupt, and any person whose affairs are liquidated by arrangement in pursuance of the Bankruptcy Act, 1869, shall, in each of the cases following, be deemed guilty of a misdemeanour, and on conviction thereof shall be liable to be imprisoned for any time not exceeding two years, with or without hard labour; that is to say,

(1.) "If he does not, to the best of his knowledge and belief, fully and truly discover to the trustee administering his estate for the benefit of his creditors all his property (*m*), real and personal, and how, and to whom, and for what consideration, and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade, if any, or laid out in the ordinary expense of his family, unless the jury is satisfied that he had no intent to defraud:

(2.) "If he does not deliver up to such trustee, or as he directs, all such part of his real and personal property as is in his custody or under his control, and which he is required by law to deliver up, unless the jury is satisfied that he had no intent to defraud:

(3.) "If he does not deliver up to such trustee, or as he directs, all books, documents, papers, and writings in his custody or under his control relating to his property or affairs, unless the jury is satisfied that he had no intent to defraud:

(4.) "If after the presentation of a bankruptcy petition [by or (*n*)] against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he conceals any part of his property (*o*) to the value of ten pounds or upwards, or conceals any debt due to or from him, unless the jury is satisfied that he had no intent to defraud:

(5.) "If after the presentation of a bankruptcy petition [by or (*n*)] against him (*n*) or the commencement of the

(*m*) *Reg.* v. *Michell*, 43 L. T. 572.
(*n*) See B. A. 1883, s. 163 (1).
(*o*) *Reg.* v. *Creese*, L. R. 2 C. C. R. 105.

Consequences to debtor himself, &c.

liquidation, or within four months next before such presentation or commencement, he fraudulently removes any part of his property of the value of ten pounds or upwards:

(6.) "If he makes any material omission in any statement relating to his affairs, unless the jury is satisfied that he had no intent to defraud:

(7.) "If, knowing or believing that a false debt has been proved by any person under the bankruptcy or liquidation, he fail for the period of a month to inform such trustee as aforesaid thereof:

(8.) "If after the presentation of a bankruptcy petition [by or (*n*)] against him or the commencement of the liquidation he prevents the production of any book, document, paper, or writing, affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law:

(9.) "If after the presentation of a bankruptcy petition [by or (*n*)] against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he conceals, destroys, mutilates, or falsifies, or is privy to the concealment, destruction, mutilation, or falsification of any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law:

(10.) "If after the presentation of a bankruptcy petition [by or (*n*)] against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he makes or is privy to the making of any false entry in any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law:

(11.) "If after the presentation of a bankruptcy petition [by or (*n*)] against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he fraudulently parts with, alters, or makes any omission, or is privy to the fraudulently parting with, altering, or making any omission in any document affecting or relating to his property or affairs:

(12.) "If after the presentation of a bankruptcy petition [by or (*n*)] against him or the commencement of the liquidation, or at any meeting of his creditors within four

(*n*) See B. A. 1883, s. 163 (1).

Consequences to debtor himself, &c.

months next before such presentation or commencement, he attempts to account for any part of his property by fictitious losses or expenses:

(13.) "If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, by any false representation or other fraud, has obtained any property on credit and has not paid for the same:

(14.) "If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, being a trader (*o*), obtains, under the false pretence of carrying on business and dealing in the ordinary way of his trade, any property on credit and has not paid for the same, unless the jury is satisfied that he had no intent to defraud:

(15.) "If within four months next before the presentation of a bankruptcy petition against him or the commencement of the liquidation, he, being a trader, pawns, pledges, or disposes of otherwise than in the ordinary way of his trade, any property which he has obtained on credit and has not paid for, unless the jury is satisfied that he had no intent to defraud:

(16.) "If he is guilty of any false representation or other fraud for the purpose of obtaining the consent of his creditors or any of them to any agreement with reference to his affairs or his bankruptcy or liquidation."

Sect. 12. "If any person who is adjudged a bankrupt or has his affairs liquidated by arrangement after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months before such presentation or commencement, quits England and takes with him, or attempts or makes preparation for quitting England and for taking with him, any part of his property to the amount of twenty pounds or upwards, which ought by law to be divided amongst his creditors, he shall (unless the jury is satisfied that he had no intent to defraud) be guilty of felony, punishable with imprisonment for a time not exceeding two years, with or without hard labour."

Sect. 13. "Any person shall in each of the cases following be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any time not exceeding one year, with or without hard labour; that is to say,

(1.) "If in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud:

(*o*) Sect. 163 (2).

Consequences to debtor himself, &c.

(2.) "If he has, with intent to defraud his creditors, or any of them, made or caused to be made any gift, delivery, or transfer of or any charge on his property:

(3.) "If he has, with intent to defraud his creditors, concealed or removed any part of his property since or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him."

If an undischarged bankrupt obtains credit to the extent of 20*l.* or upwards without informing the person from whom he obtains it that he is an undischarged bankrupt, he will be guilty of a misdemeanor and punishable as for a misdemeanor under the Debtors Act, 1869 (*l*). The above provisions of the Debtors Act will be applicable to any person whether a trader or not, against whom a receiving order has been made on a petition presented either by or against him (*m*).

The Court may commit for trial (*n*); and the public prosecutor will act where the Court orders a prosecution (*o*). An order of discharge, or the acceptance of a composition or scheme, will not relieve the debtor from liability to prosecution for a criminal offence (*p*).

The powers under the Debtors Act, 1869 (*q*), formerly vested in the Superior Courts, of committing to prison for default in payment of a judgment debt, are now vested in the judge to whom bankruptcy business is assigned (*r*). That Act, by sect. 4, abolished imprisonment for debt (*s*); but by sect. 5 enacted that—

"Any Court may commit to prison for a term not exceeding six

(*l*) B. A. 1883, s. 31.

(*m*) B. A. 1883, s. 163.

(*n*) B. A. 1883, s. 165.

(*o*) B. A. 1883, s. 166. See sect. 164, and the Debtors Act, 1869, s. 16.

(*p*) B. A. 1883, s. 167.

(*q*) 32 & 33 Vict. c. 62.

(*r*) B. A. 1883, s. 103; Order, Jan. 1, 1884.

(*s*) The following cases are excepted from the operation of the Act by sect. 4, viz.:—

"(1.) Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract: (2.) Default in payment of any sum recoverable summarily before a justice or justices of the peace: (3.) Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a Court of Equity any sum in his possession or under his control (see 41 & 42 Vict. c. 54): (4.) Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of

weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent Court."

Consequences to debtor himself, &c.

This jurisdiction may, however, only be exercised where "it is proved to the satisfaction of the Court that the person making default either has, or has had since the date of the order or judgment, the means (*t*) to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same" (*u*). Proof of "means" may be given in such manner as the Court thinks just; and for that purpose the debtor and witnesses may be summoned and examined on oath (*x*).

Jurisdiction under the section may be exercised by the judge sitting in chambers (*x*).

Instead of committing the debtor in the first instance, the judge may direct the debt to be paid by instalments (*y*). But in that case the judge has power to commit upon failure to pay each instalment (*z*). The order to pay by instalments may be from time to time varied or rescinded (*a*).

Imprisonment under the section does not operate as a satisfaction or extinguishment of the debt or demand or cause of action, or deprive any person of any right to take out execution against the lands, goods, or chattels of the person imprisoned, in

a sum of money when ordered to pay the same in his character of an officer of the Court making the order (see 41 & 42 Vict. c. 54): (5.) Default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which any Court having jurisdiction in bankruptcy is authorized to make an order: Provided that no person shall be imprisoned in any case excepted from the operation of the section for a longer period than one year."

(*t*) See *Chard* v. *Jervis*, 9 Q. B. D. 178. It is not necessary that the "means" should be derived from the debtor's earnings, or a fixed income: *Ex parte Koster*, 14 Q. B. D. 597.

(*u*) 32 & 33 Vict. c. 62, s. 5.

(*x*) Ibid.

(*y*) Ibid. The order for payment by instalments may be made without any proof of means: *Dillon* v. *Cunningham*, L. R. 8 Ex. 23. The Court if satisfied of the debtor's means may make an order for commitment, but direct the warrant to be suspended if the debtor pay the debt by instalments: *Stonor* v. *Fowle*, 13 App. Cas. 20.

(*z*) *Evans* v. *Wills*, 1 C. P. D. 229.

(*a*) 32 & 33 Vict. c. 62, s. 5.

Consequences to debtor himself, &c.

the same manner as if the imprisonment had not taken place (*c*). The person imprisoned will be discharged out of custody upon a certificate signed in the prescribed manner to the effect that he has satisfied the debt or instalment of a debt in respect of which he was imprisoned, together with the prescribed costs (if any) (*d*).

Where the debt is due upon a judgment in a County Court, the jurisdiction given by the section can only be exercised by a County Court (*e*).

County Courts within the jurisdiction of which a judgment debtor is or resides, have now jurisdiction under the section, although the amount of the judgment debt exceeds 50*l.* (*f*); but jurisdiction can be exercised in the County Court only by a judge or his deputy, and by an order showing on its face the ground on which it is issued (*g*).

Allowance.—An allowance in money may be made by the trustee, with the permission of the committee of inspection, to the bankrupt for the support of himself and his family, or in consideration of his services (*h*). The bankrupt may also be appointed in like manner to superintend the management of the property, or to carry on his trade (*i*).

Surplus.—The bankrupt is entitled to any surplus after payment in full of the creditors, with interest, and the costs of the bankruptcy (*k*).

The Bankruptcy Discharge and Closure Act, 1887 (50 & 51 Vict. c. 66), provides for the discharge of bankrupts under repealed Bankruptcy Acts, for closing bankruptcies, and for the release of trustees.

(*c*) 32 & 33 Vict. c. 62, s. 5.
(*d*) Ibid.
(*e*) Ibid.
(*f*) B. A. 1883, s. 104 (4); *Ex parte Addington*, 16 Q. B. D. 665.
(*g*) 32 & 33 Vict. c. 62, s. 5.
(*h*) B. A. 1883, s. 64; B. R. 1886, r. 296.
(*i*) Ibid.
(*k*) B. A. 1883, s. 65.

Section XII.—*Discharge of Debtor and Annulment of Bankruptcy.*

Discharge of debtor and annulment of bankruptcy.

Discharge.—At any time after adjudication, an application for discharge, which must be made in open Court, may be made by the bankrupt; but it will not be heard till after the public examination is concluded (*l*). The Court will consider a report of the official receiver, and will hear the official receiver, trustee, and any creditor on the subject. Fourteen days' notice of the day for hearing must be given to each creditor (*m*). The Court may either grant or refuse an absolute order, or suspend the operation of the order for a specified time, or impose conditions as to future earnings and property. But an order of discharge must be refused where the debtor has committed a misdemeanor under the Act, or the Debtors Act, 1869; and it must either be refused, or suspended, or made conditional, if the bankrupt has not kept proper books (*n*) relating to his business, and showing his business transactions and financial position for three years prior to his bankruptcy, or if he has traded after knowing himself to be insolvent, or if he has contracted any provable debt without reasonable or probable expectation of being able to pay it (*o*), or if he has brought on his bankruptcy by rash and hazardous speculation (*p*), or by unjustifiable extravagance in living, or if he has put a creditor to expense by frivolous or vexatious defence of an action, or if he has, within three months before the receiving order and while insolvent, given an undue preference to any creditor, or if he has been previously adjudicated, or made any statutory composition or arrangement with creditors, or if he has been guilty of any fraud or fraudulent breach of trust (*q*).

If any of the above facts are proved, the Court cannot grant an unconditional discharge; it must either refuse the discharge, suspend it, or make it conditional (*r*). The Court cannot make

(*l*) B. A. 1883, s. 28, sub-s. 1. See B. R. 1886, rr. 235—244.

(*m*) B. A. 1883, s. 28, sub-ss. 2, 4, 5.

(*n*) *Ex parte Reed*, 17 Q. B. D. 244.

(*o*) *Ex parte White*, 14 Q. B. D. 600.

(*p*) *Ex parte Salaman*, 14 Q. B. D. 936.

(*q*) B. A. 1883, s. 28, sub-s. 2.

(*r*) *In re Heap, Ex parte Board of Trade*, 4 Morrell, 314.

Discharge of debtor and annulment of bankruptcy.

a conditional order of discharge and also suspend the order—*e. g.*, require as a condition of discharge that the debtor consent to judgment being entered against him under sect. 23 (6), and also suspend the order of discharge for six months (*s*).

The effect of the order of discharge is to release the bankrupt from all provable debts, except debts on a recognizance, debts at the suit of the Crown, or chargeable against the bankrupt for any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff or other public officer, on a bail bond for the appearance of any person prosecuted for such offence (unless the Treasury consent in writing to his being discharged therefrom), and except debts or liabilities incurred by means of any fraud or fraudulent breach of trust (*t*) to which he was a party, or debts or liabilities whereof he has obtained forbearance by any fraud to which he was a party (*u*). An order of discharge is conclusive evidence of the bankruptcy, and of the validity of the proceedings therein (*x*). It will not release any person who, at the date of the receiving order, was a partner or co-trustee with the bankrupt, or who was jointly bound or had made any joint contract with him, or any person who was surety or in the nature of surety for him (*y*).

Annulment of Adjudication.—If, in the opinion of the Court, the debtor ought not to have been adjudicated, or if the debts are proved to have been paid in full, an order of adjudication may be annulled (*z*). In such case, all sales and dispositions of property and payments made, and acts done, by the official receiver, trustee, or other person acting under their authority, or by the Court, will be valid; but the property of the bankrupt will vest in such person as the Court may appoint, or, in default of appointment, in the debtor, subject to any conditions that the Court may impose (*a*). A receiving order may also, in similar

(*s*) *In re Huggins*, 6 Morrell, 38.

(*t*) *Emma Silver Mining Co.* v. *Grant*, 17 Ch. D. 122; *Ramshill* v. *Edwards*, 31 Ch. D. 100.

(*u*) B. A. 1883, s. 30, sub-ss. 1, 2.; *Cooper* v. *Prichard*, 11 Q. B. D. 351.

(*x*) B. A. 1883, s. 30, sub-s. 3.

(*y*) B. A. 1883, s. 30, sub-s. 4.

(*z*) B. A. 1883, s. 35, sub-s. 1; *In re Gyll*, 5 Morrell, 272. As to payment in full, see sect. 36.

(*a*) B. A. 1883, s. 35, sub-s. 2.

circumstances, be set aside by the Court. But the consent of the creditors to its annulment will not be decisive (*b*). Discharge of debtor and annulment of bankruptcy.

By the Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57) (*c*), deeds of arrangement made in respect of the affairs of a debtor for the benefit of his creditors generally (*d*), must be registered with the registrar of bills of sale within seven clear days after the first execution thereof by the debtor or any creditor, otherwise they are void (*e*). Registration under the Act does not make the deed valid, if bankruptcy proceedings are taken within three months of the execution of the deed. If, however, no such proceedings are taken within the three months, then the deed if duly registered stands good against the world (*f*).

A deed of arrangement, whether under seal or not, within the meaning of the Act, includes (*g*) :—

"(a) An assignment of property;

"(b) A deed of or agreement for composition;

"And in cases where creditors of a debtor obtain any control over his property or business :—

"(c) A deed of inspectorship entered into for the purpose of carrying on or winding up a business;

"(d) A letter of licence authorising the debtor or any other person to manage, carry on, realize or dispose of a business, with a view to the payment of debts; and

"(e) Any agreement or instrument entered into for the purpose of carrying on or winding up the debtor's business, or authorising the debtor or any other person to manage, carry on, realize, or dispose of the debtor's business with a view to the payment of his debts."

Registration is effected by filing in like manner as a bill of sale given by way of security for the payment of money a true copy of the deed and of every schedule or inventory thereto

(*b*) *In re Hester*, 22 Q. B. D. 632.

(*c*) See the Act in the Appendix.

(*d*) The Act does not appear to extend to a case where the debtor deals individually with each creditor, or the creditor executes a separate release.

(*e*) Sects. 5, 8. Where the time for registration expires on a Sunday, or day on which the office is closed, registration may be made on the next day the office is open: sect. 10.

(*f*) Sect. 4, sub-s. 2. See *In re Batten, Ex parte Milne*, 58 L. J. Q. B. at p. 335, per Lord *Esher*, M. R., 22 Q. B. D. at p. 691.

(*g*) Sect. 4.

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annexed, or therein referred to, together with an affidavit verifying the time of execution, and containing a description of the residence and occupation of the debtor, and of the place or places where his business is carried on, and an affidavit by the debtor stating the total estimated amount of property and liabilities included under the deed, the total amount of the composition (if any) payable thereunder, and the names and addresses of his creditors (*h*); the deed must be produced to the registrar at the time of registration duly stamped, not only with the proper inland revenue duty, but with a stamp denoting duty at the rate of 1*s.* in the pound for every 100*l.* or fraction of 100*l.* of the sworn value of the property passing, or, if none passes, of the amount of composition payable under the deed (*i*).

Registration is not invalidated by reason of the execution of the deed by creditors subsequent to registration (*k*).

Where the place of business or residence of the debtor is outside the London Bankruptcy District, the registrar must, within three days of registration, transmit a copy of the deed to the registrar of the County Court of the district where the debtor carries on business or resides (*l*).

Office copies of the deed may be obtained (*m*), and inspection had of the register (*n*).

(*h*) Sect. 6, sub-s. 1.
(*i*) Sect. 6, sub-s. 2.
(*k*) *In re Batten, Ex parte Milne*, 58 L. J. Q. B. 335; L. R. 22 Q. B. D. 685.
(*l*) Sect. 13.
(*m*) Sect. 11, and sect. 13, sub-s. 2.
(*n*) Sect. 12, and sect. 13, sub-s. 2.

APPENDIX.

APPENDIX

OF THE

PRINCIPAL STATUTES ON COMMERCIAL SUBJECTS.

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29 Car. II. c. 3.

An Act for Prevention of Frauds and Perjuries.

IV. And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise (*a*) to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or* sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised. Promises and agreements by parol.

* *Sic.*

XVII. (*b*) And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June no contract for the sale of any goods, wares, and merchandises (*c*), for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contracts, or their agents thereunto lawfully authorised. Contracts for sales of goods for 10*l.* or more.

29 Car. II. c. 7.

An Act for the better Observation of the Lord's Day, commonly called Sunday.

For the better observation and keeping holy the Lord's day, commonly called Sunday, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and of the commons, in this present parliament assembled, and by the authority of the same, That all the laws enacted and in force concerning the observation of the Lord's day, and repairing to the church thereon, be carefully put in execution; and that all and every person and persons whatsoever shall on every Lord's day apply themselves to the observation of the same, by exercising themselves thereon in the duties of piety and true religion, publicly and privately; and that no tradesman, artificer, workman, labourer, or other 3 Car. 1, c. 1.

(*a*) See as to this 19 & 20 Vict. c. 97, s. 3, *infra*

(*b*) See 9 Geo. 4, c. 94, s. 7, *infra*.

(*c*) This section is in the Revised Edition of the Statutes printed as sect. 16.

Tradesmen, artificers, and labourers.

person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's day, or any part thereof (works of necessity and charity only excepted); and that every person being of the age of fourteen years or upwards, offending in the premises, shall for every

None shall cry or expose to sale wares.

such offence forfeit the sum of five shillings; and that no person or persons whatsoever shall publicly cry, shew forth, or expose to sale, any wares, merchandises, fruit, herbs, goods, or chattels whatsoever, upon the Lord's day, or any part thereof, upon pain that every person so offending shall forfeit the same goods so cried, or shewed forth, or exposed to sale.

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19 Geo. II. c. 37.

An Act to regulate Insurance on Ships belonging to the Subjects of Great Britain, and on Merchandises or Effects laden thereon.

Preamble.

Whereas it hath been found by experience, that the making assurances, interest or no interest, or without further proof of interest than the policy, hath been productive of many pernicious practices, whereby great numbers of ships, with their cargoes, have either been fraudulently lost and destroyed, or taken by the enemy in time of war, and such assurances have encouraged the exportation of wool, and the carrying on many other prohibited and clandestine trades, which by means of such assurances have been concealed, and the parties concerned secured from loss, as well to the diminution of the public revenue as to the great detriment of fair traders; and by introducing a mischievous kind of gaming or wagering, under the pretence of assuring the risk on shipping and fair trade, the institution and laudable design of making assurances hath been perverted, and that which was intended for the encouragement of trade and navigation has, in many instances, become hurtful of and destructive to the same: for remedy whereof, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the first day

No assurance to be made on ships or effects, &c., of subjects, interest or no interest.

of August, one thousand seven hundred and forty-six, no assurance or assurances shall be made by any person or persons, bodies corporate or politic, on any ship or ships belonging to his Majesty, or any of his subjects, or on any goods, merchandises, or effects, laden or to be laden on board of any such ship or ships, interest or no interest, or without further proof or* interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer; and that every such assurance shall be null and void to all intents and purposes.

* *Sic.*

Assurance on private ships of war may be made for the owners, interest or no interest.

II. Provided always, that assurance on private ships of war, fitted out by any of his Majesty's subjects solely to cruise against his Majesty's enemies, may be made by or for the owners thereof, interest or no interest, free of average, and without benefit of salvage to the assurer; anything herein contained to the contrary thereof in anywise notwithstanding.

Assurance on effects from Spain or Portugal.

III. Provided also, that any merchandises or effects from any ports or places in Europe or America, in the possession of the Crowns of Spain or Portugal, may be assured in such way and manner as if this Act had not been made.

IV. and V. [Repealed 30 & 31 Vict. c. 59, as to all the Queen's dominions.]

In all actions plaintiff to declare within fifteen days what sums he hath assured.

VI. In all actions or suits brought or commenced, after the said first day of August, by the assured, upon any policy of assurance, the plaintiff in such action or suit, or his attorney or agent, shall, within fifteen days after he or they shall be required so to do in writing by the defendant, or his attorney or agent, declare in writing what sum or sums he hath assured or caused to be assured in the whole, and what sums he hath borrowed at respondentia or bottom-ree, for the voyage, or any part of the voyage in question in such suit or action.

VII. [Repealed by 42 & 43 Vict. c. 59, as to the Supreme Court of Judicature in England.]

VIII. Provided always, that this Act shall not extend to or be in force against any persons residing in any parts or places in Europe out of his Majesty's dominions, for whose account any assurance or assurances shall be made before the 29th day of September, in the year of our Lord one thousand seven hundred and forty-six; nor extend to or be in force against any persons residing in any parts or places in Turkey, or in Asia, Africa, or America, for whose account any assurance or assurances shall be made before the twenty-fifth day of March, in the year of our Lord one thousand seven hundred and forty-seven; anything herein contained to the contrary thereof in anywise notwithstanding (*a*).

(*a*) Repealed as to the Queen's dominions, 30 & 31 Vict. c. 59.

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14 GEO. III. c. 48.

An Act for regulating Insurances upon Lives, and for prohibiting all such Insurance, except in cases where the Persons insuring shall have an Interest in the Life or Death of the Persons insured.

Preamble.

WHEREAS it hath been found by experience, that the making insurances on lives or other events, wherein the assured shall have no interest, hath introduced a mischievous kind of gaming: for remedy whereof, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this Act, no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every assurance made, contrary to the true intent and meaning hereof, shall be null and void, to all intents and purposes whatsoever.

No insurance to be made on the lives of persons having no interest, &c.

II. It shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons' name or names interested therein, or for whose use, benefit, or on whose account such policy is so made or underwrote.

No policies on lives without inserting the persons' names, &c.

III. In all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events.

How much may be recovered where the insured hath interest in lives.

IV. Provided always, that nothing herein contained shall extend, or be construed to extend, to insurances bonâ fide made by any person or persons, on ships, goods, or merchandises; but every such insurance shall be as valid and effectual in the law, as if this Act had not been made.

Not to extend to insurances on ships, goods, &c.

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7 Geo. IV. c. 46.

An Act for the better regulating Copartnerships of certain Bankers in England; and for amending so much of an Act of the Thirty-ninth and Fortieth Years of the Reign of his late Majesty King George the Third, intituled "An Act for establishing an Agreement with the Governor and Company of the Bank of England, for advancing the Sum of Three Millions towards the Supply for the Service of the Year One Thousand eight hundred," as relates to the same.

[26*th May*, 1826.]

Preamble.

39 & 40 Geo. c. 28.

Whereas an Act was passed in the thirty-ninth and fortieth years of the reign of his late Majesty King George the Third, intituled "An Act for establishing an Agreement with the Governor and Company of the Bank of England, for advancing the sum of Three Millions towards the Supply for the Service of the Year One Thousand eight hundred:" And whereas it was, to prevent doubts as to the privilege of the said governor and company, enacted and declared in the said recited Act, that no other bank should be erected, established, or allowed by Parliament; and that it should not be lawful for any body politic or corporate whatsoever, erected or to be erected, or for any other persons united or to be united in covenants or partnership, exceeding the number of six persons, in that part of Great Britain called England, to borrow, owe, or take up any sum or sums of money, on their bills or notes payable on demand, or at any less time than six months from the borrowing thereof, during the continuance of the said privilege to the said governor and company, who were thereby declared to be and remain a corporation, with the privilege of exclusive banking, as before recited; but subject nevertheless to redemption on the terms and conditions in the said Act specified: And whereas the governor and company of the Bank of England have consented to relinquish so much of their exclusive privilege as prohibits any body politic or corporate, or any number of persons exceeding six in England, acting in copartnership, from borrowing, owing, or taking up any sum or sums of money on their bills or notes payable on demand, or at any less time than six months from the borrowing thereof; provided that such body politic or corporate, or persons united in covenants or partnerships, exceeding the number of six persons in each copartnerships, shall have the whole of their banking establishments, and carry on their business as bankers, at any place or places in England exceeding the distance of sixty-five miles from London, and that all the individuals composing such corporations or copartnerships, carrying on such business, shall be liable to and responsible for the due payment of all bills and notes issued by such corporations or copartnerships respectively: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this Act, it shall and may be lawful for any bodies politic or corporate erected for the purposes of banking, or for any number of persons united in covenants or copartnership, although such persons so united or carrying on business together shall consist of more than six in number, to carry on the trade or

Copartnerships of more than six in number may carry on business as bankers in England sixty-five miles from London, provided they have no establishment

business of bankers in England, in like manner as copartnerships of bankers consisting of not more than six persons in number may lawfully do; and for such bodies politic or corporate, or such persons so united as aforesaid, to make and issue their bills or notes at any place or places in England, exceeding the distance of sixty-five miles from London, payable on demand, or otherwise at some place or places specified upon such bills or notes, exceeding the distance of sixty-five miles from London, and not elsewhere, and to borrow, owe, or take up any sum or sums of money on their bills or notes so made and issued at any such place or places as aforesaid: Provided always, that such corporations or persons carrying on such trade or business of bankers in copartnership shall not have any house of business or establishment as bankers in London, or at any place or places not exceeding the distance of sixty-five miles from London; and that every member of any such corporation or copartnership shall be liable to and responsible for the due payment of all bills and notes which shall be issued, and for all sums of money which shall be borrowed, owed, or taken up by the corporation or copartnership of which such person shall be a member, such person being a member at the period of the date of the bills or notes, or becoming or being a member before or at the time of the bills or notes being payable, or being such member at the time of the borrowing, owing, or taking up of any sum or sums of money upon any bills or notes by the corporation or copartnership, or while any sum of money on any bills or notes is owing or unpaid, or at the time the same became due from the corporation or copartnership; any agreement, covenant, or contract to the contrary notwithstanding.

as bankers in London, and that every member shall be liable for the payment of all bills, &c.

II. Provided always, and be it further enacted, that nothing in this Act contained shall extend or be construed to extend to enable or authorise any such corporation or copartnership exceeding the number of six persons, so carrying on the trade or business of bankers as aforesaid, either by any member of or person belonging to any such corporation or copartnership, or by any agent or agents, or any other person or persons on behalf of any such corporation or copartnership, to issue or re-issue in London, or at any place or places not exceeding the distance of sixty-five miles from London, any bill or note of such corporation or copartnership, which shall be payable to bearer on demand, or any bank post bill; nor to draw upon any partner or agent, or other person or persons who may be resident in London, or at any place or places not exceeding the distance of sixty-five miles from London, any bill of exchange which shall be payable on demand, or which shall be for a less amount than fifty pounds: Provided also, that it shall be lawful, notwithstanding anything herein, or in the said recited Act contained, for any such corporation or copartnership to draw any bill of exchange for any sum of money amounting to the sum of fifty pounds or upwards, payable either in London or elsewhere, at any period after date or after sight.

This Act not to authorise copartnerships to issue within the limits mentioned, any bills payable on demand; nor to draw bills upon any partner, &c., so resident for less than 50*l.*;

III. Provided also, and be it further enacted, that nothing in this Act contained shall extend or be construed to extend to enable or authorise any such corporation or copartnership exceeding the number of six persons, so carrying on the trade or business of bankers in England as aforesaid, or any member, agent, or agents of any such corporation or copartnership, to borrow, owe, or take up in London, or at any place or places not exceeding the distance of sixty-five miles from London, any sum or sums of money on any bill or promissory note of any such corporation or copartnership payable on demand, or at any time less than six months from the borrowing thereof, nor to make or issue any bill or bills of exchange or promissory note or notes of such corporation or copartnership contrary to the provisions of the said recited Act of the thirty-ninth and fortieth years of King George the Third, save as provided by this Act in that behalf: Provided also, that nothing herein contained shall extend or be construed to extend to prevent any such corporation or copartnership, by any agent or person authorised by them, from discounting in London, or elsewhere, any bill or bills of exchange not drawn by or upon such corporation or copartnership, or by or upon any person on their behalf.

nor to borrow money, or take up or issue bills of exchange contrary to the provisions of the recited Act, except as herein provided.

IV. And be it further enacted, that before any such corporation or copartnership exceeding the number of six persons, in England, shall begin to issue any bills or notes, or borrow, owe or take up any money on their bills or notes, an account or return shall be made out, according to the form contained in the schedule marked (A) to this Act annexed, wherein shall be set forth the true names, title or firm of such intended or existing corporation or

Such copartnerships shall, before issuing any notes, &c., deliver at the Stamp Office in London an account contain-

ing the name of the firm, &c.

copartnership, and also the names and places of abode of all the members of such corporation, or of all the partners concerned or engaged in such copartnership, as the same respectively shall appear on the books of such corporation or copartnership, and the name or firm of every bank or banks established or to be established by such corporation or copartnership, and also the names and places of abode of two or more persons, being members of such corporation or copartnership, and being resident in England, who shall have been appointed public officers of such corporation or copartnership, together with the title of office or other description of every such public officer respectively, in the name of any one of whom such corporation shall sue and be sued as hereinafter provided, and also the name of every town and place where any of the bills or notes of such corporation or copartnership shall be issued by any such corporation or by their agent or agents; and every such amount* or return shall be delivered to the commissioners of stamps at the Stamp Office in London, who shall cause the same to be filed and kept in the said stamp office, and an entry and registry thereof to be made in a book or books to be there kept for that purpose by some person or persons to be appointed by the said commissioners in that behalf, and which book or books any person or persons shall from time to time have liberty to search and inspect on payment of the sum of one shilling for every search.

* *Sic.*

Governor and Company of the Bank of England may empower agents to carry on banking business at any place in England.

XV. And to prevent any doubts that might arise whether the said governor and company, under and by virtue of their charter, and the several Acts of Parliament which have been made and passed in relation to the affairs of the said governor and company, can lawfully carry on the trade or business of banking, otherwise than under the immediate order, management and direction of the court of directors of the said governor and company: Be it therefore enacted, that it shall and may be lawful for the said governor and company to authorise and empower any committee or committees, agent or agents, to carry on the trade and business of banking, for and on behalf of the said governor and company, at any place or places in that part of the United Kingdom called England, and for that purpose to invest such committee or committees, agent or agents with such powers of management and superintendence, and such authority to appoint cashiers and other officers and servants as may be necessary or convenient for carrying on such trade and business as aforesaid: and for the same purpose to issue to such committee or committees, agent or agents, cashier or cashiers, or other officer or officers, servant or servants, cash, bills of exchange, bank post bills, bank notes, promissory notes, and other securities for payment of money: Provided always, that all such acts of the said governor and company shall be done and exercised in such manner as may be appointed by any bye-laws, constitutions, orders, rules, and directions from time to time hereafter to be made by the general court of the said governor and company in that behalf, such bye-laws not being repugnant to the laws of that part of the United Kingdom called England; and in all cases where such bye-laws, constitutions, orders, rules or directions of the said general court shall be wanting, in such manner as the governor, deputy governor, and directors, or the major part of them assembled, whereof the said governor or deputy governor is always to be one, shall or may direct, such directions not being repugnant to the laws of that part of the United Kingdom called England; anything in the said charter or Acts of Parliament, or other law, usage, matter, or thing to the contrary thereof notwithstanding: Provided always, that in any place where the trade and business of banking shall be carried on for and on behalf of the said governor and company of the Bank of England, any promissory note issued on their account in such place shall be made payable in coin in such place as well as in London.

Proviso for payment of notes in coin.

Copartnerships may issue unstamped notes on giving bond.

XVI. And be it further enacted, that if any corporation or copartnership carrying on the trade or business of bankers under the authority of this Act, shall be desirous of issuing and reissuing notes in the nature of bank notes, payable to the bearer on demand, without the same being stamped as by law is required, it shall be lawful for them so to do on giving security by bond to his Majesty, his heirs and successors, in which bond two of the directors, members, or partners of such corporation or copartnership shall be the obligors, together with the cashier or cashiers, or accountant or accountants employed by such corporation or copartnership as the said commissioners of stamps shall require; and such bonds shall be taken in such reasonable sums as the duties may amount unto during the period of one year, with condition

to deliver to the said commissioners of stamps, within fourteen days after the fifth day of January, the fifth day of April, the fifth day of July, and the tenth day of October in every year, whilst the present stamp duties shall remain in force, a just and true account, verified upon the oaths or affirmations of two directors, members or partners of such corporation or copartnership, and of the said cashier or cashiers, accountant or accountants, or such of them as the said commissioners of stamps shall require, such oaths or affirmations to be taken before any justice of the peace and which oaths or affirmations any justice of the peace is hereby authorised and empowered to administer, of the amount or value of all their promissory notes in circulation on some given day in every week, for the space of one quarter of a year, prior to the quarter day immediately preceding the delivery of such account, together with the average amount or value thereof according to such account; and also to pay or cause to be paid into the hands of the receivers general of stamp duties in Great Britain, as a composition for the duties which would otherwise have been payable for such promissory notes issued within the space of one year, the sum of seven shillings for every one hundred pounds, and also for the fractional part of one hundred pounds of the said average amount or value of such notes in circulation, according to the true intent and meaning of this Act; and on due performance thereof such bond shall be void; and it shall be lawful for the said commissioners to fix the time or times of making such payment, and to specify the same in the condition to every such bond; and every such bond may be required to be renewed from time to time at the discretion of the said commissioners or the major part of them, and as often as the same shall be forfeited, or the party or parties to the same, or any of them, shall die, become bankrupt or insolvent, or reside in parts beyond the sea.

No corporation compelled to take out more than four licences.

XVII. Provided always, and be it further enacted, that no such corporation or copartnership shall be obliged to take out more than four licences for the issuing of any promissory notes for money payable to the bearer on demand, allowed by law to be re-issued in all for any number of towns or places in England; and in case any such corporation or copartnership shall issue such promissory notes as aforesaid, by themselves or their agents, at more than four different towns or places in England, then, after taking out three distinct licences for three of such towns or places, such corporation or copartnership shall be entitled to have all the rest of such towns or places included in a fourth licence.

Penalty on copartnership neglecting to send returns, 500*l.*

XVIII. And be it further enacted, that if any such corporation or copartnership exceeding the number of six persons in England shall begin to issue any bills or notes, or to borrow, owe, or take up any money on their bills or notes, without having caused such account or return as aforesaid to be made out and delivered in the manner and form directed by this Act, or shall neglect or omit to cause such account or return to be renewed yearly, and every year, between the days or times hereinbefore appointed for that purpose, such corporation or copartnership so offending shall, for each and every week they shall neglect so to make* such account and return, forfeit the sum of five hundred pounds; and if any secretary or other officer of such corporation or copartnership shall make out or sign any false account or return, or any account or return which shall not truly set forth all the several particulars by this Act required to be contained or inserted in such account or return, the corporation or copartnership to which such secretary or other officer so offending shall belong, shall for every such offence forfeit the sum of five hundred pounds, and the said secretary or other officer so offending shall also for every such offence forfeit the sum of one hundred pounds; and if any such secretary or other officer making out or signing any such account or return as aforesaid shall knowingly and wilfully make a false oath of or concerning any of the matters to be therein specified and set forth, every such secretary or other officer so offending, and being thereof lawfully convicted, shall be subject and liable to such pains and penalties as by any law now in force persons convicted of wilful and corrupt perjury are subject and liable to.

* *Sic.*

Penalties for making false returns.

False oath, perjury.

Penalty on copartnership for issuing bills payable on demand;

XIX. And be it further enacted, that if any such corporation or copartnership exceeding the number of six persons, so carrying on the trade or business of bankers as aforesaid, shall, either by any member of or person belonging to any such corporation or copartnership, or by any agent or agents, or any other person or persons on behalf of any such corporation or

or drawing bills of exchange payable on demand, or for less than 50*l.*;

or borrowing money on bills, except as herein provided.

copartnership, issue or re-issue in London, or at any place or places not exceeding the distance of sixty-five miles from London, any bill or note of such corporation or copartnership which shall be payable on demand; or shall draw upon any partner or agent, or other person or persons who may be resident in London, or at any place or places not exceeding the distance of sixty-five miles from London, any bill of exchange which shall be payable on demand, or which shall be for a less amount than fifty pounds; or if any such corporation or copartnership exceeding the number of six persons, so carrying on the trade or business of bankers in England as aforesaid, or any member, agent or agents of any such corporation or copartnership, shall borrow, owe, or take up in London, or at any place or places not exceeding the distance of sixty-five miles from London, any sum or sums of money on any bill or promissory note of any such corporation or copartnership payable on demand, or at any less time than six months from the borrowing thereof, or shall make or issue any bill or bills of exchange or promissory note or notes of such corporation or copartnership contrary to the provisions of the said recited Act of the thirty-ninth and fortieth years of King George the Third, save as provided by this Act, such corporation or copartnership so offending, or on whose account or behalf any such offence as aforesaid shall be committed, shall for every such offence forfeit the sum of fifty pounds.

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9 Geo. IV. c. 14.

An Act for rendering a written Memorandum necessary to the validity of certain Promises and Engagements. [*9th May*, 1828.]

Confirmation of promises made by infants.

V. And be it further enacted, that no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith (*a*).

Representations of character.

VI. And be it further enacted, that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon*, unless such representation or assurance be made in writing, signed by the party to be charged therewith.

* *Sic.*

29 Car. 2, c. 3. Statute of Frauds.

VII. And whereas by an Act passed in England in the twenty-ninth year of the reign of King Charles the Second, intituled "An Act for the Prevention of Frauds and Perjuries," it is among other things enacted, that from and after the twenty-fourth day of June, one thousand six hundred and seventy-seven, no contract for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised: And whereas

Irish Act, 7 Will. 3, c. 12.

a similar enactment is contained in an Act passed in Ireland in the seventh year of the reign of King William the Third: And whereas it has been held, that the said recited enactments do not extend to certain executory contracts for the sale of goods, which nevertheless are within the mischief thereby intended to be remedied; and it is expedient to extend the said

Powers of recited Acts extended to contracts for goods of 10*l.*, &c.

enactments to such executory contracts: Be it enacted, that the said enactments shall extend to all contracts for the sale of goods of the value of ten

(*a*) This section is repealed by Statute Law Revision Act, 1875, 38 & 39 Vict. c. 66. See now 37 & 38 Vict. c. 62, s. 1, *infra*.

pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

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11 GEO. IV. & 1 WILL. IV. c. 68.

An Act for the more effectual Protection of Mail Contractors, Stage Coach Proprietors and other Common Carriers for Hire, against the Loss of or Injury to Parcels or Packages delivered to them for Conveyance or Custody, the Value and Contents of which shall not be declared to them by the Owners thereof. [23rd *July*, 1830.]

Preamble.

WHEREAS by reason of the frequent practice of bankers and others of sending by the public mails, stage coaches, waggons, vans, and other public conveyances by land for hire, parcels and packages containing money, bills, notes, jewellery and other articles of great value in small compass, much valuable property is rendered liable to depredation, and the responsibility of mail contractors, stage coach proprietors and common carriers for hire is greatly increased: And whereas through the frequent omission by persons sending such parcels and packages to notify the value and nature of the contents thereof, so as to enable such mail contractors, stage coach proprietors and other common carriers, by due diligence, to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledge of notices published by such mail contractors, stage coach proprietors, and other common carriers, with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this Act no mail contractor, stage coach proprietor, or other common carrier by land for hire shall be liable for the loss of or injury to any article or articles or property of the descriptions following; (that is to say,) gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks or time-pieces of any description, trinkets, bills, notes of the governor and company of the Banks of England, Scotland and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes or securities for payment of money, English or foreign, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate, or plated articles, glass, china, silks in a manufactured and unmanufactured state, and whether wrought up or not wrought up with other materials, furs or lace (*a*), or any of them, contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage coach or other public conveyance, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse or receiving house of such mail contractor, stage coach proprietor or other common carrier, or to his, her or their book-keeper, coachman or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.

Mail contractors, coach proprietors and carriers not to be liable for loss of certain goods above the value of 10*l.*, unless delivered as such and increased charge accepted.

(*a*) This does not include machine-made lace. See Carriers Act Amendment Act, 1865 (28 & 29 Vict. c. 94).

When parcel so delivered increased rate of charge may be demanded.

Notice of the same to be affixed in offices or warehouses.

II. And be it further enacted, that when any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of ten pounds, it shall be lawful for such mail contractors, stage coach proprietors, and other common carriers to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office shall be bound by such notice without further proof of the same having come to their knowledge.

Carriers to give receipts, acknowledging increased rate.

In case of neglect to give receipt, &c.

III. Provided always, and be it further enacted, that when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted as hereinbefore mentioned, the person receiving such increased rate of charge or accepting such agreement shall, if thereto required, sign a receipt for the package or parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the mail contractor, stage coach proprietor, or other common carrier as aforesaid shall not have or be entitled to any benefit or advantage under this Act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate of charge.

Publication of notices not to limit the liability of proprietors, &c., in respect of any other goods conveyed.

IV. Provided always, and be it enacted, that from and after the first day of September now next ensuing no public notice or declaration heretofore made or hereafter to be made, shall be deemed or construed to limit or in anywise affect the liability at common law of any such mail contractors, stage coach proprietors, or other public common carriers as aforesaid, for or in respect of any articles or goods to be carried and conveyed by them; but that all and every such mail contractors, stage coach proprietors, and other common carriers as aforesaid shall from and after the said first day of September be liable, as at the common law, to answer for the loss of* any injury to any articles and goods in respect whereof they may not be entitled to the benefit of this Act; any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding.

* *Sic.*

Every office used to be deemed a receiving house;

and any one coach proprietor or carrier shall be liable to be sued.

V. And be it further enacted, that for the purposes of this Act every office, warehouse, or receiving house which shall be used or appointed by any mail contractor, or stage coach proprietor, or other such common carrier as aforesaid for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the receiving house, warehouse, or office of such mail contractor, stage coach proprietor, or other common carrier: and that any one or more of such mail contractors, stage coach proprietors, or common carriers shall be liable to be sued by his, her, or their name or names only; and that no action or suit commenced to recover damages for loss or injury to any parcel, package, or person shall abate for the want of joining any co-proprietor or co-partner in such mail, stage coach, or other public conveyance by land for hire as aforesaid.

Not to affect contracts.

VI. Provided always, and be it further enacted, that nothing in this Act contained shall extend or be construed to annul or in anywise affect any special contract between such mail contractor, stage coach proprietor, or common carrier, and any other parties, for the conveyance of goods and merchandises.

Parties entitled to damages for loss may also recover back extra charges.

VII. Provided also, and be it further enacted, that where any parcel or package shall have been delivered at any such office, and the value and contents declared as aforesaid, and the increased rate of charges been paid, and such parcels or packages shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage shall also be entitled to recover back such increased charges so paid as aforesaid, in addition to the value of such parcel or package.

Nothing herein to protect felonious acts.

VIII. Provided also, and be it further enacted, that nothing in this Act shall be deemed to protect any mail contractor, stage coach proprietor, or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever, arising from the felonious acts of any

coachman, guard, book-keeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, book-keeper, or other servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct.

Coach proprietors and carrier liable only to such damages as are proved.

IX. Provided also, and be it further enacted, that such mail contractors, stage coach proprietors, or other common carriers for hire shall not be concluded as to the value of any such parcel or package by the value so declared as aforesaid, but that he or they shall in all cases be entitled to require, from the party suing in respect of any loss or injury, proof of the actual value of the contents by the ordinary legal evidence, and that the mail contractors, stage coach proprietors, or other common carriers as aforesaid shall be liable to such damages only as shall be so proved as aforesaid, not exceeding the declared value, together with the increased charges as before mentioned.

Money may be paid into court in all actions for loss of goods.

X. And be it further enacted, that in all actions to be brought against any such mail contractor, stage coach proprietor, or other common carrier as aforesaid for the loss of or injury to any goods delivered to be carried, whether the value of such goods shall have been declared or not, it shall be lawful for the defendant or defendants to pay money into court in the same manner and with the same effect as the money may be paid into court in any other action.

Public Act.

XI. And be it further enacted, that this Act shall be deemed and taken to be a public Act, and shall be judicially taken notice of as such by all judges, justices, and others, without being specially pleaded.

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1 & 2 WILL. IV. c. 37.

An Act to prohibit the Payment, in certain Trades, of Wages in Goods, or otherwise than in the current Coin of the Realm.

[*15th October*, 1831.]

Preamble.

WHEREAS it is necessary to prohibit the payment, in certain trades, of wages in goods, or otherwise than in the current coin of the realm; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that in all contracts hereafter to be made for the hiring of any artificer in any of the trades (*a*) hereinafter enumerated, or for the performance by any artificer of any labour in any of the said trades, the wages of such artificer shall be made payable in the current coin of this realm only, and not otherwise; and that if in any such contract the whole or any part of such wages shall be made payable in any manner other than in the current coin aforesaid, such contract shall be and is hereby declared illegal, null, and void.

Contracts for the hiring of artificers must be made in the current coin of the realm;

and must not contain any stipulations, &c.

II. If in any contract hereafter to be made between any artificer in any of the trades hereinafter enumerated, and his employer, any provision shall be made directly or indirectly respecting the place where, or the manner in which, or the person or persons with whom, the whole or any part of the wages due or to become due to any such artificer shall be laid out or expended, such contract shall be and is hereby declared illegal, null, and void.

All wages must be paid in coin.

III. The entire amount of the wages earned by or payable to any artificer in any of the trades hereinafter enumerated, in respect of any labour by him done in any such trade, shall be actually paid to such artificer in the current coin of this realm (*b*), and not otherwise; and every payment made to any such artificer by his employer, of or in respect of any such wages, by the delivering to him of goods, or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be and is hereby declared illegal, null, and void.

Payment in goods declared illegal.

(*a*) See 50 & 51 Vict. c. 46, s. 2; *Ingram* v. *Barnes*, 7 E. & B. 115.

(*b*) See *Smith* v. *Walton*, 3 C. P. D. 109.

Artificers may recover wages if not paid in the current coin.

IV. Every artificer in any of the trades hereinafter enumerated shall be entitled to recover from his employer in any such trade, in the manner by law provided for the recovery of servants' wages, or by any other lawful ways and means, the whole or so much of the wages earned by such artificer in such trade as shall not have been actually paid to him by such his employer in the current coin of this realm.

In an action brought for wages no set-off shall be allowed for goods supplied by the employer, &c.

V. In any action, suit, or other proceeding to be hereafter brought or commenced by any such artificer as aforesaid, against his employer, for the recovery of any sum of money due to any such artificer as the wages of his labour in any of the trades hereinafter enumerated, the defendant shall not be allowed to make any set-off, nor to claim any reduction (*e*) of the plaintiff's demand, by reason or in respect of any goods, wares or merchandise had or received by the plaintiff as or on account of his wages or in reward for his labour, or by reason or in respect of any goods, wares or merchandise sold, delivered, or supplied to such artificer at any shop or warehouse kept by or belonging to such employer, or in the profits of which such employer shall have any share or interest.

No employer shall have any action against his artificer for goods supplied to him on account of wages.

VI. No employer of any artificer in any of the trades hereinafter enumerated shall have or be entitled to maintain any suit or action in any court of law or equity, against any such artificer, for or in respect of any goods, wares, or merchandise sold, delivered, or supplied to any such artificer by any such employer, whilst in his employment, as or on account of his wages or reward for his labour, or for or in respect of any goods, wares, or merchandise sold, delivered, or supplied to such artificer at any shop or warehouse kept by or belonging to such employer, or in the profits of which such employer shall have any share or interest.

Not to invalidate the payment of wages in bank notes, if artificer consents.

VIII. Nothing herein contained shall be construed to prevent or to render invalid any contract for the payment, or any actual payment, to any such artificer as aforesaid, of the whole or any part of his wages, either in the notes of the governor and company of the Bank of England, or in the notes of any person or persons carrying on the business of a banker, and duly licensed to issue such notes in pursuance of the laws relating to his Majesty's revenue of stamps, or in drafts or orders for the payment of money to the bearer on demand, drawn upon any person or persons carrying on the business of a banker, being duly licensed as aforesaid, within fifteen miles of the place where such drafts or order shall be so paid, if such artificer shall be freely consenting to receive such drafts or orders as aforesaid, but all payments so made, with such consent as aforesaid, in any such notes, drafts, or orders as aforesaid, shall for the purposes of this Act be as valid and effectual as if such payments had been made in the current coin of the realm.

IX. Any employer of any artificer in any of the trades hereinafter enumerated who shall by himself or by the agency of any other person or persons, directly or indirectly, enter into any contract or make any payment hereby declared illegal shall for the first offence forfeit a sum not exceeding 10*l.* nor less than 5*l.*, and for the second offence any sum not exceeding 20*l.* nor less than 10*l.*; and in the case of a third offence any such employer shall be and be deemed guilty of a misdemeanor, and being thereof convicted shall be punished by fine only at the discretion of the Court, so that the fines shall not in any case exceed the sum of 100*l.*

XIX. [Repealed by 50 & 51 Vict. c. 46.]

Domestics.

XX. Nothing herein contained shall extend to any domestic servant (*d*) [or servant in husbandry] (*e*).

Particular exceptions to the generality to the law.

XXIII. Nothing herein contained shall extend or be construed to extend to prevent any employer of any artificer, or agent of any such employer, from supplying or contracting to supply to any such artificer any medicine or medical attendance, or any fuel, or any materials, tools, or implements to be by such artificer employed in his trade or occupation, if such artificers be employed in mining, or any hay, corn, or other provender to be consumed by any horse or other beast of burden employed by any such artificer in his trade and occupation; nor from demising to any artificer, workman, or

(*e*) See *Archer* v. *James*, 2 B. & S. 61.

(*d*) Sect. 4 of 50 & 51 Vict. c. 46, *infra*.

(*e*) Words in brackets repealed by 50 & 51 Vict. c. 46, *infra*.

labourer employed in any of the trades or occupations enumerated in this Act, the whole or any part of any tenement at any rent to be thereon reserved; nor from supplying or contracting to supply to any such artificer any victuals dressed or prepared under the roof of any such employer, and there consumed by such artificer; nor from making or contracting to make any stoppage or deduction from the wages of any such artificer for or in respect of any such rent; or for or in respect of any such medicine or medical attendance; or for or in respect of such fuel, materials, tools, implements, hay, corn, or provender, or of any such victuals dressed and prepared under the roof of any such employer; or for or in respect of any money advanced to such artificer for any such purpose as aforesaid: provided always, that such stoppage or deduction shall not exceed the real and true value of such fuel, materials, tools, implements, hay, corn, and provender, and shall not be in any case made from the wages of such artificer, unless the agreement or contract for such stoppage or deduction shall be in writing, and signed by such artificer (*f*).

Employers may advance money to artificers for certain purposes.

XXIV. Nothing herein contained shall extend or be construed to extend to prevent any such employer from advancing to any such artificer any money to be by him contributed to any friendly society or bank for savings duly established according to law, nor from advancing to any such artificer any money for his relief in sickness, or for the education of any child or children of such artificer, nor from deducting or contracting to deduct any sum or sums of money from the wages of such artificers for the education of any such child or children of such artificer [and unless the agreement or contract for such deduction shall be in writing, and signed by such artificer] (*g*).

Definition of terms.

XXV. In the meaning and for the purposes of this Act [all workmen, labourers, and other persons in any manner engaged in the performance of any work, employment, or operation of what nature soever, in or about the several trades and occupations aforesaid, shall be and be deemed "artificers;" and that within the meaning and for the purposes aforesaid all masters, bailiffs, foremen, managers, clerks, and other persons engaged in the hiring, employment, or superintendence of the labour of any such artificers, shall be and be deemed to be "employers;" and that within the meaning and for the purposes of this Act any money or other thing had or contracted to be paid, delivered, or given as a recompense, reward, or remuneration for any labour, done or to be done, whether within a certain time or to a certain amount, or for a time or an amount uncertain, shall be deemed and taken to be the "wages" of such labour; and that within the meaning and for the purposes aforesaid] (*g*) any agreement, understanding, device, contrivance, collusion or arrangement whatsoever on the subject of wages, whether written or oral, whether direct or indirect, to which the employer and artificer are parties or are assenting, or by which they are mutually bound to each other or whereby either of them shall have endeavoured to impose an obligation on the other of them, shall be and be deemed a "contract."

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3 & 4 WILL. IV. c. 98.

An Act for giving to the Corporation of the Governor and Company of the Bank of England certain Privileges, for a limited Period, under certain Conditions. [29*th August*, 1833.]

Preamble recites 39 & 40 Geo. 3, c. 28.

WHEREAS an Act was passed in the thirty-ninth and fortieth years of the reign of his Majesty King George the Third, intituled "An Act for establishing an Agreement with the Governor and Company of the Bank of England for advancing the sum of Three Millions towards the Supply for the Service of the Year One thousand eight hundred:" and whereas it was by the said recited Act declared and enacted, that the said governor and company should be and continue a corporation, with such powers, autho-

(*f*) See 50 & 51 Vict. c. 46, s. 5, *infra*.

(*g*) Words within brackets repealed by 50 & 51 Vict. c. 46, *infra*.

rities, emoluments, profits, and advantages, and such privileges of exclusive banking, as are in the said recited Act specified, subject nevertheless to the powers and conditions of redemption and on the terms in the said Act mentioned: and whereas an Act passed in the seventh year of the reign of his late Majesty King George the Fourth, intituled "An Act for the better regulating Copartnership of certain Bankers in England, and for amending so much of an Act of the thirty-ninth and fortieth years of the reign of his late Majesty King George the Third, intituled 'An Act for establishing an Agreement with the Governor and Company of the Bank of England for advancing the sum of Three Millions towards the Supply for the Service of the Year One thousand eight hundred,' as relates to the same:" and whereas it is expedient that certain privileges of exclusive banking should be continued to the said governor and company for a further limited period upon certain conditions: and whereas the said governor and company of the Bank of England are willing to deduct and allow to the public, from the sums now payable to the said governor and company for the charges of management of the public unredeemed debt, the annual sum hereinafter mentioned, and for the period in this Act specified, provided the privilege of exclusive banking specified in this Act is continued to the said governor and company for the period specified in this Act: may it therefore please your Majesty that it may be enacted: and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the said governor and company of the Bank of England shall have and enjoy such exclusive privilege of banking as is given by this Act, as a body corporate, for the period and upon the terms and conditions hereinafter mentioned, and subject to termination of such exclusive privilege at the time and in the manner in this Act specified.

7 Geo. 4, c. 46.

Bank of England to enjoy an exclusive privilege of banking, &c.

II. And be it further enacted, that during the continuance of the said privilege, no body politic or corporate, and no society or company, or persons united or to be united in covenants or partnerships, exceeding six persons, shall make or issue in London, or within sixty-five miles thereof, any bill of exchange or promissory note, or engagement for the payment of money on demand, or upon which any person holding the same may obtain payment on demand: Provided always, that nothing herein or in the said recited Act of the seventh year of the reign of his late Majesty King George the Fourth contained shall be construed to prevent any body politic or corporate, or any society or company, or incorporated company or corporation, or copartnership, carrying on and transacting banking business at any greater distance than sixty-five miles from London, and not having any house of business or establishment as bankers in London, or within sixty-five miles thereof (except as hereinafter mentioned), to make and issue their bills and notes, payable on demand or otherwise, at the place at which the same shall be issued, being more than sixty-five miles from London, and also in London, and to have an agent or agents in London, or at any other place at which such bills or notes shall be made payable, for the purpose of payment only, but no such bill or note shall be for any sum less than five pounds, or be re-issued in London or within sixty-five miles thereof.

During such privilege, no banking company of more than six persons to issue notes payable on demand within London, or sixty-five miles thereof.

7 & 8 Vict. c. 32.

Any company or partnership may carry on business of banking in London or within sixty-five miles thereof, upon the terms herein mentioned.

III. And whereas the intention of this Act is, that the governor and company of the Bank of England should, during the period stated in this Act (subject nevertheless to such redemption as is described in this Act), continue to hold and enjoy all the exclusive privileges of banking given by the said recited Act of the thirty-ninth and fortieth years of the reign of his Majesty King George the Third aforesaid, as regulated by the said recited Act of the seventh year of his late Majesty King George the Fourth, or any prior or subsequent Act or Acts of Parliament, but no other or further exclusive privilege of banking: and whereas doubts have arisen as to the construction of the said Acts, and as to the extent of such exclusive privilege; and it is expedient that all such doubts should be removed: be it therefore declared and enacted, that any body politic or corporate, or society, or company, or partnership, although consisting of more than six persons, may carry on the trade or business of banking in London, or within sixty-five miles thereof, provided that such body politic or corporate, or society, or company, or partnership, do not borrow, owe, or take up in England any sum or sums of money on their bills or notes payable on demand or at any less time than six months from the borrowing thereof, during the continuance of the privi-

7 & 8 Vict. c. 32, s. 26.

leges granted by this Act to the said governor and company of the Bank of England.

All notes of the Bank of England payable on demand which shall be issued out of London shall be payable at the place where issued, &c.

IV. Provided always, and be it further enacted, that from and after the first day of August, One thousand eight hundred and thirty-four, all promissory notes payable on demand of the governor and company of the Bank of England, which shall be issued at any place in that part of the United Kingdom called England out of London, where the trade and business of banking shall be carried on for and on behalf of the said governor and company of the Bank of England, shall be made payable at the place where such promissory notes shall be issued; and it shall not be lawful for the said governor and company, or any committee, agent, cashier, officer or servant of the said governor and company to issue, at any such place out of London, any promissory note payable on demand which shall not be made payable at the place where the same shall be issued; anything in the said recited Act of the seventh year aforesaid to the contrary notwithstanding.

V. [Repealed by Statute Law Revision Act, 1874.]

Bank notes to be a legal tender, except at the Bank and branch banks.

VI. And be it further enacted, that from and after the first day of August, One thousand eight hundred and thirty-four, unless and until Parliament shall otherwise direct, a tender of a note or notes of the governor and company of the Bank of England, expressed to be payable to bearer on demand, shall be a legal tender to the amount expressed in such note or notes, and shall be taken to be valid as a tender to such amount for all sums above five pounds on all occasions on which any tender of money may be legally made, so long as the Bank of England shall continue to pay on demand their said notes in legal coin: Provided always, that no such note or notes shall be deemed a legal tender of payment by the governor and company of the Bank of England, or any branch bank of the said governor and company; but the said governor and company are not to become liable or be required to pay and satisfy, at any branch bank of the said governor and company, any note or notes of the said governor and company, not made specially payable at such branch bank; but the said governor and company shall be liable to pay and satisfy at the Bank of England in London all notes of the said governor and company, or of any branch thereof.

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5 & 6 WILL. IV. c. 41.

An Act to amend the Law relating to Securities given for Considerations arising out of gaming, usurious, and certain other illegal Transactions (a). [31*st August*, 1835.]

Preamble recites 16 Car. 2, c. 7. 10 Will. 3 (I.).

WHEREAS by an Act passed in the sixteenth year of the reign of his late Majesty King Charles the Second, and by an Act passed in the parliament of Ireland in the tenth year of the reign of his late Majesty King William the Third, each of such Acts being intituled "An Act against deceitful, disorderly, and excessive Gaming," it was enacted that all and singular judgments, statutes, recognizances, mortgages, conveyances, assurances, bonds, bills, specialties, promises, covenants, agreements, and other acts, deeds and securities whatsoever, which should be obtained, made, given, acknowledged, or entered into for security or satisfaction of or for any money or other thing lost at play or otherwise as in the said Acts respectively is mentioned, or for any part thereof, should be utterly void and of none effect: and whereas by an Act passed in the ninth year of the reign of her late Majesty Queen Anne, and also by an Act passed in the parliament of Ireland in the eleventh year of the reign of her said late Majesty, each of such Acts being intituled "An Act for the better preventing of excessive and deceitful Gaming," it was enacted, that from and after the several days therein respectively mentioned all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, drawn or entered into

9 Anne, c. 14. 11 Anne (I.).

(a) Repealed, except so much of sects. 1 and 2 as relates to the Acts 9 and 11 Anne, by Statute Law Revision Act, 1874.

or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities should be for any money or other valuable thing whatsoever won by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as did game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting as aforesaid, or lent or advanced at the time and place of such play, to any person or persons so gaming or betting as aforesaid, or that should, during such play, so play or bet, should be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever; and that where such mortgages, securities, or other conveyances should be of lands, tenements, or hereditaments, or should be such as should incumber or affect the same, such mortgages, securities, or other conveyances should enure and be to and for the sole use and benefit of and should devolve upon such person or persons as should or might have or be entitled to such lands or hereditaments in case the said grantor or grantors thereof, or the person or persons so incumbering the same had been naturally dead, and as if such mortgages, securities, or other conveyances had been made to such person or persons so to be entitled after the decease of the person or persons so incumbering the same; and that all grants or conveyances to be made for the preventing of such lands, tenements, or hereditaments from coming to or devolving upon such person or persons thereby intended to enjoy the same as aforesaid should be deemed fraudulent and void and of none effect, to all intents and purposes whatsoever: And whereas by an Act passed in the twelfth year of the reign of her said late Majesty Queen Anne, intituled "An Act to reduce the Rate of Interest without any Prejudice to Parliamentary Securities," it was enacted that all bonds, contracts, and assurances whatsoever made after the twenty-ninth day of September, one thousand seven hundred and fourteen, for payment of any principal or money to be lent or covenanted to be performed upon or for any usury, whereupon or whereby there should be reserved or taken above the rate of five pounds in the hundred, as therein mentioned, should be utterly void: And whereas by an Act passed in the parliament of Ireland in the fifth year of the reign of his late Majesty King George the Second, intituled "An Act for reducing the Interest of Money to six per cent.," it was enacted, that all bonds, contracts, and assurances whatsoever made after the first day of May, one thousand seven hundred and thirty-two, for payments of any principal or money to be lent or covenant to be performed upon or for any loan, whereupon or whereby there should be taken or reserved above the rate of six pounds in the hundred, should be utterly void: And whereas by an Act passed in the fifty-eighth year of the reign of his late Majesty King George the Third, intituled, "An Act to afford Relief to the bonâ fide Holders of Negotiable Securities without Notice that they were given for a usurious Consideration," it was enacted that no bill of exchange or promissory note that should be drawn or made after the passing of that Act should, though it might have been given for a usurious consideration or upon a usurious contract, be void in the hands of an indorsee for valuable consideration, unless such indorsee had at the time of discounting or paying such consideration for the same, actual notice that such bill of exchange or promissory note had been originally given for a usurious consideration or upon a usurious contract: And whereas by an Act passed in the parliament of Ireland in the eleventh and twelfth years of the reign of his said late Majesty King George the Third, intituled "An Act to prevent Frauds committed by Bankrupts," it was enacted, that every bond, bill, note, contract, agreement, or other security whatsoever to be made or given by any bankrupt or by any other person unto or to the use of or in trust for any creditor or creditors, or for the security of the payment of any debt or sum of money due from such bankrupt at the time of his becoming bankrupt, or any part thereof, between the time of his becoming bankrupt, and such bankrupt's discharge, as a consideration or to the intent to persuade him, her, or them to consent to or sign any such allowance or certificate, should be wholly void and of no effect, and the moneys there secured or agreed to be paid should not be recovered or recoverable: And whereas by an Act passed in the forty-fifth year of the reign of his said late Majesty King George the Third, intituled "An Act for the Encouragement of Seamen and for the better and more effectually manning his Majesty's Navy during the present War," it was enacted, that

12 Anne, st. 2, c. 16.

5 Geo. 2 (I.).

58 Geo. 3, c. 93.

11 & 12 Geo. 3 (I.).

45 Geo. 3, c. 72.

all contracts and agreements which should be entered into, and all bills, notes, and other securities which should be given, by any person or persons for ransom of any ship or vessel, or of any merchandise or goods on board the same, contrary to that Act, should be absolutely null and void in law, and of no effect whatsoever: And whereas by an Act passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled "An Act to amend the Laws relating to Bankrupts," it was enacted, that any contract or security made or given by any bankrupt or other person unto or in trust for any creditor, or for securing the payment of any money due by such bankrupt, at his bankruptcy, as a consideration or with intent to persuade such creditor to consent to or sign the certificate of any such bankrupt, should be void, and the money thereby secured or agreed to be paid should not be recoverable, and the party sued on such contract or security might plead the general issue, and give that Act and the special matter in evidence: And whereas securities and instruments made void by virtue of the several hereinbefore recited Acts of the sixteenth year of the reign of his said late Majesty King Charles the Second, the tenth year of the reign of his said late Majesty King William the Third, the ninth and eleventh years of the reign of her said late Majesty Queen Anne, the eleventh and twelfth years of the reign of his said late Majesty King George the Third, the forty-fifth year of the reign of his said late Majesty King George the Third, and the sixth year of the reign of his said late Majesty King George the Fourth, and securities and instruments made void by virtue of the said Act of the twelfth year of the reign of her said late Majesty Queen Anne, and the fifth year of the reign of his said late Majesty King George the Second, other than bills of exchange or promissory notes made valid by the said Act of the fifty-eighth year of the reign of his said late Majesty King George the Third, are sometimes indorsed, transferred, assigned, or conveyed to purchasers or other persons for a valuable consideration, without notice of the original consideration for which such securities or instruments were given, and the avoidance of such securities or instruments in the hands of such purchasers or other persons is often attended with great hardship and injustice: for remedy thereof be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that so much of the hereinbefore-recited Acts of the sixteenth year of the reign of his said late Majesty King Charles the Second, the tenth year of the reign of his said late Majesty King William the Third, the ninth, eleventh, and twelfth years of the reign of her said late Majesty Queen Anne, the fifth year of the reign of his said late Majesty King George the Second, the eleventh and twelfth, and the forty-fifth years of the reign of his said late Majesty King George the Third, and the sixth year of the reign of his said late Majesty King George the Fourth, as enacts that any note, bill, or mortgage shall be absolutely void, shall be and the same is hereby repealed; but nevertheless every note, bill, or mortgage which if this Act had not been passed would, by virtue of the said several lastly hereinbefore-mentioned Acts or any of them, have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given or executed for an illegal consideration, and the said several Acts shall have the same force and effect which they would respectively have had if instead of enacting that any such note, bill, or mortgage should be absolutely void, such Acts had respectively provided that every such note, bill, or mortgage should be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration: provided always, that nothing herein contained shall prejudice or affect any note, bill or mortgage which would have been good and valid if this Act had not been passed.

6 Geo. 4, c. 16.

Securities given for considerations arising out of illegal transactions not to be void, but to be deemed to have been given for an illegal consideration.

II. And be it further enacted, that in case any person shall, after the passing of this Act, make, draw, give, or execute any note, bill, or mortgage for any consideration on account of which the same is by the hereinbefore-recited Acts of the sixteenth year of the reign of his said late Majesty King Charles the Second, the tenth year of the reign of his said late Majesty King William the Third, and the ninth and eleventh years of the reign of her said late Majesty Queen Anne, or by one or more of such Acts, declared to be void, and such person shall actually pay to any indorsee, holder, or assignee of such note, bill, or mortgage the amount of the money thereby secured, or any part thereof, such money so paid shall be deemed and taken

Money paid to the holder of such securities shall be deemed to be paid on account of the person to whom the same was originally given.

to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given upon such illegal consideration as aforesaid, and shall be deemed and taken to be a debt due and owing from such last-named person to the person who shall so have paid such money, and shall accordingly be recoverable by action at law in any of his Majesty's Courts of Record.

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1 & 2 Vict. c. 106.

An Act to abridge the holding of Benefices in Plurality, and to make better Provision for the Residence of the Clergy.

[14*th August*, 1838.]

No spiritual person beneficed or performing ecclesiastical duty shall engage in trade, or buy to sell again for profit or gain.

XXIX. And be it enacted, that it shall not be lawful for any spiritual person holding any such cathedral preferment, benefice, curacy or lectureship, or who shall be licensed or allowed to perform such duties as aforesaid, by himself or by any other for him or to his use, to engage in or carry on any trade or dealing for gain or profit, or to deal in any goods, wares or merchandise, unless in any case in which such trading or dealing shall have been or shall be carried on by or on behalf of any number of partners exceeding the number of six, or in any case in which any trade or dealing, or any share in any trade or dealing, shall have devolved or shall devolve upon any spiritual person, or upon any other person for him or to his use, under or by virtue of any devise, bequest, inheritance, intestacy, settlement, marriage, bankruptcy or insolvency; but in none of the foregoing excepted cases shall it be lawful for such spiritual person to act as a director or managing partner, or to carry on such trade or dealing as aforesaid in person (*a*).

Not to extend to spiritual persons engaged in keeping schools or as tutors, &c., in respect of anything done, or any buying or selling in such employment; or to selling anything bonâ fide bought for the use of the family, or to being a manager, &c., in any benefit or life or fire assurance society, or buying and selling cattle, &c. for the use of his own lands, &c.

XXX. Provided always, and be it enacted, that nothing hereinbefore contained shall subject to any penalty or forfeiture any spiritual person for keeping a school or seminary, or acting as a schoolmaster or tutor or instructor, or being in any manner concerned or engaged in giving instruction or education for profit or reward, or for buying or selling or doing any other thing in relation to the management of any such school, seminary or employment, or to any spiritual person whatever for the buying of any goods, wares, or merchandises, or articles of any description, which shall without fraud be bought with intent at the buying thereof to be used by the spiritual person buying the same for his family or in his household, and after the buying of any such goods, wares or merchandises or articles, selling the same again or any parts thereof which such person may not want or choose to keep, although the same shall be sold at an advanced price beyond that which may have been given for the same; or for disposing of any books or other works to or by means of any bookseller or publisher; or for being a manager, director, partner or shareholder in any benefit society, or fire or life assurance society, by whatever name or designation such society may have been constituted; or for any buying or selling again for gain or profit, of any cattle or corn or other articles necessary or convenient to be bought, sold, kept or maintained by any spiritual person, or any other person for him or to his use, for the occupation, manuring, improving, pasturage or profit of any glebe, demesne lands, or other lands or hereditaments which may be lawfully held and occupied, possessed or enjoyed by such spiritual person or any other for him or to his use; or for selling any minerals the produce of mines situated on his own lands; so nevertheless that no such spiritual person shall buy or sell any cattle or corn or other articles as aforesaid in person in any market, fair, or place of public sale.

(*a*) *Lewis* v. *Bright*, 4 El. & B. 917.

Spiritual persons illegally trading may be suspended, and for the third offence deprived.

XXXI. And be it enacted, that if any spiritual person shall trade or deal in any manner contrary to the provisions of this Act, it shall be lawful for the bishop of the diocese where such person shall hold any cathedral preferment, benefice, curacy or lectureship, or shall be licensed or otherwise allowed to perform the duties of any ecclesiastical office whatever, to cause such person to be cited before his chancellor or other competent judge, and it shall be lawful for such chancellor or other judge, on proof in due course of law of such trading, to suspend such spiritual person for his first offence for such time not exceeding one year as to such judge shall seem fit; and on proof in like manner before such or any other competent ecclesiastical judge of a second offence committed by such spiritual person subsequent to such sentence of suspension, such spiritual person shall for such second offence be suspended for such time as to the judge shall seem fit; and for his third offence be deprived ab officio et beneficio; and thereupon it shall be lawful for the patron or patrons of any such cathedral preferment, benefice, lectureship or office, to make donation or to present or nominate to the same as if the person so deprived were actually dead; and in all such cases of suspension the bishop, during such suspension, shall sequester the profits of any cathedral preferment, benefice, lectureship, or office of which such spiritual person may be in possession, and by an order under his hand direct the application of the profits of the same respectively, after deducting the necessary expenses of providing for the due performance of the duties of the same respectively, towards the same purposes and in the same order, as near as the difference of circumstances will admit, as are hereinafter directed with respect to the profits of a benefice sequestered in case of noncompliance after monition with an order requiring a spiritual person to proceed and reside on his benefice, save that no part of such profits shall be paid to the spiritual person so suspended, nor applied in satisfaction of a sequestration at the suit of a creditor; and in case of deprivation, the bishop shall forthwith give notice thereof in writing under his hand to the patron or patrons of any cathedral preferment, benefice, lectureship or office which the said spiritual person may have holden in the manner hereinafter required with respect to notice to the patron of a benefice continuing under sequestration for one whole year, and thereby becoming void, and any such cathedral preferment or benefice shall lapse at such period after the said notice as any such last-mentioned benefice would under the provisions of this Act lapse: Provided always, that no contract shall be deemed to be void by reason only of the same having been entered into by a spiritual person trading or dealing, either solely or jointly with any other person or persons contrary to the provisions of this Act, but every such contract may be enforced by or against such spiritual person, either solely, or jointly with any other person or persons, as the case may be, in the same way as if no spiritual person had been party to such contract.

7 & 8 Vict. c. 32.

An Act to regulate the Issue of Bank Notes, and for giving to the Governor and Company of the Bank of England certain Privileges for a limited Period. [19*th July*, 1844.]

All persons may demand of the issue department notes for gold bullion.

IV. And be it enacted, that from and after the thirty-first day of August, one thousand eight hundred and forty-four, all persons shall be entitled to demand from the issue department of the Bank of England Bank of England notes in exchange for gold bullion, at the rate of three pounds seventeen shillings and nine-pence per ounce of standard gold: Provided always, that the said governor and company shall in all cases be entitled to require such gold bullion to be melted and assayed by persons approved by the said governor and company at the expense of the parties tendering such gold bullion.

No new bank of issue.

X. And be it enacted, that from and after the passing of this Act no person other than a banker, who, on the sixth day of May, one thousand eight hundred and forty-four, was lawfully issuing his own bank notes, shall make or issue bank notes in any part of the United Kingdom.

Restriction against issue of bank notes.

XI. And be it enacted, that from and after the passing of this Act it shall not be lawful for any banker to draw, accept, make, or issue, in England or Wales, any bill of exchange or promissory note, or engagement for the payment of money payable to bearer on demand, or to borrow, owe, or take up, in England or Wales, any sums or sum of money on the bills or notes of such banker payable to bearer on demand, save and except that it shall be lawful for any banker who was on the sixth day of May, one thousand eight hundred and forty-four, carrying on the business of a banker in England or Wales, and was then lawfully issuing, in England or Wales, his own bank notes, under the authority of a license to that effect, to continue to issue such notes to the extent and under the conditions hereinafter mentioned, but not further or otherwise; and the right of any company or partnership to continue to issue such notes shall not be in any manner prejudiced or affected by any change which may hereafter take place in the personal composition of such company or partnership, either by the transfer of any shares or share therein, or by the admission of any new partner or member thereto, or by the retirement of any present partner or member therefrom: Provided always, that it shall not be lawful for any company or partnership now consisting of only six or less than six persons to issue bank notes at any time after the number of partners therein shall exceed six in the whole.

Bankers ceasing to issue notes may not resume.

XII. And be it enacted, that if any banker in any part of the United Kingdom, who, after the passing of this Act, shall be entitled to issue bank notes, shall become bankrupt, or shall cease to carry on the business of a banker, or shall discontinue the issue of bank notes, either by agreement with the governor and company of the Bank of England or otherwise, it shall not be lawful for such banker at any time thereafter to issue any such notes.

Existing banks of issue to continue under

XIII. And be it enacted, that every banker claiming under this Act to continue to issue bank notes in England or Wales, shall, within one month

next after the passing of this Act, give notice in writing to the commissioners of stamps and taxes at their head office in London of such claim, and of the place and name and firm at and under which such banker has issued such notes during the twelve weeks next preceding the twenty-seventh day of April last; and thereupon the said commissioners shall ascertain if such banker was, on the sixth day of May, one thousand eight hundred and forty-four, carrying on the business of a banker, and lawfully issuing his own bank notes in England or Wales, and if it shall so appear, then the said commissioners shall proceed to ascertain the average amount of the bank notes of such banker which were in circulation during the said period of twelve weeks preceding the twenty-seventh day of April last, according to the returns made by such banker in pursuance of the Act passed in the fourth and fifth years of the reign of her present Majesty, intituled, "An Act to make further provisions relative to the returns to be made by banks of the amount of their notes in circulation;" and the said commissioners, or any two of them, shall certify under their hands to such banker the said average amount, when so ascertained as aforesaid; and it shall be lawful for every such banker to continue to issue his own bank notes after the passing of this Act: Provided nevertheless, that such banker shall not at any time after the tenth day of October, one thousand eight hundred and forty-four, have in circulation upon the average of a period of four weeks, to be ascertained as hereinafter mentioned, a greater amount of notes than the amount so certified.

certain limitations.

4 & 5 Vict. c. 50.

XIV. Provided always, and be it enacted, that if it shall be made to appear to the commissioners of stamps and taxes that any two or more banks have, by written contract or agreement (which contract or agreement shall be produced to the said commissioners), become united within the twelve weeks next preceding such twenty-seventh day of April as aforesaid, it shall be lawful for the said commissioners to ascertain the average amount of the notes of each such bank in the manner hereinbefore directed, and to certify the average amount of the notes of the two or more banks so united as the amount which the united bank shall thereafter be authorized to issue, subject to the regulations of this Act.

Provision for united banks.

XV. And be it enacted, that the commissioners of stamps and taxes shall, at the time of certifying to any banker such particulars as they are hereinbefore required to certify, also publish a duplicate of their certificate thereof in the next succeeding London Gazette in which the same may be conveniently inserted; and the Gazette in which such publication shall be made, shall be conclusive evidence in all courts whatsoever of the amount of bank notes which the banker named in such certificate or duplicate is by law authorized to issue and to have in circulation as aforesaid.

Duplicate certificate to be published in the Gazette.

Gazette to be evidence.

XVI. And be it enacted, that in case it shall be made to appear to the commissioners of stamps and taxes, at any time hereafter, that any two or more banks, each such bank consisting of not more than six persons, have, by written contract or agreement (which contract or agreement shall be produced to the said commissioners), become united subsequently to the passing of this Act, it shall be lawful to the said commissioners, upon the application of such united bank, to certify, in manner hereinbefore mentioned, the aggregate of the amounts of bank notes which such separate banks were previously authorized to issue, and so from time to time; and every such certificate shall be published in manner hereinbefore directed; and from and after such publication the amount therein stated shall be and be deemed to be the limit of the amount of bank notes which such united bank may have in circulation: Provided always, that it shall not be lawful for any such united bank to issue bank notes at any time after the number of partners therein shall exceed six in the whole.

In case banks become united, commissioners to certify the amount of bank notes which each bank was authorised to issue.

XVII. And be it enacted, that if the monthly average circulation of bank notes of any banker, taken in the manner hereinafter directed, shall at any time exceed the amount which such banker is authorized to issue and to have in circulation under the provisions of this Act, such banker shall in every such case forfeit a sum equal to the amount by which the average monthly circulation, taken as aforesaid, shall have exceeded the amount which such banker was authorized to issue and to have in circulation as aforesaid.

Penalty on banks issuing in excess.

XVIII. And be it enacted, that every banker in England and Wales who, after the tenth day of October one thousand eight hundred and forty-four, shall issue bank notes, shall, on some one day in every week after the nineteenth day of October, one thousand eight hundred and forty-four (such day

Issuing banks to render accounts.

to be fixed by the commissioners of stamps and taxes), transmit to the said commissioners an account of the amount of the bank notes of such banker in circulation on every day during the week ending on the next preceding Saturday, and also an account of the average amount of the bank notes of such banker in circulation during the same week; and on completing the first period of four weeks, and so on completing each successive period of four week, every such banker shall annex to such account the average amount of bank notes of such banker in circulation during the said four weeks, and also the amount of bank notes which such banker is authorized to issue under the provisions of this Act; and every such account shall be verified by the signature of such banker or his chief cashier, or in the case of a company or partnership, by the signature of a managing director or partner or chief cashier of such company or partnership, and shall be made in the form of this Act annexed marked (B); and so much of the said return as states the weekly average amount of the notes of such bank shall be published by the said commissioners in the next succeeding London Gazette in which the same may be conveniently inserted; and if any such banker shall neglect or refuse to render any such account in the form and at the time required by this Act, or shall at any time render a false account, such banker shall forfeit the sum of one hundred pounds for every such offence.

Mode of ascertaining the average amount of bank notes of each banker in circulation during the first four weeks after the 10th October, 1844.

XIX. And be it enacted, that for the purpose of ascertaining the monthly average amount of bank notes of each banker in circulation, the aggregate of the amount of bank notes of each such banker in circulation on every day of business during the first complete period of four weeks next after the tenth day of October, one thousand eight hundred and forty-four, such period ending on a Saturday, shall be divided by the number of days of business in such four weeks, and the average so ascertained shall be deemed to be the average of bank notes of each such banker in circulation during such period of four weeks, and so in each successive period of four weeks, and such average is not to exceed the amount certified by the commissioners of stamps and taxes as aforesaid.

Commissioners of stamps and taxes empowered to cause the books of bankers containing accounts of their bank notes in circulation to be inspected.

XX. And whereas, in order to insure the rendering of true and faithful accounts of the amount of bank notes in circulation, as directed by this Act, it is necessary that the commissioners of stamps and taxes should be empowered to cause the books of bankers issuing such notes to be inspected, as hereinafter mentioned; be it therefore enacted, that all and every the book and books of any banker who shall issue bank notes under the provisions of this Act, in which shall be kept, contained or entered any account, minute or memorandum of or relating to the bank notes issued or to be issued by such banker, or of or relating to the amount of such notes in circulation from time to time, or any account, minute, or memorandum, the sight or inspection whereof may tend to secure the rendering of true accounts of the average amount of such notes in circulation, as directed by this Act, or to test the truth of any such account, shall be open for the inspection and examination, at all seasonable times, of any officer of stamp duties authorized in that behalf by writing, signed by the commissioners of stamps and taxes, or any two of them; and every such officer shall be at liberty to take copies of or extracts from any such book or account as aforesaid; and if any banker or other person keeping any such book, or having the custody or possession thereof, or power to produce the same, shall, upon demand made by any such officer, showing (if required) his authority in that behalf, refuse to produce any such book to such officer for his inspection and examination, or to permit him to inspect and examine the same, or to take copies thereof or extracts therefrom, or of or from such account, minute or memorandum as aforesaid kept, contained or entered therein, every such banker or other person so offending shall for every such offence forfeit the sum of one hundred pounds; provided always, that the said commissioners shall not exercise the powers aforesaid without the consent of the commissioners of her Majesty's treasury.

Penalty for refusing to allow such inspection.

All bankers to return names once a year to the stamp office.

XXI. And be it enacted, that every banker in England and Wales who is now carrying on or shall hereafter carry on business as such shall on the first day of January, in each year or within fifteen days thereafter, make a return to the commissioners of stamps and taxes at their head office in London of his name, residence and occupation, or, in the case of a company or partnership, of the name, residence and occupation of every person composing or being a member of such company or partnership, and also the name of the firm under

which such banker, company or partnership carry on the business of banking and of every place where such business is carried on; and if any such banker, company or partnership shall omit or refuse to make such return within fifteen days after the said first day of January, or shall wilfully make other than a true return of the persons as herein required, every banker, company or partnership so offending shall forfeit and pay the sum of fifty pounds; and the said commissioners of stamps and taxes shall, on or before the first day of March in every year, publish in some newspaper circulating within each town or county respectively a copy of the return so made by every banker, company or partnership carrying on the business of bankers within such town or county respectively, as the case may be.

Bankers to take out a separate licence for every place at which they issue notes or bills.

XXII. And be it enacted, that every banker who shall be liable by law to take out a licence from the commissioners of stamps and taxes to authorize the issuing of notes or bills shall take a separate and distinct licence for every town or place at which he shall, by himself or his agent, issue any notes or bills requiring such licence to authorize the issuing thereof, anything in any former Act contained to the contrary thereof notwithstanding: Provided always, that no banker who on or before the sixth day of May, one thousand eight hundred and forty-four, had taken out four such licences, which on the said last-mentioned day were respectively in force, for the issuing of any such notes or bills at more than four separate towns or places, shall at any time hereafter be required to take out or to have in force at one and the same time more than four such licences to authorize the issuing of such notes or bills at all or any of the same towns or places specified in such licences in force on the said sixth day of May, one thousand eight hundred and forty-four, and at which towns or places respectively such bankers had on or before the said last-mentioned day issued such notes or bills in pursuance of such licences or any of them respectively.

Proviso in favour of bankers who had four such licences in force on the 6th of May, 1844.

Bank of England to be allowed to compound with issuing banks.

XXIV. And be it enacted, that it shall be lawful for the said governor and company to agree with every banker who, under the provisions of this Act, shall be entitled to issue bank notes, to allow to such banker a composition at the rate of one per centum per annum on the amount of Bank of England notes which shall be issued and kept in circulation by such banker, as a consideration for his relinquishment of the privilege of issuing his own bank notes; and all the provisions herein contained for the ascertaining and determining the amount of composition payable to the several bankers named in the Schedule hereto marked (C), shall apply to all such other bankers with whom the said governor and company are hereby authorized to agree as aforesaid; provided that the amount of composition payable to such bankers as last aforesaid shall, in every case in which an increase of securities in the issue department shall have been authorized by any order in council, be deducted out of the amount payable by the said governor and company to the public under the provisions herein contained: Provided always, that the total sum payable to any banker, under the provisions herein contained, by way of composition as aforesaid, in any one year, shall not exceed, in case of the bankers mentioned in the Schedule hereto marked (C), one per centum on the several sums set against the names of such bankers respectively in the list and statement delivered to the commissioners of stamps as aforesaid, and in the case of other bankers shall not exceed one per centum on the amount of bank notes which such bankers respectively would otherwise be entitled to issue under the provisions herein contained.

Limitation of compositions.

XXV. [Repealed by 19 Vict. c. 20, s. 1.]

Banks within sixty-five miles of London may accept, &c., bills.

XXVI. And be it enacted, that from and after the passing of this Act it shall be lawful for any society or company or any persons in partnership, though exceeding six in number, carrying on the business of banking in London, or within sixty-five miles thereof, to draw, accept or indorse bills of exchange, not being payable to bearer on demand, anything in the hereinbefore recited Act passed in the fourth year of the reign of his said Majesty King William the Fourth, or in any other Act, to the contrary notwithstanding.

SCHEDULE (B).

Name and title as set forth in the licence . . . . } _____ Bank.
Name of the firm . . . . _____ Firm.
Insert head office or principal place of issue . . . } _____ Place.

An Account pursuant to the Act 7 & 8 Vict. c. 32, of the notes of the said bank in circulation during the week ending Saturday, the —— day of ——, 18—.

Monday . . .	
Tuesday . . .	
Wednesday . . .	
Thursday . . .	
Friday . . .	
Saturday . . .	
	6)
Average of the week	

[*To be annexed to this Account at the End of the Period of Four Weeks.*]

Amount of notes authorized by law . . .	£
Average amount in circulation during the four weeks ending as above	£

I, being [the banker, chief cashier, managing director *or* partner of the —— Bank, *as the case may be*], do hereby certify, that the above is a true account of the notes of the said bank in circulation during the week above written.

(Signed)

Dated the —— day of ——, 18—.

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17 & 18 VICT. C. 31.

An Act for the better Regulation of the Traffic on Railways and Canals (*a*).
[10*th July*, 1854.]

WHEREAS it is expedient to make better provision for regulating the traffic on railways and canals: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

"Board of Trade;" I. In the construction of this Act, "the Board of Trade" shall mean the Lords of the Committee of her Majesty's Privy Council for Trade and Foreign Plantations:

"Traffic," The word "traffic" shall include not only passengers, and their luggage, and goods, animals and other things conveyed by any railway company or canal company, or railway and canal company, but also carriages, waggons, trucks, boats and vehicles of every description adapted for running or passing on the railway or canal of any such company:

"Railway;" The word "railway" shall include every station of or belonging to such railway used for the purposes of public traffic: and,

"Canal;" The word "canal" shall include any navigation whereon tolls are levied by authority of parliament, and also the wharves and landing places of and belonging to such canal or navigation, and used for the purposes of public traffic:

"Company." The expression "railway company," "canal company" or "railway and canal company," shall include any person being the owner or lessee of

(*a*) See 51 & 52 Vict. c. 25, *infra*, p. 1190.

or any contractor working any railway or canal or navigation, constructed or carried on under the powers of any Act of Parliament:

Stations.

A station, terminus or wharf shall be deemed to be near another station, terminus or wharf when the distance between such stations, termini or wharves shall not exceed one mile, such stations not being situate within five miles from St. Paul's Church, in London.

Duty of railway companies to make arrangements for receiving and forwarding traffic without unreasonable delay, and without partiality.

II. Every railway company, canal company and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway company and canal company and railway and canal company having or working railways or canals which form part of a continuous line of railway or canal or railway and canal communication, or which have the terminus, station or wharf of the one near the terminus, station or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any reasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf.

Parties complaining that reasonable facilities for forwarding traffic, &c., are withheld, may apply by motion or summons to the superior courts.

III. It shall be lawful for any company or person complaining against any such companies or company of anything done, or of any omission made in violation or contravention of this Act, to apply in a summary way, by motion or summons, in England, to her Majesty's Court of Common Pleas at Westminster, or in Ireland to any of her Majesty's superior courts in Dublin, or in Scotland to the Court of Session in Scotland, as the case may be, or to any judge of any such court (*a*): and, upon the certificate to her Majesty's Attorney-General in England or Ireland, or her Majesty's Lord Advocate in Scotland, of the Board of Trade alleging any such violation or contravention of this Act by any such companies or company, it shall also be lawful for the said Attorney-General or Lord Advocate to apply in like manner to any such court or judge, and in either of such cases it shall be lawful for such court or judge to hear and determine the matter of such complaint; and for that purpose, if such court or judge shall think fit, to direct and prosecute, in such mode and by such engineers, barristers or other persons, as they shall think proper, all such inquiries as may be deemed necessary to enable such court or judge to form a just judgment on the matter of such complaint; and if it be made to appear to such court or judge on such hearing, or on the report of any such person, that anything has been done or omission made, in violation or contravention of this Act, by such company or companies, it shall be lawful for such court or judge to issue a writ of injunction or interdict, restraining such company or companies from further continuing such violation or contravention of this Act, and enjoining obedience to the same; and in case of disobedience of any such writ of injunction or interdict, it shall be lawful for such court or judge to order that a writ or writs of attachment or any other process of such court incident or applicable to writs of injunction or interdict, shall issue against any one or more of the directors of any company, or against any owner, lessee, contractor or other person failing to obey such writ of injunction or interdict; and such court or judge may also, if they or he shall think fit, make an order directing the payment by any one or more of such companies of such sum of money as such court or judge shall determine, not exceeding for each company the sum of two hundred pounds for every day, after a day to be named in the order, that such com-

(*a*) See Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), and Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 8, *infra*.

pany or companies shall fail to obey such injunction or interdict: and such moneys shall be payable as the court or judge may direct, either to the party complaining, or into court to abide the ultimate decision of the court, or to her Majesty, and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by decree or judgment in any superior court at Westminster or Dublin in England or Ireland, and in Scotland by such diligence as is competent on an extracted decree of the Court of Session; and in any such proceeding as aforesaid, such court or judge may order and determine that all or any costs thereon incurred shall and may be paid by or to the one party or the other, as such court or judge shall think fit; and it shall be lawful for any such engineer, barrister or other person, if directed so to do by such court or judge, to receive evidence on oath relating to the matter of any such inquiry, and to administer such oath.

Judges may make such regulations as may be necessary for proceedings under this Act.

IV. It shall be lawful for the said Court of Common Pleas at Westminster, or any three of the judges thereof, of whom the Chief Justice shall be one, and it shall be lawful for the said courts in Dublin, or any nine of the judges thereof, of whom the Lord Chancellor, the Master of the Rolls, the Lords Chief Justice of the Queen's Bench and Common Pleas, and the Lord Chief Baron of the Exchequer, shall be five, from time to time to make all such general rules and orders as to the forms of proceedings and process, and all other matters and things touching the practice and otherwise in carrying this Act into execution before such courts and judges, as they may think fit, in England or Ireland, and in Scotland it shall be lawful for the Court of Session to make such Acts of sederunt for the like purpose as they shall think fit.

Court or judge may order a re-hearing.

V. Upon the application of any party aggrieved by the order made upon any such motion or summons as aforesaid, it shall be lawful for the court or judge by whom such order was made to direct, if they think fit so to do, such motion or application on summons to be reheard before such court or judge, and upon such rehearing to rescind or vary such order.

Mode of proceeding under this Act.

VI. No proceeding shall be taken for any violation or contravention of the above enactments, except in the manner herein provided; but nothing herein contained shall take away or diminish any rights, remedies or privileges of any person or company against any railway or canal or railway and canal company under the existing law.

Company to be liable for neglect or default in the carriage of goods, notwithstanding notice to the contrary.

VII. Every such company as aforesaid shall be liable for the loss of, or for any injury done to any horses, cattle or other animals, or to any articles, goods or things, in the receiving, forwarding or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition or declaration made and given by such company contrary thereto, or in anywise limiting such liability: every such notice, condition or declaration being hereby declared to be null and void: provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding and delivering of any of the said animals, articles, goods or things as shall be adjudged by the court or judge before whom any question relating thereto shall be tried to be just and reasonable: provided always, that no greater damages shall be recovered for the loss of or for any injury done to any of such animals, beyond the sums hereinafter mentioned; (that is to say,) for any horse fifty pounds; for any neat cattle, per head, fifteen pounds; for any sheep or pigs, per head, two pounds; unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared them to be respectively of higher value than as above mentioned; in which case it shall be lawful for such company to demand and receive, by way of compensation for the increased risk and care thereby occasioned, a reasonable per-centage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge; and such per-centage or increased rate of charge shall be notified in the manner prescribed in the statute 11 Geo. 4 & 1 Will. 4, c. 68, and shall be binding upon such company in the manner therein mentioned: provided also, that the proof of the value of such animals, articles, goods, and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or injury: provided also, that no special contract between such company

Company not to be liable beyond a limited amount in certain cases, unless the value declared and extra payment made.

Proof of value to be on the person claiming compensation.

and any other parties respecting the receiving, forwarding or delivering of any animals, articles, goods, or things as aforesaid, shall be binding upon or affect any such party unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for carriage: provided also, that nothing herein contained shall alter or affect the rights, privileges or liabilities of any such company under the said Act of the 11 Geo. 4 & 1 Will. 4, c. 68, with respect to articles of the descriptions mentioned in the said Act.

No special contract to be binding unless signed.

Saving of Carriers Act, 11 Geo. 4 & 1 Will. 4, c. 68.

VIII. This Act may be cited for all purposes as "The Railway and Canal Traffic Act, 1854."

Short title.

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17 & 18 VICT. c. 104.

An Act to amend and consolidate the Acts relating to Merchant Shipping. [10*th August*, 1854.]

WHEREAS it is expedient to amend and consolidate (*a*) the Acts relating to Merchant Shipping: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

Preliminary.

Preliminary.

I. This Act may be cited for all purposes as "The Merchant Shipping Act, 1854."

Short title of Act.

II. In the construction and for the purposes of this Act (if not inconsistent with the context or subject-matter) the following terms shall have the respective meanings hereinafter assigned to them: that is to say,

Interpretation of certain terms in this Act.

"Her Majesty's Dominions" shall mean her Majesty's dominions strictly so called, and all territories under the government of the East India Company, and all other territories (if any) governed by any charter or licence from the crown or parliament of the United Kingdom:

"The United Kingdom" shall mean Great Britain and Ireland:

"British Possession" shall mean any colony, plantation, island, territory, or settlement within her Majesty's dominions, and not within the "United Kingdom" (*b*):

"The Treasury" shall mean the commissioners of her Majesty's treasury:

"The Admiralty" shall mean the lord high admiral or the commissioners for executing his office:

"The Board of Trade" shall mean the lords of the committee of privy council appointed for the consideration of matters relating to trade and foreign plantations:

"The Trinity House" shall mean the master, wardens, and assistants of the guild, fraternity, or brotherhood of the most glorious and undivided Trinity and of St. Clement in the parish of Deptford Strond, in the county of Kent, commonly called the corporation of the Trinity House of Deptford Strond:

"The Port of Dublin Corporation" shall mean the corporation for preserving and improving the port of Dublin:

"Consular Officer" shall include consul-general, consul, and vice-consul, and any person for the time being discharging the duties of consul-general, consul, or vice-consul:

(*a*) The previous provisions upon this subject were repealed by statute 17 & 18 Vict. c. 120, from the time this statute came into operation. Only those parts of this long enactment have been inserted which relate to the matters discussed in this Treatise, and they have been inserted entire. This Act has, in some respects, been amended and repealed by 25 & 26 Vict. c. 63; 30 & 31 Vict. c. 124; 34 & 35 Vict. c. 110; 35 & 36 Vict. c. 73; 36 & 37 Vict. c. 85, 39 & 40 Vict. c. 80, and 42 & 43 Vict. c. 72, *post*.

(*b*) See 32 Vict. c. 11, s. 7.

Preliminary.

"Receiver" shall mean any person appointed in pursuance of this Act receiver of wreck:

"Pilotage Authority" shall include all bodies and persons authorized to appoint or license pilots, or to fix or alter rates of pilotage, or to exercise any jurisdiction in respect of pilotage:

"Pilot" shall mean any person not belonging to a ship who has the conduct thereof:

"Qualified Pilot" shall mean any person duly licensed by any pilotage authority to conduct ships to which he does not belong:

"Master" shall include every person (except a pilot) having command or charge of any ship:

"Seamen" shall include every person (except masters, pilots and apprentices duly indentured and registered), employed or engaged in any capacity on board any ship:

"Salvor" shall, in the case of salvage services rendered by the officers or crew or part of the crew of any ship belonging to her Majesty, mean the person in command of such ship:

"Person" shall include body corporate:

"Ship" shall include every description of vessel used in navigation not propelled by oars:

"Foreign-going Ship" shall include every ship employed in trading or going between some place or places in the United Kingdom, and some place or places situate beyond the following limits: that is to say, the coasts of the United Kingdom, the islands of Guernsey, Jersey, Sark, Alderney and Man, and the continent of Europe between the river Elbe and Brest inclusive:

"Home-trade Ship" shall include every ship employed in trading or going within the following limits: that is to say, the United Kingdom, the islands of Guernsey, Jersey, Sark, Alderney and Man, and the continent of Europe between the river Elbe and Brest inclusive:

"Home-trade Passenger Ship" shall mean every home-trade ship employed in carrying passengers:

"Lighthouses" shall, in addition to the ordinary meaning of the word, include floating and other lights exhibited for the guidance of ships, and "buoys and beacons" shall include all other marks and signs of the sea:

"Wreck" shall include jetsam, flotsam, lagan and derelict found in or on the shores of the sea or any tidal water (*c*).

Commencement of Act.

III. This Act shall come into operation on the first day of May, one thousand eight hundred and fifty-five.

Exemption of her Majesty's ships.

IV. This Act shall not, except as hereinafter specially provided, apply to ships belonging to Her Majesty.

Division of Act.

V. This Act shall be divided into eleven parts:

The First Part relating to the Board of Trade: its general functions.
The Second Part to British Ships: their ownership, measurement and registry:
The Third Part to Masters and Seamen:
The Fourth Part to Safety and Prevention of Accidents:
The Fifth Part to Pilotage:
The Sixth Part to Lighthouses:
The Seventh Part to the Mercantile Marine Fund:
The Eighth Part to Wrecks, Casualties and Salvage:
The Ninth Part to Liability of Shipowners:
The Tenth Part to Legal Procedure:
The Eleventh Part to Miscellaneous Matters.

(*c*) See 31 & 32 Vict. c. 45, s. 2.

PART I.

THE BOARD OF TRADE: ITS GENERAL FUNCTIONS.

I. Functions of Board of Trade.

Board of Trade to superintend merchant shipping.

VI. The Board of Trade shall be the department to undertake the general superintendence of matters relating to merchant ships and seamen, and shall be authorised to carry into execution the provisions of this Act, and of all other Acts relating to merchant ships and seamen in force for the time being, other than such Acts as relate to the revenue.

Certificates and documents purporting to be sealed or signed in a given manner to be received in evidence.

VII. All documents whatever purporting to be issued or written by or under the direction of the Board of Trade, and purporting either to be sealed with the seal of such board, or to be signed by one of the secretaries or assistant secretaries to such board, shall be received in evidence and shall be deemed to be issued or written by or under the direction of the said board, without further proof, unless the contrary be shown; and all documents purporting to be certificates issued by the Board of Trade in pursuance of this Act, and to be sealed with the seal of such board, or to be signed by one of the officers of the marine department of such board, shall be received in evidence and shall be deemed to be such certificates, without further proof, unless the contrary be shown.

Board of Trade to issue forms of instruments.

VIII. The Board of Trade may from time to time prepare and sanction forms of the various books, instruments, and papers required by this Act other than those required by the second part thereof, and may from time to time make such alterations therein as it deems requisite; and shall before finally issuing or altering any such form, give such public notice thereof as it deems necessary in order to prevent inconvenience; and shall cause every such form to be sealed with such seal as aforesaid, or marked with some other distinguishing mark, and to be supplied at the custom houses and shipping offices of the United Kingdom free of charge, or at such moderate prices as it may from time to time fix, or may license any persons to print and sell the same; and every such book, instrument and paper as aforesaid, shall be made in the form issued by the Board of Trade, and sanctioned by it as the proper form for the time being; and no such book, instrument or paper as aforesaid, unless made in such form, shall be admissible in evidence in any civil proceeding on the part of any owner or master of any ship; and every such book, instrument or paper, if made in a form purporting to be a proper form, and to be sealed or marked as aforesaid, shall be taken to be made in the form hereby required, unless the contrary is proved.

Certain forms and instruments to be exempt from stamp duty.

IX. All instruments used in carrying into effect the second part of this Act, if not already exempted from stamp duty, and all instruments which by the third, fourth, sixth, or seventh parts of this Act are required to be made in forms sanctioned by the Board of Trade, if made in such forms, and all instruments used by or under the direction of the Board of Trade in carrying such parts of this Act into effect, shall be exempt from stamp duty.

Penalties for forgery of seal and fraudulent alteration of forms, and for not using forms issued by Board of Trade.

X. Every person who forges, assists in forging, or procures to be forged, such seal or other distinguishing mark as aforesaid, or who fraudulently alters, assists in fraudulently altering, or procures to be fraudulently altered, any form issued by the Board of Trade, with the view of evading any of the provisions of this Act or any condition contained in such form, shall for each offence be deemed guilty of a misdemeanour; and every person who, in any case in which a form sanctioned by the Board of Trade is by the third part of this Act required to be used, uses without reasonable excuse any form not purporting to be so sanctioned, or who prints, sells or uses any document purporting to be a form so sanctioned, knowing the same not to be so sanctioned for the time being, or not to have been prepared and issued by the Board of Trade, shall for each such offence incur a penalty not exceeding ten pounds.

Application of money and fines paid to Board of Trade.

XI. Subject to the provisions hereinafter contained, all fees and payments (other than fines) coming to the hands of the Board of Trade under the third and fourth parts of this Act, shall be carried to the account of the Mercantile Marine Fund hereinafter mentioned (*d*), and shall be dealt with as herein prescribed in that behalf; and all fines coming to the hands of the Board of Trade under this Act shall be paid into the receipt of her Majesty's

(*d*) See s. 417.

I. *Functions of Board of Trade.*

exchequer in such manner as the treasury may direct, and shall be carried to and form part of the Consolidated Fund of the United Kingdom.

Returns to Board of Trade.

XII. All consular officers (*e*), and all officers of customs abroad, and all local marine boards and shipping masters, shall make and send to the Board of Trade such returns or reports on any matter relating to British merchant shipping or seamen as such board requires; and all shipping masters shall, whenever required by the Board of Trade, produce to such board or to its officers all official log-books and other documents which, in pursuance of this Act, are delivered to them.

Officers of Board of Trade, naval officers, consuls, the registrar-general of seamen, officers of customs and shipping masters, may inspect documents and muster crews.

XIII. Every officer of the Board of Trade, and every commissioned officer of any of her Majesty's ships on full pay, and every British consular officer, and the registrar-general of seamen and his assistant, and every chief officer of customs in any place in her Majesty's dominions, and every shipping master, may, in cases where he has reason to suspect that the provisions of this Act or the laws for the time being relating to merchant seamen and to navigation are not complied with, exercise the following powers; (that is to say,)

He may require the owner, master, or any of the crew of any British ship to produce any official log-books or other documents relating to such crew or any member thereof in their respective possession or control:

He may require any such master to produce a list of all persons on board his ship, and take copies of all official log-books or documents, or of any part thereof:

He may muster the crew of any such ship:

He may summon the master to appear and give any explanation concerning such ship or her crew or the said official log-book or documents:

And if upon requisition duly made by any person so authorised in that behalf as aforesaid, any person refuses or neglects to produce any such official log-book or document as he is hereinbefore required to produce, or to allow the same to be inspected or copied as aforesaid, or impedes any such master of a crew as aforesaid, or refuses or neglects to give any explanation which he is hereinbefore required to give, or knowingly misleads or deceives any person hereinbefore authorised to demand any such explanation, he shall for each such offence incur a penalty not exceeding twenty pounds.

Board of Trade may appoint inspectors.

XIV. The Board of Trade may, from time to time, whenever it seems expedient to them so to do, appoint any person, as an inspector to report to them upon the following matters: (that is to say,)

(1.) Upon the nature and causes of any accident or damage which any ship has sustained or caused, or is alleged to have sustained or caused:

(2.) Whether the provisions of this Act, or any regulations made under or by virtue of this Act, have been complied with:

(3.) Whether the hull and machinery of any steam ship are sufficient and in good condition;

Powers of inspectors.

XV. Every such inspector as aforesaid shall have the following powers: (that is to say,)

(1.) He may go on board any ship, and may inspect the same or any part thereof, or any of the machinery, boats, equipments, or articles on board thereof to which the provisions of this Act apply, not unnecessarily detaining or delaying her from proceeding on any voyage:

(2.) He may enter and inspect any premises the entry or inspection of which appears to him to be requisite for the purpose of the report which he is directed to make:

(3.) He may, by summons under his hand, require the attendance of all such persons as he thinks fit to call before him and examine for such purpose, and may require answers or returns to any inquiries he thinks fit to make:

(4.) He may require and enforce the production of all books, papers or documents which he considers important for such purpose:

(5.) He may administer oaths, or may, in lieu of requiring or administering an oath, require every person examined by him to make and subscribe a declaration of the truth of the statements made by him in his examination:

(*e*) See s. 2.

I. *Functions of Board of Trade.*

Witnesses to be allowed expenses.

Penalty for refusing to give evidence.

Penalty for obstructing inspectors in the execution of their duty.

Any every witness so summoned as aforesaid shall be allowed such expenses as would be allowed to any witness attending on subpœna to give evidence before any court of record, or if in Scotland to any witness attending on citation the Court of Justiciary; and in case of any dispute as to the amount of such expenses, the same shall be referred by the inspector to one of the masters of her Majesty's Court of Queen's Bench in England or Ireland, or to the Queen's and lord treasurer's remembrancer in Scotland, who on a request made to him for that purpose under the hand of the said inspector, shall ascertain and certify the proper amount of such expenses; and every person who refuses to attend as a witness before any such inspector, after having been required so to do in the manner hereby directed, and after having had a tender made to him of the expenses (if any) to which he is entitled as aforesaid, or who refuses or neglects to make any answer, or to give any return, or to produce any document in his possession, or to make or subscribe any declarations which any such inspector is hereby empowered to require, shall for each such offence incur a penalty not exceeding ten pounds.

XVI. Every person who wilfully impedes any such inspector appointed by the Board of Trade as aforesaid in the execution of his duty, whether on board any ship or elsewhere, shall incur a penalty not exceeding ten pounds, and may be seized and detained by such inspector or other person or by any person or persons whom he may call to his assistance until such offender can be conveniently taken before some justice of the peace or other officer having proper jurisdiction.

PART II. (*f*).

BRITISH SHIPS: THEIR OWNERSHIP, MEASUREMENT, AND REGISTRY.

Application.

Application.

Application of Part 2 of Act.

XVII. The second part of this Act shall apply to the whole of her Majesty's dominions.

Description and Ownership of British Vessels.

II. *Description and Ownership of British Ships.*

Description and ownership of British ships.

Who may be owners.

XVIII. No ship shall be deemed to be a British ship unless she belongs wholly to owners of the following description: (that is to say,)

(1.) Natural-born British subjects:

Provided, that no natural-born subject who has taken the oath of allegiance to any foreign sovereign or state shall be entitled to be such owner as aforesaid, unless he has subsequently to taking such last-mentioned oath, taken the oath of allegiance to her Majesty, and is and continues to be during the whole period of his so being an owner resident in some place within her Majesty's dominions, or if not so resident, member of a British factory, or partner in a house actually carrying on business in the United Kingdom, or in some other place within her Majesty's dominions:

(2.) Persons made denizens by letters of denization, or naturalized by or pursuant to any Act of the Imperial Legislature, or by or pursuant to any Act or ordinance of the proper legislative authority in any British possession:

Provided that such persons are and continue to be during the whole period of their so being owners resident in some place within her Majesty's dominions, or if not so resident, members of a British factory, or partners in a house actually carrying on business in the United Kingdom or in some other place within her Majesty's dominions, and have taken the oath of allegiance to her Majesty subsequently to the period of their being so made denizens or naturalized:

(3.) Bodies corporate established under, subject to the laws of, and having their principal place of business in the United Kingdom or some British possession.

(*f*) See 18 & 19 Vict. c. 91, s. 9, *infra*.

II. *Description and Ownership of British Ships.*

British ships with certain exceptions must be registered.

XIX. Every British ship must be registered in manner hereinafter mentioned, except,

(1.) Ships duly registered before this Act comes into operation:

(2.) Ships not exceeding fifteen tons burden employed solely in navigation on the rivers or coasts of the United Kingdom, or on the rivers or coasts of some British possession within which the managing owners of such ships are resident:

(3.) Ships not exceeding thirty tons burden, and not having a whole or fixed deck, and employed solely in fishing or trading coastwise on the shores of Newfoundland, or parts adjacent thereto, or in the Gulf of St. Lawrence, or on such portion of the coasts of Canada, Nova Scotia, or New Brunswick as lie bordering on such Gulf:

And no ship hereby required to be registered shall, unless registered, be recognized as a British ship; and no officer of customs shall grant a clearance or transire to any ship hereby required to be registered for the purpose of enabling her to proceed to sea as a British ship, unless the master of such ship, upon being required so to do, produces to him such certificate of registry as is hereinafter mentioned; and if such ship attempts to proceed to sea as a British ship without a clearance or transire, such officer may detain such ship until such certificate is produced to him.

Measurement of Tonnage.

Measurement of Tonnage (f).

Tonnage deck; feet; decimals.

XX. Throughout the following rules the tonnage deck shall be taken to be the upper deck in ships which have less than three decks, and to be the second deck from below in all other ships; and in carrying such rules into effect all measurements shall be taken in feet and fractions of feet, and all fractions of feet shall be expressed in decimals.

Rule I.

For ships to be registered and other ships of which the hold is clear.

XXI. The tonnage of every ship to be registered, with the exceptions mentioned in the next section, shall, previously to her being registered, be ascertained by the following rule, hereinafter called Rule I. (*g*); and the tonnage of every ship to which such rule can be applied, whether she is about to be registered or not, shall be ascertained by the same rule:—

Lengths.

(1.) Measure the length of the ship in a straight line along the upper side of the tonnage deck from the inside of the inner plank (average thickness) at the inside of the stem to the inside of the midship stern timber or plank there, as the case may be (average thickness), deducting from this length what is due to the rake of the bow in the thickness of the deck, and what is due to the rake of the stern timber in the thickness of the deck, and also what is due to the rake of the stern timber in one-third of the round of the beam; divide the length so taken into the number of equal parts required by the following table, according to the class in such table to which the ship belongs:

Table.

Class 1. Ships of which the tonnage deck is according to the above measurement 50 feet long or under, into four equal parts:

,, 2. Ships of which the tonnage deck is according to the above measurement above 50 feet long and not exceeding 120, into six equal parts:

,, 3. Ships of which the tonnage deck is according to the above measurement above 120 feet long and not exceeding 180, into eight equal parts:

,, 4. Ships of which the tonnage deck is according to the above measurement above 180 feet long and not exceeding 225, into ten equal parts:

,, 5. Ships of which the tonnage deck is according to the above measurement above 225 feet long, into twelve equal parts.

Transverse areas.

(2.) Then, the hold being first sufficiently cleared to admit of the required depths and breadths being properly taken, find the transverse area of such ship at each point of division of the length as follows:—

(*f*) See the Merchant Shipping (Tonnage) Act, 1889 (52 & 53 Vict. c. 43).
(*g*) See 18 & 19 Vict. c. 91, s. 14.

Measure the depth at each point of division, from a point at a distance of one-third of the round of the beam below such deck, or, in case of a break, below a line stretched in continuation thereof, to the upper side of the floor timber at the inside of the limber strake, after deducting the average thickness of the ceiling which is between the bilge planks and limber strake: then, if the depth at the midship division of the length do not exceed sixteen feet, divide each depth into four equal parts; then measure the inside horizontal breadth at each of the three points of division, and also at the upper and lower points of the depth, extending each measurement to the average thickness of that part of the ceiling which is between the points of measurement; number those breadths from above (*i. e.* numbering the upper breadth one, and so on down to the lowest breadth); multiply the second and fourth by four, and the third by two; add these products together, and to the sum add the first breadth and the fifth: multiply the quantity thus obtained by one-third of the common interval between the breadths, and the product shall be deemed the transverse area; but if the midship depth exceed sixteen feet, divide each depth into six equal parts instead of four, and measure as before directed the horizontal breadths at the five points of division, and also at the upper and lower points of the depth; number them from above as before; multiply the second, fourth, and sixth by four, and the third and fifth by two; add these products together, and to the sum add the first breadth and the seventh; multiply the quantity thus obtained by one-third of the common interval between the breadths, and the product shall be deemed the transverse area.

Computation from areas.

(3.) Having thus ascertained the transverse area at each point of division of the length of the ship as required by the above table, proceed to ascertain the register tonnage of the ship in the following manner:—Number the areas successively, 1, 2, 3, &c., No. 1 being at the extreme limit of the length at the bow, and the last number at the extreme limit of the length at the stern: then, whether the length be divided according to the table into four or twelve parts as in classes 1 and 5, or any intermediate number as in classes 2, 3, and 4, multiply the second and every even numbered area by four, and the third and every odd numbered area (except the first and last) by two; add these products together, and to the sum add the first and last if they yield anything; multiply the quantity thus obtained by one-third of the common interval between the areas, and the product will be the cubical contents of the space under the tonnage deck; divide this product by one hundred, and the quotient being the tonnage under the tonnage deck shall be deemed to be the register tonnage of the ship, subject to the additions and deductions hereinafter mentioned.

Poop and any other closed-in space.

(4.) If there be a break, a poop, or any other permanent closed-in space on the upper deck, available for cargo or stores, or for the berthing or accommodation of passengers or crew, the tonnage of such space shall be ascertained as follows:—Measure the internal mean length of such space in feet, and divide it into two equal parts; measure at the middle of its height three inside breadths, namely, one at each end and the other at the middle of the length; then to the sum of the end breadths add four times the middle breadth, and multiply the whole sum by one-third of the common interval between the breadths: the product will give the mean horizontal area of such space; then measure the mean height, and multiply it by the mean horizontal area; divide the product by one hundred, and the quotient shall be deemed to be the tonnage of such space, and shall be added to the tonnage under the tonnage deck, ascertained as aforesaid, subject to the following provisions:—[First, that nothing shall be added for a closed-in space solely appropriated to the berthing of the crew, unless such space exceeds one-twentieth of the remaining tonnage of the ship, and in case of such excess the excess only shall be added; and, secondly (*h*)], that nothing shall

(*h*) Repealed: 52 & 53 Vict. c. 43, s. 1 (2).

II. *Measurement of Tonnage.*

be added in respect of any building erected for the shelter of deck passengers, and approved by the Board of Trade.

In case of two or more decks.

(5.) If the ship has a third deck, commonly called a spar deck, the tonnage of the space between it and the tonnage deck shall be ascertained as follows:—Measure in feet the inside length of the space at the middle of its height from the plank at the side of the stem to the lining on the timbers at the stern, and divide the length into the same number of equal parts into which the length of the tonnage deck is divided as above directed; measure (also at the middle of its height) the inside breadth of the space at each of the points of division, also the breadth of the stem and the breadth of the stern; number them successively 1, 2, 3, &c., commencing at the stem; multiply the second and all the other even numbered breadths by four; and the third and all the other odd numbered (except the first and last) by two; to the sum of these products add the first and last breadths; multiply the whole sum by one-third of the common interval between the breadths, and the result will give in superficial feet the mean horizontal area of such space; measure the mean height of such space, and multiply by it the mean horizontal area, and the product will be the cubical contents of the space; divide this product by one hundred, and the quotient shall be deemed to be the tonnage of such space, and shall be added to the other tonnage of the ship ascertained as aforesaid; and if the ship has more than three decks, the tonnage of each space between decks above the tonnage deck shall be severally ascertained in manner above described, and shall be added to the tonnage of the ship ascertained as aforesaid.

Rule II.

For ships not requiring registry with cargo on board.

XXII. Ships which, requiring to be measured for any purpose other than registry, have cargo on board, and ships which, requiring to be measured for the purpose of registry, cannot be measured by the rule above given, shall be measured by the following rule, hereinafter called Rule II.:—

Length.

Breadth.

(1.) Measure the length on the upper deck from the outside of the outer plank at the stem to the aftside of the stern post, deducting therefrom the distance between the aftside of the stern post and the rabbet of the stern post at the point where the counter plank crosses it; measure also the greatest breadth of the ship to the outside of the outer planking or wales, and then, having first marked on the outside of the ship on both sides thereof the height of the upper deck at the ship's sides, girt the ship at the greatest breadth in a direction perpendicular to the keel from the height so marked on the outside of the ship on the one side to the height so marked on the other side by passing a chain under the keel; to half the girth thus taken add half the main breadth; square the sum; multiply the result by the length of the ship taken as aforesaid; then multiply this product by the factor ·0018 (eighteen ten-thousandths) in the case of ships built of wood, and by ·0021 (twenty-one ten-thousandths) in the case of ships built of iron, and the products shall be deemed the register tonnage of the ship* subject to the additions and deductions hereinafter mentioned.

Girting of the ship.

* *Sic.*

Poop and other closed-in spaces on upper deck.

(2.) If there be a break, a poop, or other closed-in space on the upper deck, the tonnage of such space shall be ascertained by multiplying together the mean length, breadth, and depth of such space and dividing the product by one hundred, and the quotient so obtained shall be deemed to be the tonnage of such space, and shall, [subject to the deduction for a closed-in space appropriated to the crew as mentioned in Rule I. (*i*)], be added to the tonnage of the ship ascertained as aforesaid.

Rule III.

Allowance for engine room in steamers.

XXIII. In every ship propelled by steam or other power requiring engine-room, an allowance shall be made for the space occupied by the propelling power, and the amount so allowed shall be deducted from the gross tonnage of the ship ascertained as aforesaid, and the remainder shall be deemed to be the register tonnage of such ship; and such deduction shall be estimated as follows; (that is to say,)

To be rateable in ordinary steamers.

(*a.*) As regards ships propelled by paddle wheels in which the tonnage of the space solely occupied by and necessary for the proper working of the boilers and machinery is above twenty per cent. and under thirty per

(*i*) Repealed: 52 & 53 Vict. c. 43, s. 1 (2).

cent. of the gross tonnage of the ship, such deduction shall be thirty-seven one-hundredths of such gross tonnage; and in ships propelled by screws in which the tonnage of such space is above thirteen per cent. and under twenty per cent. of such gross tonnage, such deduction shall be thirty-two one hundredths of such gross tonnage. II. *Measurement of Tonnage.*

(*b.*) As regards all other ships, the deduction shall, if the commissioners of customs (*k*) and the owner both agree thereto, be estimated in the same manner; but either they or he may in their or his discretion require the space to be measured and the deduction estimated accordingly; and whenever such measurement is so required, the deduction shall consist of the tonnage of the space actually occupied by or required to be inclosed for the proper working of the boilers and machinery, with the addition in the case of ships propelled by paddle-wheels of one-half, and in the case of ships propelled by screws of three-fourths of the tonnage of such space; and the measurement and use of such space shall be governed by the following rules; (that is to say,) May be measured where the space is unusually large or small.

(1.) Measure the mean depth of the space from its crown to the ceiling at the limber strake, measure also three, or if necessary, more than three breadths of the space at the middle of its depth, taking one of such measurements at each end, and another at the middle of the length; take the mean of such breadths; measure also the mean length of the space between the foremost and aftermost bulkheads or limits of its length, excluding such parts, if any, as are not actually occupied by or required for the proper working of the machinery; multiply together these three dimensions of length, breadth, and depth, and the product will be the cubical contents of the space below the crown; then find the cubical contents of the space or spaces, if any, above the crown aforesaid, which are framed in for the machinery or for the admission of light and air, by multiplying together the length, depth and breadth thereof; add such contents to the cubical contents of the space below the crown; divide the sum by 100; and the result shall be deemed to be the tonnage of the said space: Mode of measurement.

(2.) If in any ship in which the space aforesaid is to be measured the engines and boilers are fitted in separate compartments, the contents of each shall be measured severally in like manner, according to the above rules, and the sum of their several results shall be deemed to be the tonnage of the said space: In case of separate compartments.

(3.) In the case of screw steamers in which the space aforesaid is to be measured, the contents of the shaft trunk shall be added to and deemed to form part of such space, and shall be ascertained by multiplying together the mean length, breadth, and depth of the trunk, and dividing the product by 100: Shaft trunk of screw steamer.

(4.) If in any ship in which the space aforesaid is to be measured any alteration be made in the length or capacity of such space, or if any cabins be fitted in such space, such ship shall be deemed to be a ship not registered until remeasurement: Alteration of engine room.

(5.) If in any ship in which the space aforesaid is to be measured any goods or stores are stowed or carried in such space, the master and owner each shall be liable to a penalty not exceeding one hundred pounds. Penalty for carrying goods in such spaces.

XXIV. In ascertaining the tonnage of open ships the upper edge of the upper strake is to form the boundary line of measurement, and the depths shall be taken from an athwartship line, extending from upper edge to upper edge of the said strake at each division of the length. RULE IV. Open ships, how measured.

XXV. Repealed by 34 & 35 Vict. c. 110, s. 12, and see 36 & 37 Vict. c. 85, s. 3.

XXVI. Whenever the tonnage of any ship has been ascertained and registered in accordance with the provisions of this Act, the same shall thenceforth be deemed to be the tonnage of such ship, and be repeated in every subsequent registry thereof, unless any alteration is made in the form or capacity of such ship, or unless it is discovered that the tonnage of such ship has been erroneously computed; and in either of such cases such ship shall Tonnage when once ascertained to be ever after deemed the tonnage.

(*k*) Now the Board of Trade, 35 & 36 Vict. c. 73, s. 3.

II. *Measurement of Tonnage.*

be measured, and her tonnage determined and registered according to the rules hereinbefore contained in that behalf.

Remeasurement of ships already registered may be made, but not to be compulsory.

XXVII. The rules for the measurement of tonnage herein contained shall not make it necessary to alter the present registered tonnage of any British ship registered before this Act comes into operation; but if the owner of any such ship desires to have the same remeasured according to these rules, he may apply to the commissioners of customs (*j*) for the purpose, and such commissioners shall thereupon, and on payment of such reasonable charge for the expenses of remeasurement, not exceeding the sum of seven shillings and sixpence for each transverse section, as they may authorise, direct such remeasurement to be made, and such ship shall thereupon be remeasured according to such rules as aforesaid, or according to such of them as may be applicable; and the number denoting the register tonnage shall be altered accordingly.

Power to remeasure engine-rooms improperly extended.

XXVIII. If it appears to the commissioners of customs (*j*) that in any steam ship measured before this Act comes into operation, store rooms or coal bunkers have been introduced into or thrown across the engine-room, so that the deduction from the tonnage on account of the engine-room is larger than it ought to be, the said commissioners may, if they think fit, direct such engine-room to be remeasured according to the rules in force before this Act comes into operation, excluding the space occupied by such store rooms or coal bunkers, or may, if the owners so desire, cause the ship to be remeasured according to the rules hereinbefore contained, and subject to the conditions contained in the last preceding section; and, after remeasurement, the said commissioners shall cause the ship to be registered anew, or the registry thereof to be altered, as the case may require.

Officers may be appointed and regulations made for measurement of ships.

XXIX. The commissioners of customs (*j*) may, with the sanction of the treasury, appoint such persons to superintend the survey and admeasurement of ships as they think fit; and may, with the approval of the Board of Trade, make such regulations for that purpose as may be necessary; and also, with the like approval, make such modifications and alterstions as from time to time become necessary in the tonnage rules hereby prescribed, in order to the more accurate and uniform application thereof, and the effectual carrying out of the principle of admeasurement therein adopted.

Registry of British Ships.

Registry of British Ships.

Registrars of British ships.

XXX. The following persons are required to register British ships, and shall be deemed registrars for the purposes of this Act (*k*); (that is to say,)

(1.) At any port or other place in the United Kingdom or Isle of Man approved by the commissioners of customs for the registry of ships, the collector, comptroller, or other principal officer of customs for the time being:

(2.) In the islands of Guernsey and Jersey, the principal officers of her Majesty's customs, together with the governor, lieutenant-governor, or other person administering the government of such islands respectively:

(3.) In Malta, Gibraltar, and Heligoland, the governor, lieutenant-governor, or other person administering the government of such places respectively:

(4.) At any port or place so approved as aforesaid within the limits of the charter but not under the government of the East India Company, and at which no custom house is established, the collector of duties, together with the governor, lieutenant-governor, or other person administering the government:

(5.) At the ports of Calcutta, Madras, and Bombay, the master attendants, and at any other port or place so approved, as aforesaid, within the limits of the charter and under the government of the East India Company, the collector of duties, or any other person of six years' standing in the civil service of the said company who is appointed by any of the governments of the said company to act for this purpose:

(*j*) By 35 & 36 Vict. c. 73, s. 3, the Board of Trade.
(*k*) See 32 Vict. c. 11, s. 6.

(6.) At every other port or place so approved as aforesaid within her Majesty's dominions abroad, the collector, comptroller, or other principal officer of customs or of navigation laws, or if there is no such officer resident at such port or place, the governor, lieutenant-governor, or other person administering the government of the possession in which such port or place is situate.

Substitution of governor abroad for commissioners of customs, and of consul for justice.

XXXI. The governor, lieutenant-governor, or other person administering the government in any British possession where any ship is registered under the authority of this Act shall, with regard to the performance of any act or thing relating to the registry of a ship or of any interest therein, be considered in all respects as occupying the place of the commissioners of customs; and any British consular officer shall, in any place where there is no justice of the peace, be authorized to take any declaration hereby required or permitted to be made in the presence of a justice of the peace (*l*).

Registrar to keep register books.

XXXII. Every registrar shall keep a book, to be called "the Register Book," and enter therein the particulars hereinafter required to be registered.

Port of registry of British ship.

XXXIII. The port or place at which any British ship is registered for the time being shall be considered her port of registry, or the port to which she belongs.

XXXIV. Repealed by 34 & 35 Vict. c. 110, s. 12; and see 36 & 37 Vict. c. 85, s. 3.

Application for registry, by whom to be made.

XXXV. Every application for the registry of a ship shall, in the case of individuals, be made by the person requiring to be registered as owner, or by some one or more of such persons if more than one, or by his or their duly authorized agent, and in the case of bodies corporate by their duly authorized agent; the authority of such agent, if appointed by individuals, to be testified by some writing under the hands of the appointors, and if appointed by a body corporate, by some instrument under the common seal of such body corporate.

Survey of ship.

XXXVI. Before registry the ship shall be surveyed by a person duly appointed under this Act; and such surveyor shall grant a certificate in the form marked (A) in the schedule hereto, specifying her tonnage, build, and such other particulars descriptive of the identity of the ship, as may from time to time be required by the Board of Trade; and such certificate shall be delivered to the registrar before registry.

Rules as to entries in register book.

XXXVII. The following rules shall be observed with respect to entries in the register book; (that is to say,)

(1.) The property in a ship shall be divided into sixty-four shares:

(2.) Subject to the provisions with respect to joint owners or owner by transmission hereinafter contained, not more than thirty-two (*m*) individuals shall be entitled to be registered at the same time as owners of any one ship; but this rule shall not affect the beneficial title of any number of persons or of any company represented by or claiming under or through any registered owner or joint owner:

(3.) No person shall be entitled to be registered as owner of any fractional part of a share in a ship; but any number of persons, not exceeding five, may be registered as joint owners of a ship or of a share or shares therein:

(4.) Joint owners shall be considered as constituting one person only as regards the foregoing rule relating to the number of persons entitled to be registered as owners, and shall not be entitled to dispose in severalty of any interest in any ship or in any share or shares therein in respect of which they are registered:

(5.) A body corporate may be registered as owner by its corporate name.

Declaration of ownership by individual owner.

XXXVIII. No person shall be entitled to be registered as owner of a ship or any share therein until he has made and subscribed a declaration in the form marked (B) in the schedule hereto, referring to the ship as described in the certificate of the surveyor, and containing the following particulars; (that is to say,)

(1.) A statement of his qualification to be an owner of a share in a British ship:

(*l*) See 50 & 51 Vict. c. 62, s. 3, *infra*.
(*m*) Sixty-four by 43 & 44 Vict. c. 18, s. 2.

II. *Registry of British Ships.*

(2.) A statement of the time when and the place where such ship was built, or (if the ship is foreign built, and the time and place of building not known) a statement that she is foreign built, and that he does not know the time or place of her building; and, in addition thereto, in the case of a foreign ship, a statement of her foreign name, or (in the case of a ship condemned) a statement of the time, place and court at and by which she was condemned:

(3.) A statement of the name of the master:

(4.) A statement of the number of shares in such ship of which he is entitled to be registered as owner:

(5.) A denial that, to the best of his knowledge and belief, any unqualified person or body of persons is entitled as owner to any legal or beneficial (*n*) interest in such ship or any share therein:

The above declaration of ownership shall be made and subscribed in the presence of the registrar if the declarant reside within five miles of the custom house of the port of registry, but if beyond that distance, in the presence of any registrar or of any justice of the peace.

Declaration of ownership by body corporate.

XXXIX. No body corporate shall be entitled to be registered as owner of a ship or of any share therein until the secretary or other duly appointed public officer of such body corporate has made and subscribed in the presence of the registrar of the port of registry a declaration in the form marked (C) in the Schedule hereto, referring to the ship as described in the certificate of the surveyor, and containing the following particulars; (that is to say,)

(1.) A statement of such circumstances of the constitution and business of such body corporate as prove it to be qualified to own a British ship:

(2.) A statement of the time when and the place where such ship was built, or (if the ship is foreign built, and the time and place of building unknown) a statement that she is foreign built, and that he does not know the time or place of her building; and, in addition thereto, in the case of a foreign ship, a statement of her foreign name, or (in the case of a ship condemned) a statement of the time, place and court at and by which she was condemned:

(3.) A statement of the name of the master:

(4.) A statement of the number of shares in such ship of which such body corporate is owner:

(5.) A denial that, to the best of his knowledge and belief, any unqualified person or body of persons is entitled as owner to any legal or beneficial (*n*) interest in such ship, or any share therein.

Evidence to be produced on registry.

XL. Upon the first registry of a ship there shall, in addition to the declaration of ownership, be produced the following evidence; (that is to say,)

(1.) In the case of a British-built ship, a certificate (which the builder is hereby required to grant under his hand) containing a true account of the proper denomination and of the tonnage of such ship as estimated by him, and of the time when and of the place where such ship was built, together with the name of the party (if any) on whose account he has built the same, and, if any sale or sales have taken place, the bill or bills of sale under which the ship or share therein has become vested in the party requiring to be registered as owner:

(2.) In the case of a foreign-built ship, the same evidence as in the case of a British-built ship, unless the person requiring to be registered as owner, or, in the case of a body corporate, the duly appointed officer, declares that the time or place of her building is unknown, or that the builder's certificate cannot be procured, in which case there shall be required only the bill or bills of sale under which the ship or share therein became vested in the party requiring to be registered as owner thereof:

(3.) In the case of a ship condemned by any competent court, an official copy of the condemnation of such ship.

Penalty on builder for false certificate.

XLI. If any builder wilfully makes a false statement in any certificate hereby required to be granted by him, he shall for every such offence incur a penalty not exceeding one hundred pounds.

(*n*) See 25 & 26 Vict. c. 63, s. 3, *infra*.

II. *Registry of British Ships.*

XLII. As soon as the foregoing requisites to the due registry of a ship have been complied with, the registrar shall enter in the register book the following particulars relating to such ship; (that is to say,) Particulars of entry in register book.

(1.) The name of the ship and of the port to which she belongs:
(2.) The details as to her tonnage, build and description comprised in the certificate hereinbefore directed to be given by the surveyor:
(3.) The several particulars as to her origin stated in the declaration or declarations of ownership:
(4.) The names and descriptions of her registered owner or owners, and if there is more than one such owner, the proportions in which they are interested in such ship.

XLIII. No notice of any trust, express, implied or constructive, shall be entered in the register book, or receivable by the registrar; and, subject to any rights and powers appearing by the register book to be vested in any other party, the registered owner of any ship or share therein shall have power absolutely to dispose, in manner hereinafter mentioned, of such ship or share, and to give effectual receipts for any money paid or advanced by way of consideration (*o*). No notice taken of trusts.

Certificate of Registry.

Certificate of Registry.

XLIV. Upon the completion of the registry of any ship the registrar shall grant a certificate of registry in the form marked (D) in the Schedule hereto, comprising the following particulars; (that is to say,) Certificate of registry to be granted.

(1.) The name of the ship and of the port to which she belongs:
(2.) The details as to her tonnage, build, and description comprised in the certificate hereinbefore directed to be given by the surveyor:
(3.) The name of her master:
(4.) The several particulars as to her origin stated in the declaration or declarations of ownership:
(5.) The names and descriptions of her registered owner or owners, and if there is more than one such owner, the proportions in which they are respectively interested, indorsed upon such certificate.

XLV. Whenever any change takes place in the registered ownership of any ship, then, if such change occurs at a time when the ship is at her port of registry, the master shall forthwith deliver the certificate of registry to the registrar, and he shall indorse thereon a memorandum of such change; but if such change occurs during the absence of the ship from her port of registry, then upon her first return to such port the master shall deliver the certificate of registry to the registrar, and he shall indorse thereon a like memorandum of the change; or if she previously arrives at any port where there is a British registrar, such registrar shall, upon being advised by the registrar of her port of registry of the change having taken place, indorse a like memorandum thereof on the certificate of registry, and may for that purpose require the certificate to be delivered to him, so that the ship be not thereby detained; and any master who fails to deliver to the registrar the certificate of registry as hereinbefore required shall incur a penalty not exceeding one hundred pounds. Change of owners to be indorsed on certificate of registry.

XLVI. Whenever the master of any British registered ship is changed, the following persons, that is to say, if such change is made in consequence of the sentence of any naval court, the presiding officer of such court, but if the change takes place from any other cause, the registrar, or if there is no registrar the British consular officer resident at the port where such change takes place, shall indorse on the certificate of registry a memorandum of such change, and subscribe his name to such indorsement, and forthwith report the change of master to the commissioners of customs (*p*) in London; and the officers of customs at any port situate within her Majesty's dominions may refuse to admit any person to do any act at such port as master of any British ship unless his name is inserted in or indorsed upon the certificate of registry of such ship as the last appointed master thereof. Change of master to be indorsed on certificate of registry.

XLVII. The registrar may, with the sanction of the commissioners of customs, upon the delivery up to him of the former certificate of registry, grant a new certificate in the place of the one so delivered up. Power to grant new certificate.

(*o*) See 25 & 26 Vict. c. 63, s. 3, *infra*.
(*p*) Now a registrar-general of seamen: 35 & 36 Vict. c. 73, *infra*.

II. *Certificate of Registry.*

Provision in case of loss of certificate.

XLVIII. In the event of the certificate of registry of any ship being mislaid, lost or destroyed, if such event occurs at any port in the United Kingdom, the ship being registered in the United Kingdom, or at any port in any British possession, the ship being registered in the same British possession, then the registrar of her port of registry shall grant a new certificate of registry in lieu of and as a substitute for her original certificate of registry; but if such event occurs elsewhere, the master or some other person having knowledge of the circumstances shall make a declaration before the registrar of any port having a British registrar at which such ship is at the time or first arrives after such mislaying, loss or destruction; and such declaration shall state the facts of the case, and the names and descriptions of the registered owners of such ship, to the best of the declarant's knowledge and belief; and the registrar shall thereupon grant a provisional certificate as near to the form appointed by this Act as circumstances permit, and shall insert therein a statement of the circumstances under which such provisional certificate is granted.

Provisional certificate to be delivered up.

XLIX. Every such provisional certificate shall, within ten days after the first subsequent arrival of the ship at her port of discharge in the United Kingdom, if registered in the United Kingdom, or, if registered elsewhere, at her port of discharge in the British possession within which her port of registry is situate, be delivered up to the registrar thereof, who shall thereupon grant a new one, as near to the form appointed by this Act as circumstances permit; and if the master neglects to deliver up such certificate within such time he shall incur a penalty not exceeding fifty pounds.

Custody of certificate.

L. The certificate of registry shall be used only for the lawful navigation of the ship, and shall not be subject to detention by reason of any title, lien, charge or interest whatsoever, which any owner, mortgagee or other person may have or claim to have on or in the ship described in such certificate;

Delivery of certificate may be required.

and if any person whatsoever, whether interested or not in the ship, refuses on request to deliver up such certificate when in his possession or under his control to the person for the time being entitled to the custody thereof for the purposes of such lawful navigation as aforesaid, or to any registrar, officer of the customs or other person legally entitled to require such delivery, it shall be lawful for any justice, by warrant under his hand and seal, or for any court capable of taking cognisance of such matter, to cause the person so refusing to appear before him and to be examined touching such refusal;

Penalty for detention.

and unless it is proved to the satisfaction of such justice or court that there was reasonable cause for such refusal, the offender shall incur a penalty not exceeding one hundred pounds; but if it is made to appear to such justice or court that the certificate is lost, the party complained of shall be discharged, and such justice or court shall thereupon certify that the certificate of registry is lost.

Mode of proceeding, if detaining party abscond.

LI. If the person charged with such detainer or refusal is proved to have absconded, so that the warrant of the justice or process of the court cannot be served upon him, or if he persists in his refusal to deliver the certificate, such justice or court shall certify the fact, and the same proceedings may then be taken as in the case of a certificate of registry mislaid, lost or destroyed, or as near thereto as circumstances permit.

Penalty for using improper certificate.

LII. If the master or owner of any ship uses or attempts to use for the navigation of such ship a certificate of registry not legally granted in respect of such ship, he shall be guilty of misdemeanor, and it shall be lawful for any commissioned officer on full pay in the military or naval service of her Majesty, or any British officer of customs, or any British consular officer, to seize and detain such ship, and to bring her for adjudication before the High Court of Admiralty in England or Ireland or any Court having Admiralty jurisdiction in her Majesty's dominions; and if such court is of opinion that such use or attempt at use has taken place, it shall pronounce such ship, with her tackle, apparel and furniture to be forfeited to her Majesty, and may award such portion of the proceeds arising from the sale of such ship as it may think just to the officer so bringing in the same for adjudication.

Certificate of ship lost or ceasing to be British to be delivered up.

LIII. If any registered ship is either actually or constructively lost, taken by the enemy, burnt or broken up, or if by reason of a transfer to any persons not qualified to be owners of British ships, or of any other matter or thing, any such ship as aforesaid ceases to be a British ship, every person who at the time of the occurrence of any of the aforesaid events owns such ship or any share therein shall, immediately upon obtaining knowledge of any such

II. *Certificate of Registry.*

occurrence, if no notice thereof has already been given to the registrar at the port of registry of such ship, give such notice to him, and he shall make an entry thereof in his register book; and, except in cases where the certificate of registry is lost or destroyed, the master of every ship so circumstanced as aforesaid shall immediately, if such event occurs in port, but if the same occurs elsewhere, then within ten days after his arrival in port, deliver the certificate of registry of such ship to the registrar, or if there be no registrar, to the British consular officer at such port, and such registrar, if he is not himself the registrar of her port of registry, or such British consular officer, shall forthwith forward the certificate so delivered to him to the registrar of the port of registry of the ship; and every owner and master who, without reasonable cause, makes default in obeying the provisions of this section, shall for each offence incur a penalty not exceeding one hundred pounds.

Provisional certificate for ship becoming vested in British owners at foreign port.

LIV. If any ship becomes the property of persons qualified to be owners of British ships at any foreign port, the British consular officer resident at such port may grant the master of such ship, upon his application, a provisional certificate stating—

The name of the ship;

The time and place of her purchase, and the names of her purchasers;

The name of her master;

The best particulars as to her tonnage, build, and description that he is able to obtain;

And he shall forward a copy of such certificate, at the first convenient opportunity, to the commissioners of customs (*q*) in London: the certificate so granted shall possess the same force as a certificate of registry until the expiration of six months, or until such earlier time as the ship arrives at some port where there is a British registrar; but upon the expiration of such period, or upon arrival at such port, shall be void to all intents.

Transfers and Transmissions.

Transfers and Transmissions.

Transfer of ships or shares therein.

LV. A registered ship or any share therein, when disposed of to persons qualified to be owners of British ships, shall be transferred by bill of sale; and such bill of sale shall contain such description of the ship as is contained in the certificate of the surveyor, or such other description as may be sufficient to identify the ship to the satisfaction of the registrar, and shall be according to the form marked (E) in the Schedule hereto, or as near thereto as circumstances permit, and shall be executed by the transferor in the presence of and be attested by one or more witnesses.

Declaration to be made by transferee.

LVI. No individual shall be entitled to be registered as transferee of a ship or any share therein until he has made a declaration in the form marked (F) in the Schedule hereto, stating his qualification to be registered as owner of a share in a British ship, and containing a denial similar to the denial hereinbefore required to be contained in a declaration of ownership by an original owner; and no body corporate shall be entitled to be registered as transferee of a ship or any share therein until the secretary or other duly appointed public officer of such body corporate has made a declaration in the form marked (G) in the Schedule hereto, stating the name of such body corporate, and such circumstances of its constitution and business as may prove it to be qualified to own a British ship, and containing a denial similar to the denial hereinbefore required to be contained in a declaration of ownership made on behalf of a body corporate; in the case of an individual, the above declaration shall be made, if he resides within five miles of the custom house of the port of registry in the presence of the registrar, but if beyond that distance in the presence of any registrar or of any justice of the peace; in the case of a body corporate the declaration shall be made in the presence of the registrar of the port of registry.

Registration of transfer.

LVII. Every bill of sale for the transfer of any registered ship, or of any share therein, when duly executed, shall be produced to the registrar of the port at which the ship is registered, together with the declaration hereinbefore required to be made by a transferee; and the registrar shall thereupon enter in the register book the name of the transferee, as owner of the ship or share comprised in such bill of sale, and shall indorse on the bill of sale the

(*q*) Now the Registrar-General of Seamen: 35 & 36 Vict. c. 73, s. 4, *infra*.

II. *Transfers and Transmissions.*

fact of such entry having been made, with the date and hour thereof; and all bills of sale of any ship or shares in a ship shall be entered in the registry book in the order of their production to the registrar.

Transmission of shares by death, bankruptcy, or marriage.

LVIII. If the property in any ship, or in any share therein, becomes transmitted in consequence of the death or bankruptcy or insolvency of any registered owner, or in consequence of the marriage of any female registered owner, or by any lawful means other than by a transfer according to the provisions of this Act, such transmission shall be authenticated by a declaration of the person to whom such property has been transmitted, made in the form marked (H) in the Schedule hereto, and containing the several statements hereinbefore required to be contained in the declaration of a transferee, or as near thereto as circumstances permit, and in addition, a statement describing the manner in which and the party to whom such property has been transmitted; and such declaration shall be made and subscribed, if the declarant resides at or within five miles of the custom house of the port of registry, in the presence of the registrar, but if beyond that distance in the presence of any registrar or of any justice of the peace.

Proof of transmission by bankruptcy, marriage, will, or an intestacy.

LIX. If such transmission has taken place by virtue of the bankruptcy or insolvency of any registered owner, the said declaration shall be accompanied by such evidence as may for the time being be receivable in courts of justice as proof of the title of parties claiming under any bankruptcy or insolvency; and if such transmission has taken place by virtue of the marriage of a female owner, the said declaration shall be accompanied by a copy of the register of such marriage or other legal evidence of the celebration thereof, and shall declare the identity of the said female owner; and if such transmission has taken place by virtue of any testamentary instrument or by intestacy, then in England, Wales, and Ireland the said declaration shall be accompanied by the probate of the will, or the letters of administration or an official extract therefrom, and in Scotland, or in any British possession, by the will or any copy thereof that may be evidence by the laws of Scotland or of such possession, or by letters of administration or any copy thereof, or by such other document as may by the laws of Scotland or of such possession be receivable in the courts of judicature thereof as proof of the person entitled upon an intestacy.

Registration of transmitted share.

LX. The registrar, upon the receipt of such declaration so accompanied as aforesaid, shall enter the name of the person or persons entitled under such transmission in the register book as owner or owners of the ship or share therein in respect of which such transmission has taken place; and such persons, if more than one, shall, however numerous, be considered as one person only as regards the rule hereinbefore contained relating to the number of persons entitled to be registered as owners.

Registrar to retain certain evidence.

LXI. Of the documents hereby required to be produced to the registrar, he shall retain in his possession the following; that is to say, the surveyor's certificate, the builder's certificate, the copy of the condemnation, and all declarations of ownership.

Unqualified owner entitled by transmission may apply to court for sale of ship.

LXII. Whenever any property in a ship or share in a ship becomes vested by transmission on the death of any owner or on the marriage of any female owner in any person not qualified to be the owner of British ships, it shall be lawful, if such ship is registered in England or Ireland for the Court of Chancery, if in Scotland for the Court of Session, or if in any British possession for any court possessing the principal civil jurisdiction within such possession, upon an application made by or on behalf of such unqualified person, to order a sale to be made of the property so transmitted, and to direct the proceeds of such sale, after deducting the expenses thereof, to be paid to the person entitled under such transmission, or otherwise as the court may direct; and it shall be in the discretion of any such court as aforesaid to make or refuse any such order for sale, and to annex thereto any terms or conditions, and to require any evidence in support of such application it may think fit, and generally to act in the premises in such manner as the justice of the case requires.

Order to be made by court.

LXIII. Every order for a sale made by such court as aforesaid shall contain a declaration vesting the right to transfer the ship or share so to be sold in some person or persons named by the court, and such nominee or nominees shall thereupon be entitled to transfer such ship or share in the same manner and to the same extent, as if he or they were the registered owner or owners of the same; and every registrar shall obey the requisition of such nominee

or nominees as aforesaid in respect of any transfer to the same extent as he would be compellable to obey the requisition of any registered owner or owners of such ship or share. II. *Transfers and Transmissions.*

LXIV. Every such application as aforesaid for sale shall be made within four weeks after the occurrence of the event on which such transmission has taken place, or within such further time as such court as aforesaid may allow, such time not in any case to exceed the space of one year from the date of such occurrence as aforesaid; and in the event of no such application being made within such period as aforesaid, or of such court refusing to accede thereto, the ship or share so transmitted shall thereupon be forfeited in manner hereinafter directed with respect to interests acquired by unqualified owners in ships using a British flag and assuming the British character. Limit of time for application.

LXV. It shall be lawful in England or Ireland for the Court of Chancery (*r*), in Scotland for the Court of Session, in any British possession for any court, possessing the principal civil jurisdiction within such possession, without prejudice to the exercise of any other power such court may possess, upon the summary application of any interested person made either by petition or otherwise, and either ex parte, or upon service of notice on any other person, as the court may direct, to issue an order prohibiting for a time to be named in such order any dealing with such ship or share; and it shall be in the discretion of such court to make or refuse any such order, and to annex thereto any terms or conditions it may think fit, and to discharge such order when granted with or without costs, and generally to act in the premises in such manner as the justice of the case requires; and every registrar, without being made a party to the proceedings, upon being served with such order, or an official copy thereof, shall obey the same. Power of courts to prohibit transfers.

Mortgages. *Mortgages.*

LXVI. A registered ship or any share therein may be made a security for a loan or other valuable consideration; and the instrument creating such security, hereinafter termed a "mortgage," shall be in the form marked (I) in the Schedule hereto, or as near thereto as circumstances permit; and on the production of such instrument the registrar of the port at which the ship is registered shall record the same in the register book (*s*). Mortgage of ships and shares therein.

LXVII. Every such mortgage shall be recorded by the registrar in the order of time in which the same is produced to him for that purpose; and the registrar shall, by memorandum under his hand, notify on the instrument of mortgage that the same has been recorded by him, stating the date and hour of such record. Mortgages to be registered in order of time of production.

LXVIII. Whenever any registered mortgage has been discharged, the registrar shall, on the production of the mortgage deed, with a receipt for the mortgage money indorsed thereon, duly signed and attested, make an entry in the register book to the effect that such mortgage has been discharged; and upon such entry being made, the estate, if any, which passed to the mortgagee shall vest in the same person or persons in whom the same would, having regard to intervening acts and circumstances, if any, have vested if no such mortgage had ever been made. Entry of discharge of mortgage.

LXIX. If there is more than one mortgage registered of the same ship or share therein, the mortgagees shall, notwithstanding any express, implied, or constructive notice, be entitled in priority one over the other according to the date at which each instrument is recorded in the register books, and not according to the date of each instrument itself. Priority of mortgages.

LXX. A mortgagee shall not by reason of his mortgage be deemed to be the owner of a ship or any share therein, nor shall the mortgagor be deemed to have ceased to be owner of such mortgaged ship or share, except in so far as may be necessary for making such ship or share available as a security for the mortgage debt. Mortgagee not to be deemed owner.

LXXI. Every registered mortgagee shall have power absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase-money: but if there are more persons than Mortgagee to have power of sale.

(*r*) See 24 Vict. c. 10, s. 12. (*s*) See 8 & 9 Vict. c. 89, s. 45.

II. *Mortgages.*

one registered as mortgagees of the same ship or share, no subsequent mortgagee shall, except under the order of some court capable of taking cognizance of such matters, sell such ship or share without the concurrence of every prior mortgagee.

Rights of mortgagee not affected by any act of bankruptcy of mortgagor.

LXXII. No registered mortgage of any ship or of any share therein shall be affected by any act of bankruptcy committed by the mortgagor after the date of the record of such mortgage, notwithstanding such mortgagor at the time of his becoming bankrupt may have in his possession and dispositien and be reputed owner of such ship or share thereof; and such mortgage shall be preferred to any right, claim or interest in such ship or any share thereof which may belong to the assignees of such bankrupt.

Transfer of mortgages.

LXXIII. A registered mortgage of any ship or share in a ship may be transferred to any person, and the instrument creating such transfer shall be in the form marked (K) in the Schedule hereto, and on the production of such instrument the registrar shall enter in the register book the name of the transferee as mortgagee of the ship or shares therein mentioned, and shall by memorandum under his hand record on the instrument of transfer that the same has been recorded by him, stating the date and hour of such record.

Transmission of interest of mortgagee by death, bankruptcy, or marriage.

LXXIV. If the interest of any mortgagee in any ship or in any share therein becomes transmitted in consequence of death, bankruptcy or insolvency, or in consequence of the marriage of any female mortgagee, or by any lawful means other than by a transfer according to the provisions of this Act, such transmission shall be authenticated by a declaration of the person to whom such interest has been transmitted, made in the form marked (L) in the Schedule hereto, and containing a statement describing the manner in which and the party to whom such property has been transmitted; and such declaration shall be made and subscribed, if the declarant resides at or within five miles of the custom house of the port of registry, in the presence of the registrar, but if beyond that distance, in the presence of any registrar or of any justice of the peace, and shall be accompanied by such evidence as is hereinbefore required to authenticate a correspending transmission of property from one registered owner to another.

Entry of transmitted mortgage.

LXXV. The registrar, upon the receipt of such declaration, and the production of such evidence as aforesaid, shall enter the name of the person or persons entitled under such transmission in the register book as mortgagee or mortgagees of the ship or share in respect of which such transmission has taken place.

Certificates of Mortgage and Sale.

Certificates of Mortgage and Sale.

Powers of mortgage and sale may be conferred by certificate.

LXXVI. Any registered owner, if desirous of disposing by way of mortgage or sale of the ship or share in respect of which he is registered at any place out of the country or possession in which the port of registry of such ship is situate, may apply to the registrar, who shall thereupon enable him to do so by granting such certificates as are hereinafter mentioned, to be called respectively certificates of mortgage or certificates of sale, according as they purport to give a power to mortgage or a power to sell.

Requisites for certificates of mortgage and sale.

LXXVII. Previously to any certificate of mortgage or sale being granted, the applicant shall state to the registrar, to be by him entered in the register book, the following particulars; (that is to say,)

(1). The names of the persons by whom the power mentioned in such certificate is to be exercised, and in the case of a mortgage the maximum amount of charge to be created, if it is intended to fix any such maximum, and in the case of a sale the minimum price at which a sale is to be made, if it is intended to fix any such minimum:

(2). The specific place or places where such power is to be exercised, or if no place be specified, then that it may be exercised anywhere, subject to the provisions hereinafter contained:

(3). The limit of time within which such power may be exercised.

Restrictions on certificates of mortgage and sale.

LXXVIII. No certificate of mortgage or sale shall be granted so as to authorise any mortgage or sale to be made—

At any place within the United Kingdom, if the port of registry of the ship be situate in the United Kingdom; or at any place within the same

British possession if the port of registry is situate within a British possession; or,

By any person not named in the certificate.

II. *Certificates of Mortgage and Sale.*

Forms of certificates of mortgage and sale.

LXXIX. Certificates of mortgage and sale shall be in the forms marked respectively (M) and (N) in the Schedule hereto, and shall contain a statement of the several particulars hereinbefore directed to be entered in the register book, and in addition thereto an enumeration of any registered mortgages or certificates of mortgage or sale affecting the ships or shares in respect of which such certificates are given.

Rules as to certificates of mortgage.

LXXX. The following rules shall be observed as to certificates of mortgage; (that is to say,)

(1). The power shall be exercised in conformity with the directions contained in the certificate:

(2). A record of every mortgage made thereunder shall be indorsed thereon by a registrar or British consular officer:

(3). No mortgage bonâ fide made thereunder shall be impeached by reason of the person by whom the power was given dying before the making of such mortgage:

(4). Whenever the certificate contains a specification of the place or places at which, and a limit of time not exceeding twelve months within which, the power is to be exercised, no mortgage bonâ fide made to a mortgagee without notice shall be impeached by reason of the bankruptcy or insolvency of the person by whom the power was given:

(5). Every mortgage which is so registered as aforesaid on the certificate shall have priority over all mortgages of the same ship or share created subsequently to the date of the entry of the certificate in the register book; and if there be more mortgages than one so indorsed, the respective mortgagees claiming thereunder shall, notwithstanding any express, implied or constructive notice, be entitled one before the other according to the date at which a record of each instrument is indorsed on the certificate, and not according to the date of the instrument creating the mortgage:

(6). Subject to the foregoing rules every mortgagee whose mortgage is registered on the certificate shall have the same rights and powers, and be subject to the same liabilities as he would have had and been subject to if his mortgage had been registered in the register book instead of on the certificate:

(7). The discharge of any mortgage so registered on the certificate may be indorsed thereon by any registrar or British consular officer, upon the production of such evidence as is hereby required to be produced to the registrar on the entry of the discharge of a mortgage in the register book; and upon such indorsement being made, the estate, if any, which passed to the mortgagee shall vest in the same person or persons in whom the same would, having regard to intervening acts and circumstances, if any, have vested if no such mortgage had been made:

(8). Upon the delivery of any certificate of mortgage to the registrar by whom it was granted, he shall, after recording in the register book in such manner as to preserve its priority any unsatisfied mortgage registered thereon, cancel such certificate, and enter the fact of such cancellation in the register book; and every certificate so cancelled shall be void to all intents.

Rules as to certificates of sale.

LXXXI. The following rules shall be observed as to certificates of sale; (that is to say,)

(1). No such certificate shall be granted except for the sale of an entire ship:

(2). The power shall be exercised in conformity with the directions contained in the certificate:

(3). No sale bonâ fide made to a purchaser for valuable consideration shall be impeached by reason of the person by whom the power was given dying before the making of such sale:

(4). Whenever the certificate contains a specification of the place or places at which, and a limit of time not exceeding twelve months within which, the power is to be exercised, no sale bonâ fide made to

II. *Certificates of Mortgage and Sale.*

a purchaser for valuable consideration without notice shall be impeached by reason of the bankruptcy or insolvency of the person by whom the power was given:

(5). Any transfer made to a person qualified to be the owner of British ships, shall be by bill of sale in the form hereinbefore mentioned, or as near thereto as circumstances permit:

(6). If the ship is sold to a party qualified to hold British ships, the ship shall be registered anew, but notice of all mortgages enumerated on the certificate of sale shall be entered in the register book:

(7). Previously to such registry anew there shall be produced to the registrar required to make the same the bill of sale by which the ship is transferred, the certificate of sale and the certificate of registry of such ship:

(8). Such last-mentioned registrar shall retain the certificates of sale and registry, and after having indorsed on both of such instruments an entry of the fact of a sale having taken place, shall forward the said certificates to the registrar of the port appearing on such certificates to be the former port of registry of the ship, and such last-mentioned registrar shall thereupon make a memorandum of the sale in his register book, and the registry of the ship in such book shall be considered as closed, except as far as relates to any unsatisfied mortgagee or existing certificates of mortgage entered therein:

(9). On such registry anew the description of the ship contained in her original certificate of registry may be transferred to the new register book, without her being re-surveyed, and the declaration to be made by the purchaser shall be the same as would be required to be made by an ordinary transferee:

(10). If the ship is sold to a party not qualified to be the owner of a British ship, the bill of sale by which the ship is transferred, the certificate of sale, and the certificate of registry shall be produced to some registrar or consular officer, who shall retain the certificates of sale and registry, and having indorsed thereon the fact of such ship having been sold to persons not qualified to be owners of British ships, shall forward such certificatee to the registrar of the port appearing on the certificate of registry to be the port of registry of such ship; and such last-mentioned registrar shall thereupon make a memorandum of the sale in his register book, and the registry of the ship in such book shall be considered as closed, except so far as relates to any unsatisfied mortgages or existing certificates of mortgage entered therein:

(11). If upon a sale being made to an unqualified person default is made in the production of such certificates as are mentioned in the last rule, such unqualified person shall be considered by British law as having acquired no title to or interest in the ship; and further, the party upon whose application such certificate was granted, and the persons exercising the power, shall each incur a penalty not exceeding one hundred pounds:

(12). If no sale is made in conformity with the certificate of sale, such certificate shall be delivered to the registrar by whom the same was granted; and such registrar shall thereupon cancel it, and enter the fact of such cancellation in the register book; and every certificate so cancelled shall be void to all intents.

Power of commissioners of customs in case of loss of certificate of mortgage or sale.

LXXXII. Upon proof at any time to the satisfaction of the commissioners of customs that any certificate of mortgage or sale is lost or so obliterated as to be useless, and that the powers thereby given have never been exercised, or if they have been exercised, then upon proof of the several matters and things that have been done thereunder, it shall be lawful for the registrar, with the sanction of the said commissioners, as circumstances may require, either to issue a new certificate, or to direct such entries to be made in the register book, or such other matter or thing to be done as might have been made or done if no such loss or obliteration had taken place.

Revocation of certificates of mortgage and sale.

LXXXIII. The registered owner for the time being of any ship or share therein in respect of which a certificate of mortgage or sale has been granted, specifying the place or places where the power thereby given is to be exercised, may, by an instrument under his hand made in the form (O) in the Schedule hereto, or as near thereto as circumstances permit, authorise the

registrar by whom such certificate was granted to give notice to the registrar or consular officer, registrars or consular officers, at such place or places, that such certificate is revoked; and notice shall be given accordingly; and all registrars or consular officers receiving such notice shall record the same, and shall exhibit the same to all persons who may apply to them for the purpose of effecting or obtaining a mortgage or transfer under the said certificate of mortgage or sale; and after such notice has been so recorded the said certificate shall, so far as concerns any mortgage or sale to be thereafter made at such place, be deemed to be revoked and of no effect; and every registrar or consular officer recording any such notice shall thereupon state to the registrar by whom the certificate was granted whether any previous exercise of the power to which such certificate refers has been taken.

II. *Certificates of Mortgage and Sale.*

Registry anew, and Transfer of Registry.

Registry anew, and Transfer of Registry.

Alteration in ship to be registered.

LXXXIV. Whenever any registered ship is so altered as not to correspond with the particulars relating to her tonnage or description contained in the register book, then if such alteration is made at a port where there is a registrar, the registrar of such port, but if made elsewhere, the registrar of the first port having a registrar at which the ship arrives after her alteration, shall, on application made to him, and on the receipt of a certificate from the proper surveyor specifying the nature of such alteration, either retain the old certificate of registry and grant a new certificate of registry containing a description of the ship as altered, or indorse on the existing certificate a memorandum of such alteration, and subscribe his name to such indorsement; and the registrar to whom such application as aforesaid is made, if he is the registrar of the port of registry of the ship, shall himself enter in his register book the particulars of the alteration so made, and the fact of such new certificate having been granted or indorsement having been made on the existing certificate; but if he is not such last-mentioned registrar, he shall forthwith report such particulars and facts as aforesaid, accompanied by the old certificate of registry in cases where a new one has been granted, to the registrar of the port of registry of the ship, who shall retain such old certificate (if any), and enter such particulars and facts in his register book accordingly.

On alteration registry anew may be required.

LXXXV. When the registrar, to whom application is made in respect of any such alteration as aforesaid, is the registrar of the port of registry, he may, if he thinks fit, instead of registering such alteration, require such ship to be registered anew in manner hereinbefore directed on the first registry of a ship, and if he is not such registrar as lastly hereinbefore mentioned he may nevertheless require such ship to be registered anew, but he shall in such last-mentioned case grant a provisional certificate or make a provisional indorsement of the alteration made in manner hereinbefore directed in cases where no registry anew is required, taking care to add to such certificate or indorsement a statement that the same is made provisionally, and to insert in his report to the registrar of the port of registry of the ship a like statement.

Grant of provisional certificate in respect of alteration.

LXXXVI. Every such provisional certificate, or certificate provisionally indorsed, shall, within ten days after the first subsequent arrival of the ship at her port of discharge in the United Kingdom, if registered in the United Kingdom, or if registered elsewhere, at her port of discharge, in the British possession within which her port of registry is situate, be delivered up to the registrar thereof, who shall thereupon cause such ship to be registered anew in the same manner in all respects as hereinbefore required on the first registry of any ship.

Consequence of omission to register anew.

LXXXVII. On failure of such registry anew of any ship or registry of alteration of any ship so altered as aforesaid, such ship shall be deemed not duly registered, and shall no longer be recognised as a British ship.

On change of owners, registry anew may be granted if required.

LXXXVIII. If upon any change of ownership in any ship the owner or owners desire to have such ship registered anew, although such registry anew is not required by this Act, it shall be lawful for the registrar of the port at which such ship is already registered, on the delivery up to him of the existing certificate of registry, and on the other requisites to registry, or such of them as the registrar thinks material, being duly complied with, to make such registry anew, and grant a certificate thereof.

II. *Registry anew, and Transfer of Registry.*

Registry may be transferred from port to port.

LXXXIX. The registry of any ship may be transferred from one port to another upon the application of all parties appearing on the register to be interested in such ship, whether as owners or mortgagees, such application to be expressed by a declaration in writing made and subscribed, if the party so required to make and subscribe the same resides at or within five miles of the custom house of the port from which such ship is to be transferred, in the presence of the registrar of such port, but if beyond that distance in the presence of any registrar or of any justice of the peace.

Manner of transfer of registry.

XC. Upon such application being made as is hereinbefore mentioned, and upon the delivery to him of the certificate of registry, the registrar of the port at which such ship is already registered (*a*) shall transmit to the registrar of the port at which such ship is intended to be registered, notice of such application having been made to him, together with a true copy of all particulars relating to such ship, and the names of all the parties appearing by his book to be interested as owners or mortgagees in such ship; and such last-mentioned registrar shall, upon the receipt of such notice, enter all such particulars and names in his book of registry, and grant a fresh certificate of registry, and thenceforth such ship shall be considered as registered at and belonging to such last-mentioned port, and the name of such last-mentioned port shall be substituted on the stern of such ship in lieu of the name of the port previously appearing thereon.

Transfer of registry not to affect rights of owners.

XCI. The transfer of the registry of any ship in manner aforesaid shall not in any way affect the rights of the several persons interested either as owners or mortgagees in such ship, but such rights shall in all respects be maintained and continue in the same manner as if no such transfer had been effected.

Registry Miscellaneous.

Registry Miscellaneous.

Inspection of register books.

XCII. Every person may, upon payment of a fee to be fixed by the commissioners of customs (*b*) not exceeding one shilling, have access to the register book for the purpose of inspection at any reasonable time during the hours of official attendance of the registrar.

Indemnity to registrar.

XCIII. No registrar shall be liable to damages or otherwise for any loss accruing to any person by reason of any act done or default made by him in his character of registrar, unless the same has happened through his neglect or wilful act.

Return to be made by registrars to commissioners of customs.

XCIV. Every registrar in the United Kingdom shall at the expiration of every month, and every other registrar shall without delay, or at such stated times as may be fixed by the commissioners of customs, transmit to the custom house in London (*c*) a full return in such form as they may direct of all registries, transfers, transmissions, mortgages and other dealings with ships which have been registered by or communicated to them in their character of registrars, and the names of the persons who have been concerned in the same, and such other particulars as may be directed by the said commissioners.

Application of fees.

XCV. All fees authorised to be taken under the Second Part of this Act shall, if taken in any part of the United Kingdom, be applied in payment of the general expenses of carrying into effect the purposes of such Second Part, or otherwise as the treasury may direct, but if taken elsewhere shall be disposed of in such way as the executive government of the British possession in which they are taken may direct.

Commissioners of customs to provide, and with consent of Board of Trade may alter forms and issue instructions.

XCVI. The commissioners of customs shall cause the several forms (*d*) required or authorised to be used by the Second Part of this Act, and contained in the Schedule hereto, to be supplied to all registrars within her Majesty's dominions for distribution to the several persons requiring to use the same, either free of charge, or at such moderate prices as they may from time to time direct, and the said commissioners, with the consent of the Board of Trade, may from time to time make such alterations in the forms contained in the Schedule hereto as it may deem requisite, but shall, before issuing any altered form, give such public notice thereof as may be necessary in order to prevent inconvenience; and the said commissioners may also, with such consent as aforesaid, for the purposes of carrying into effect the

(*a*) See 18 & 19 Vict. c. 91, s. 112, *infra*.

(*b*) Registrar-General of Seamen: 35 & 36 Vict. c. 73, s. 4, *infra*.

(*c*) See 35 & 36 Vict. c. 73, s. 4, *infra*.

(*d*) 18 & 19 Vict. c. 91, s. 11, and 35 & 36 Vict. c. 73, s. 4, *infra*.

provisions contained in the Second Part of this Act, give such instructions as to the manner of making entries in the register book, as to the execution and attestation of powers of attorney, as to any evidence to be required for identifying any person, and generally as to any act or thing to be done in pursuance of the Second Part of this Act, as they may think fit.

II. *Registry Miscellaneous.*

Power to registrar to dispense with declarations and other evidence.

XCVII. Whenever in any case in which under the Second Part of this Act any person is required to make a declaration on behalf of himself or of any body corporate, or any evidence is required to be produced to the registrar, it is shown to the satisfaction of the registrar that from any reasonable cause such person is unable to make the declaration, or that such evidence cannot be produced, it shall be lawful for the registrar, with the sanction of the commissioners of customs, and upon the production of such other evidence, and subject to such terms as they may think fit, to dispense with any such declaration or evidence.

Power for commissioners or governor in special cases to grant a pass to a ship not registered.

XCVIII. In cases where it appears to the commissioners of customs, or to the governor or other person administering the government of any British possession, that by reason of special circumstances it would be desirable that permission should be granted to any British ship to pass, without being previously registered, from one port or place in her Majesty's dominions to any other port or place within the same, it shall be lawful for such commissioners or governor or other person to grant a pass accordingly, and such pass shall for the time and within the limits therein mentioned have the same effect as a certificate of registry.

Provision for cases of infancy or other incapacity.

XCIX. If any person interested in any ship or any share therein, is by reason of infancy, lunacy or other inability, incapable of making any declaration or doing anything required or permitted by this Act to be made or done by such incapable person in respect of registry, then the guardian or committee, if any, of such incapable person, or, if there be none, any person appointed by any court or judge possessing jurisdiction in respect of the property of incapable persons, upon the petition of any person on behalf of such incapable person, or of any other person interested in the making such declaration or doing such thing, may make such declaration, or a declaration as nearly corresponding thereto as circumstances permit, and do such thing in the name and on behalf of such incapable person; and all acts done by such substitute shall be as effectual as if done by the person for whom he is substituted.

Liabilities of owners.

C. Whenever any person is beneficially interested, otherwise than by way of mortgage, in any ship or share therein registered in the name of some other person as owner, the person so interested shall, as well as the registered owner, be subject to all pecuniary penalties imposed by this or by any other Act on owners of ships or shares therein, so nevertheless that proceedings may be taken for the enforcement of any such pecuniary penalties against both or either of the aforesaid parties, with or without joining the other of them.

Forgery.

Forgery.

Punishment for forgery.

CI. Any person who forges, assists in forging, or procures to be forged, fraudulently alters, assists in fraudulently altering, or procures to be fraudulently altered, any register book, certificate of surveyor, certificate of registry, declaration of ownership, bill of sale, instrument of mortgage, certificate of mortgage or sale, or any entry or indorsement required by the Second Part of this Act to be made in or on any of the above documents, shall for every such offence be deemed to be guilty of felony.

National Character.

National Character.

National character of ship to be declared before clearance.

CII. No officer of customs shall grant a clearance or transire for any ship until the master of such ship has declared to such officer the name of the nation to which he claims that she belongs, and such officer shall thereupon inscribe such name on the clearance or transire; and if any ship attempts to proceed to sea without such clearance or transire, any such officer may detain her until such declaration is made.

Penalties:

CIII. The offences hereinafter mentioned shall be punishable as follows; (that is to say,)

For unduly assuming a British character.

(1). If any person uses the British flag and assumes the British national character on board any ship owned in whole or in part by any persons not entitled by law to own British ships, for the purpose of making such ship appear to be a British ship, such ship shall be for-

II. *National Character.*

feited to her Majesty, unless such assumption has been made for the purpose of escaping capture by an enemy or by a foreign ship of war in exercise of some belligerent right; and in any proceeding for enforcing any such forfeiture the burden of proving a title to use the British flag and assume the British national character shall lie upon the person using and assuming the same:

For concealment of British or assumption of foreign character.

(2). If the master or owner of any British ship does or permits to be done any matter or thing, or carries or permits to be carried any papers or documents, with intent to conceal the British character of such ship from any person entitled by British law to inquire into the same, or to assume a foreign character, or with intent to deceive any such person as lastly hereinbefore mentioned, such ship shall be forfeited to her Majesty; and the master, if he commits or is privy to the commission of the offence, shall be guilty of a misdemeanor:

For acquiring ownership if unqualified.

(3). If any qualified person, except in the case of such transmitted interests as are hereinbefore mentioned, acquires as owner any interest, either legal or beneficial, in a ship using a British flag and assuming the British character, such interest shall be forfeited to her Majesty:

For false declaration of ownership.

(4). If any person, on behalf of himself or any other person or body of persons, wilfully makes a false declaration touching the qualification of himself or such other person or body of persons to own British ships or any share therein, the declarant shall be guilty of a misdemeanor; and the ship or share in respect of which such declaration is made, if the same has not been forfeited under the foregoing provision, shall, to the extent of the interest therein of the person making the declaration, and, unless it is shown that he had no authority to make the same, of the parties on behalf of whom such declaration is made, be forfeited to her Majesty:

And in order that the above provisions as to forfeitures may be carried into effect it shall be lawful for any commissioned officer on full pay in the military or naval service of her Majesty, or any British officer of customs, or any British consular officer, to seize and detain any ship which has, either wholly or as to any share therein, become subject to forfeiture as aforesaid, and to bring her for adjudication before the High Court of Admiralty in England or Ireland, or any court having Admiralty jurisdiction in her Majesty's dominions; and such court may thereupon make such order in the case as it may think fit, and may award to the officer bringing in the same for adjudication such portion of the proceeds of the sale of any forfeited ship or share as it may think right.

Officer not liable for any seizure made on reasonable grounds.

CIV. No such officer as aforesaid shall be responsible, either civilly or criminally, to any person whomsoever, in respect of the seizure or detention of any ship that has been seized or detained by him in pursuance of the provisions herein contained, notwithstanding that such ship is not brought in for adjudication, or, if so brought in, is declared not to be liable to forfeiture, if it is shown to the satisfaction of the judge, or court before whom any trial relating to such ship or such seizure or detention is held that there were reasonable grounds for such seizure or detention; but if no such grounds are shown, such judge or court may award payment of costs and damages to any party aggrieved, and make such other order in the premises as it thinks just.

Penalty for carrying improper colours.

CV. If any colours usually worn by her Majesty's ships, or any colours resembling those of her Majesty, or any distinctive national colours, except the red ensign usually worn by merchant ships (*c*), or except the union jack with a white border, or if the pendant usually carried by her Majesty's ships or any pendant in anywise resembling such pendant, are or is hoisted on board any ship or boat belonging to any subject of her Majesty without warrant for so doing from her Majesty or from the Admiralty, the master of such ship or boat, or the owner thereof, if on board the same, and every other person hoisting or joining or assisting in hoisting the same, shall for every such offence incur a penalty not exceeding five hundred pounds (*d*); and

(*c*) See the Merchant Shipping (Colours) Act, 1889 (52 & 53 Vict. c. 73).

(*d*) As to the recovery of the penalty, see 52 & 53 Vict. c. 73, s. 3.

it shall be lawful for any officer on full pay in the military or naval service of her Majesty, or any British officer of the customs, or any British consular officer, to board any such ship or boat, and to take away any such jack, colours, or pendant; and such jack, colours or pendant shall be forfeited to her Majesty.

II. *National Character.*

CVI. Whenever it is declared by this Act that a ship belonging to any person or body corporate qualified according to this Act to be owners of British ships shall not be recognized as a British ship, such ship shall not be entitled to any benefits, privileges, advantages or protection usually enjoyed by British ships, and shall not be entitled to use the British flag, or assume the British national character; but, so far as regards the payment of dues, the liability to pains and penalties, and the punishment of offences committed on board such ship or by any persons belonging to her, such ship shall be dealt with in the same manner in all respects as if she were a recognized British ship.

Effect of declaration in the Act that a ship shall not be recognized as a British ship.

Evidence.

Evidence.

CVII. Every register of or declaration made in pursuance of the Second Part of this Act in respect of any British ship may be proved in any court of justice, or before any person having by law or by consent of parties authority to receive evidence, either by the production of the original or by an examined copy thereof, or by a copy thereof purporting to be certified under the hand of the registrar or other person having the charge of the original; which certified copies he is hereby required to furnish to any person applying at a reasonable time for the same, upon payment of one shilling for each such certified copy; and every such register or copy of a register, and also every certificate of registry of any British ship, purporting to be signed by the registrar or other proper officer, shall be received in evidence in any court of justice or before any person having by law or by consent of parties authority to receive evidence as primâ facie proof of all the matters contained or recited in such register when the register or such copy is produced, and of all the matters contained in or indorsed on such certificate of registry, and purporting to be authenticated by the signature of a registrar, when such certificate is produced.

Copies of registers and declarations to be admissible in evidence, and to be primâ facie proof of certain things (*e*).

Saving Clause.

Saving Clause.

CVIII. Nothing in this Act contained shall repeal or affect an Act passed in the session of Parliament holden in the third and fourth years of the reign of her present Majesty, chapter fifty-six, intituled "An Act further to regulate the Trade of Ships built and trading within the Limits of the East India Company's Charter."

Saving of 3 & 4 Vict. c. 56, relating to East Indian ships.

PART III.

MASTERS AND SEAMEN (*f*).

Application.

Application.

CIX. The various provisions of the Third Part of this Act shall have the following applications, unless the context or subject-matter requires a different application; (that is to say,)

Application of Part III. of Act.

So much of the Third Part of this Act as relates to the delivery or transmission of lists of crews to the registrar-general of seamen shall apply to all fishing vessels belonging to the United Kingdom, whether employed exclusively on the coasts of the United Kingdom or not; to all ships belonging to the Trinity House, or the commissioners of northern lighthouses, constituted, as hereinafter mentioned, or the port of Dublin corporation, and to all pleasure yachts, and to the owners, masters and crews of such ships (*f*).

Returns for certain ships belonging to the United Kingdom.

So much of the Third Part of this Act as relates to the delivery and transmission of lists of crews, and to the wages and effects of deceased seamen and apprentices, shall apply to all seagoing British ships,

Returns and wages of deceased seamen in certain colonial ships.

(*e*) See ss. 9 and 15 of 18 & 19 Vict. c. 91, *infra*.

(*f*) See 25 & 26 Vict. c. 63, s. 13, *infra*.

III. *Application.*

wherever registered, of which the crews are discharged, or whose final port of destination is in the United Kingdom, and to the owners, masters and crews of such ships:

Shipping and discharging men in the United Kingdom.

So much of the Third Part of this Act as relates to the shipping and discharge of seamen in the United Kingdom, shall apply to all sea-going British ships, wherever registered, and to the owners, masters and crews of such ships:

Volunteering into the navy.

So much of the Third Part of this Act as relates to seamen volunteering into the royal navy shall apply to all sea-going British ships wherever registered, and to the owners, masters and crews of such ships, wheresoever the same may be:

Provisions applicable to colonial ships.

So much of the Third Part of this Act as relates to rights to wages and remedies for the recovery thereof; to the shipping and discharge of seamen in foreign ports; to leaving seamen abroad, and to the relief of seamen in distress in foreign ports; to the provisions, health and accommodation of seamen; to the power of seamen to make complaints; to the protection of seamen from imposition; to discipline; to naval courts on the high seas and abroad; and to crimes committed abroad; shall apply to all ships registered in any of her Majesty's dominions abroad, when such ships are out of the jurisdiction of their respective governments, and to the owners, masters and crews of such ships:

As to whole of Part III. of Act.

And the whole of the Third Part of this Act shall apply to all sea-going ships registered in the United Kingdom (except such as are exclusively employed in fishing on the coasts of the United Kingdom, and such as belong to the Trinity House, the commissioners of northern lighthouses, or the port of Dublin corporation, and also except pleasure yachts), and also to all ships registered in any British possession and employed in trading or going between any place in the United Kingdom and any place or places not situate in the possession in which such ships are registered, and to the owners, masters and crews of such ships respectively, wherever the same may be (*g*).

Local Marine Boards.

Local Marine Boards.

Constitution of local marine boards.

CX. There shall be local marine boards for carrying into effect the provisions of this Act under the superintendence of the board of trade at those seaports of the United Kingdom at which local marine boards have heretofore been established, and at such other places as the board of trade appoints for this purpose; and each of such local marine boards shall be constituted as follows: (that is to say,) the mayor or provost and the stipendiary magistrate or such of the mayors or provosts and stipendiary magistrates of the place (if more than one) as the board of trade appoints shall be a member or members ex officio; the board of trade shall appoint four members from persons residing or having places of business at the port or within seven miles thereof; and the owners of foreign-going ships and of home-trade passenger ships registered at the port shall elect six members; and such elections as aforesaid shall take place on the twenty-fifth day of January, one thousand eight hundred and fifty-seven, and on the twenty-fifth day of January in every third succeeding year, and such appointments as aforesaid shall take place within one month after such elections; and upon the conclusion of such month and the constitution of a new board the functions of the then existing board shall cease, and the board consisting of the members then newly elected and appointed shall take its place; and any occasional vacancy caused in the intervals between the general elections and appointments, by death, resignation, disqualification, or otherwise, shall be filled up within one month after it occurs; and every person elected or appointed on an occasional vacancy shall continue a member until the next constitution of a new board; and the mayor or provost shall fix the place and mode of conducting all such elections as aforesaid, and also on occasional vacancies the day of election, and shall give at least ten days' notice thereof; and the board of trade shall have power to decide any questions raised concerning any such elections.

Qualification of voters for

CXI. Owners of foreign-going ships and of home-trade passenger ships registered at any seaport of which there is a local marine board shall have

(*g*) See 25 & 26 Vict. c. 63, s. 13, *infra*.

votes at the election of members of such board as follows: (that is to say,) every registered owner of not less than two hundred and fifty tons in the whole of such shipping shall at every election have one vote for each member for every two hundred and fifty tons owned by him, so that his votes for any one member do not exceed ten: And for the purpose of ascertaining the qualification of such electors the following rules shall be observed; (that is to say,) in the case of a ship registered in the name of one person, such person shall be deemed to be the owner, and in the case of a ship registered in distinct and several shares in the names of more persons than one, the tonnage shall be apportioned among the owners as nearly as may be in proportion to their respective shares, and each of such persons shall be deemed to be the owner of the tonnage so apportioned to him; and in the case of a ship or shares of a ship registered jointly without severance of interest in the names of more persons than one, the tonnage shall, if it is sufficient, either alone or together with other tonnage (if any) owned by such joint owners, to give a qualification to each of them, be apportioned equally between the joint owners, and each of such joint owners shall be deemed to be the owner of the equal share so apportioned to him, but if it is not so sufficient, the whole of such tonnage shall be deemed to be owned by such one of the joint owners resident or having a place of business at the port or within seven miles thereof as is first named on the register; and in making any such apportionment as aforesaid any portion may be struck off so as to obtain a divisible amount; and the whole amount of tonnage so owned by each person, whether in ships or shares of or interests in ships, shall be added together, and, if sufficient, shall constitute his qualification.

members of local marine boards.

CXII. The collector or comptroller of customs in every seaport of the United Kingdom at which there is a local marine board, shall, with the assistance of the registrar-general of seamen, on or before the twenty-fifth day of December in the year one thousand eight hundred and fifty-six, and in every third succeeding year, make out an alphabetical list of the persons entitled by virtue of this Act to vote at the election of members of such local marine board, containing the Christian name, surname and residence of each such person, and the number of votes to which he is entitled, and shall sign such list, and cause a sufficient number of copies thereof to be printed, and to be fixed on or near the doors of the custom-house of such seaport for two entire weeks next after such list has been made, and shall keep true copies of such list, and permit the same to be perused by any person, without payment of any fee, at all reasonable hours during such two weeks.

Lists of such voters to be made.

CXIII. The mayor or provost of every seaport at which there is a local marine board, or such of them, if more than one, as is or are for the time being so appointed as aforesaid, shall at least twenty days before the twenty-fifth day of January in the year one thousand eight hundred and fifty-seven, and in each succeeding third year, nominate two justices of the peace to revise the said lists; and such justices shall, between the eighth and fifteenth days of January both inclusive in the year in which they are so nominated, revise the said list at the custom-house of the port, or in some convenient place near thereto, to be hired, if necessary, by the said collector or comptroller, and shall give three clear days' notice of such revision by advertising the same in some local newspaper, and by affixing a notice thereof on or near to the doors of such custom-house, and shall make such revision by inserting in such list the name of every person who claims to be inserted therein and gives proof satisfactory to the said revisors of his right to have his name so inserted, and by striking out therefrom the name of every person to the insertion of which an objection is made by any other person named in such list who gives proof satisfactory to the said revisors that the name of the person so objected to ought not to have been inserted therein; and the decision of the said revisors with respect to every such claim or objection shall be conclusive; and the said revisors shall immediately after such revision sign their names at the foot of the list so revised; and such list so revised shall be the register of voters at elections of members of the local marine board of such seaport for three years from the twenty-fifth day of January then next ensuing inclusive to the twenty-fourth day of January inclusive in the third succeeding year; and the said revised list, when so signed, shall be delivered to such mayor or provost as aforesaid of the place, who shall, if necessary, cause a sufficient number of copies thereof to be printed, and shall cause a copy to be delivered to every voter applying for the same.

Revision of list of voters.

III. *Local Marine Boards.*

Registers to be produced.

CXIV. The said collector, or comptroller, if required, shall for the assistances of the said revisers in revising the said list produce to them the books containing the register of ships registered at such seaport; and the registrar-general of seamen, if required, shall also produce or transmit to such revisers such certified extracts or returns from the books in his custody as may be necessary for the same purpose.

Expenses to be paid by board of trade.

CXV. The two justices aforesaid shall certify all expenses properly incurred by any such collector or comptroller as aforesaid in making and printing the said list and in the revision thereof, and the board of trade shall pay the same, and also all expenses properly incurred by any such mayor or provost as aforesaid in printing the same or in elections taking place under this Act; and the said board may disallow any items of any such expenses as aforesaid which it deems to have been improperly incurred.

Persons on revised list qualified to vote.

CXVI. Every person whose name appears on such revised list, and no other person, shall be qualified to vote at the election of members of the local marine board at such seaport to be held on the twenty-fifth day of January next after the revision of such list, and at any occasional election held at any time between that day and the next ordinary triennial election of the members of such board.

Qualification of members of local marine boards.

CXVII. Every male person who is according to such revised list of the voters at any seaport entitled to a vote, shall be qualified to be elected a member of the local marine board of such seaport, and no other person shall be so qualified; and if any person elected as a member after such election ceases to be an owner of such quantity of tonnage as would entitle him to a vote, he shall no longer continue to act or be considered as a member, and thereupon another member shall be elected in his place.

Error in elections not to vitiate acts done.

CXVIII. No act of any local marine board shall be vitiated or prejudiced by reason of any irregularity in the election of any of its members, or of any error in the list of voters herein mentioned, or of any irregularity in the making or revising of such list, or by reason of any person who is not duly qualified as hereinbefore directed acting upon such board.

Minutes and business of local marine boards.

CXIX. Every local marine board shall keep minutes of its proceedings, and the same shall be kept in such mode (if any) as the board of trade prescribes; and such minutes, and all books or documents used or kept by any local marine board, or by any examiners, shipping masters, or other officers or servants under the control of any local marine board, shall be open to the inspection of the board of trade and its officers; and every local marine board shall make and send to the board of trade such reports and returns as it requires; but, subject as aforesaid, every local marine board may regulate the mode in which its meetings are to be held and its business conducted (*h*).

If any local marine board fails to discharge its duties, board of trade may assume its duties, or direct a new election.

CXX. If any local marine board, by reason of any election not taking place, or of the simultaneous resignation or continued non-attendance of all or the greater part of the members, or from any other cause, fails to meet or to discharge its duties, the board of trade may, in its discretion, either take into its own hands the performance of the duties of such local marine board until the next triennial appointment and election thereof, or direct that a new appointment and election of such local marine board shall take place immediately.

Board of trade, on complaint, may alter arrangements made by local marine boards.

CXXI. If upon complaint made to the board of trade, it appears to such board that any appointments or arrangements made by any local marine board under the powers hereby given to it are not such as to meet the wants of the port, or are in any respect unsatisfactory or improper, the board of trade may annul, alter, or rectify such appointments or arrangements in such manner as, having regard to the intentions of this Act and to the wants of the port, it deems to be expedient.

Shipping Offices.

Shipping Offices (*i*).

Local marine boards to establish shipping offices.

CXXII. In every seaport in the United Kingdom in which there is a local marine board such board shall establish a shipping office or shipping offices, and may for that purpose, subject as herein mentioned, procure the requisite premises, and appoint and from time to time remove and re-appoint

(*h*) See 25 & 26 Vict. c. 63, s. 14, *infra*.

(*i*) Now termed mercantile marine offices: 25 & 26 Vict. c. 63, s. 15, *infra*.

superintendents of such offices, to be called shipping masters, with any necessary deputies, clerks, and servants, and regulate the mode of conducting business at such offices, and shall, subject as herein mentioned, have complete control over the same; and every act done by or before any deputy duly appointed shall have the same effect as if done by or before a shipping-master (*k*).

Board of trade to have partial control over shipping offices.

CXXIII. The sanction of the board of trade shall be necessary so far as regards the number of persons so appointed by any such local marine board, and the amount of their salaries and wages and all other expenses; and the board of trade shall have the immediate control of such shipping offices, so far as regards the receipt and payment of money thereat; and all shipping masters, deputies, clerks, and servants so appointed as aforesaid shall before entering upon their duties give such security (if any) for the due performance thereof as the board of trade requires; and if in any case the board of trade has reason to believe that any shipping master, deputy clerk or servant appointed by any local marine board does not properly discharge his duties, the board of trade may cause the case to be invested, and may, if it thinks fit so to do, remove him from his office, and may provide for the proper performance of his duties until another person is properly appointed in his place.

Business of such offices generally.

CXXIV. It shall be the general business of shipping masters appointed as aforesaid—

To afford facilities for engaging seamen by keeping registries of their names and characters;

To superintend and facilitate their engagement and discharge in manner hereinafter mentioned;

To provide means for securing the presence on board at the proper times of men who are so engaged;

To facilitate the making apprenticeships to the sea service;

To perform such other duties relating to merchant seamen and merchant ships as are hereby or may hereafter under the powers herein contained be committed to them.

Fees to be paid upon engagements and discharges.

CXXV. Such fees, not exceeding the sums specified in the table marked (P) in the Schedule hereto, as are from time to time fixed by the board of trade, shall be payable upon all engagements and discharges effected before shipping masters as hereinafter mentioned, and the board of trade shall cause scales of the fees payable for the time being to be prepared and to be conspicuously placed in the shipping offices; and all shipping masters, their deputies, clerks and servants, may refuse to proceed with any engagement or discharge unless the fees payable thereon are first paid.

Masters to pay fees, and to deduct part from wages.

CXXVI. Every owner or master of a ship engaging or discharging any seamen or seaman in a shipping office or before a shipping master shall pay to the shipping master the whole of the fees hereby made payable in respect of such engagement or discharge, and may, for the purpose of in part reimbursing himself, deduct in respect of each such engagement or discharge from the wages of all persons (except apprentices) so engaged or discharged, and retain any sums not exceeding the sum specified in that behalf in the table marked (Q) in the Schedule hereto: Provided that, if in any cases the sums which the owner is so entitled to deduct exceed the amount of the fee payable by him, such excess shall be paid by him to the shipping master in addition to such fee.

Proviso as to excess.

Penalty on shipping masters taking other remuneration.

CXXVII. Any shipping master, deputy shipping master, or any clerk or servant in any shipping office, who demands or receives any remuneration whatever, either directly or indirectly, for hiring or supplying any seaman for any merchant ship, excepting the lawful fees payable under this Act, shall for every such offence incur a penalty not exceeding twenty pounds, and shall also be liable to be dismissed from his office by the board of trade.

Business of shipping offices may be transacted at custom houses.

CXXVIII. The board of trade may, with the consent of the commissioners of customs, direct that at any place in which no separate shipping office is established the whole or any part of the business of the shipping office shall be conducted at the custom house, and thereupon the same shall be there conducted accordingly; and in respect of such business such custom house shall for all purposes be deemed to be a shipping office, and the officer of

(*k*) See 25 & 26 Vict. c. 63, s. 15, *infra*.

III. *Shipping Offices.*

customs there to whom such business is committed shall for all purposes be deemed to be a shipping master within the meaning of this Act.

In London sailors' homes may be shipping offices.

CXXIX. The board of trade may appoint any superintendent of or other person connected with any sailors' home in the port of London to be a shipping master, with any necessary deputies, clerks and servants, and may appoint any office in any such home to be a shipping office; and all shipping masters and shipping offices so appointed shall be subject to the immediate control of the board of trade and not of the local marine board of the port.

Dispensation with shipping master's superintendence.

CXXX. The board of trade may from time to time dispense with the transaction before a shipping master or in a shipping office of any matters required by this Act to be so transacted; and thereupon such matters shall, if otherwise duly transacted as required by law, be as valid as if transacted before a shipping master or in a shipping office.

Certificates of Masters and Mates.

Examinations and Certificates of Masters and Mates.

Examinations to be instituted for masters and mates (*l*).

CXXXI. Examinations shall be instituted for persons who intend to become masters or mates of foreign-going ships, or of home-trade passenger ships, or who wish to procure certificates of competency hereinafter mentioned (*l*); and, subject as herein mentioned, the local marine boards shall provide for the examinations at their respective ports, and may appoint and from time to time remove and re-appoint examiners to conduct the same, and may regulate the same; and any members of the local marine board of the place where the examination is held may be present and assist at any such examination.

Powers of board of trade over examinations.

CXXXII. The board of trade may from time to time lay down rules as to the conduct of such examinations and as to the qualifications of the applicants, and such rules shall be strictly adhered to by all examiners; and no examiner shall be appointed unless he possesses a certificate of qualification, to be from time to time granted or renewed by the board of trade; and the sanction of the board of trade shall be necessary, so far as regards the number of examiners to be appointed and the amount of their remuneration; and the board of trade may at any time depute any of its officers to be present and assist at any examination; and if it appears to the board of trade that the examinations for any two or more ports can be conducted without inconvenience by the same examiners, it may require and authorize the local marine boards of such ports to act together as one board in providing for and regulating examinations and appointing and removing examiners for such ports.

Fees to be paid by applicants for examination.

CXXXIII. All applicants for examination shall pay such fees, not exceeding the sums specified in the table marked (R) in the Schedule hereto, as the board of trade directs; and such fees shall be paid to such persons as the said board appoints for that purpose.

Certificates of competency to be granted to those who pass.

CXXXIV. Subject to the proviso hereinafter contained, the board of trade shall deliver to every applicant who is duly reported by the local examiners to have passed the examination satisfactorily, and to have given satisfactory evidence of his sobriety, experience, ability and general good conduct on board ship, a certificate (hereinafter called a "certificate of competency") to the effect that he is competent to act as master, or as first, second or only mate of a foreign-going ship, or as master or mate of a home-trade passenger ship, as the case may be: Provided that in every case in which the board of trade has reason to believe such report to have been unduly made, such board may remit the case either to the same or to any other examiners, and may require a re-examination of the applicant, or a further inquiry into his testimonials and character, before granting him a certificate.

Certificates of service to be delivered to persons who served as masters or mates before 1851, and to certain naval officers; and

CXXXV. Certificates of service, differing in form from certificates of competency, shall be granted as follows; (that is to say),

(1). Every person who before the first day of January, one thousand eight hundred and fifty-one, served as master in the British merchant service, or who has attained or attains the rank of lieutenant, master, passed mate or second master, or any higher rank in the service of Her Majesty or of the East India Company, shall

(*l*) As to certificates of engineers, which are required in certain cases, see 25 & 26 Vict. c. 63, s. 5 *et seq.*, *infra*.

be entitled to a certificate of service as master for foreign-going ships:

(2). Every person who before the first day of January, one thousand eight hundred and fifty-one, served as mate in the British merchant service, shall be entitled to a certificate of service as mate for foreign-going ships:

(3). Every person who before the first day of January, one thousand eight hundred and fifty-four, has served as master of a home-trade passenger ship, shall be entitled to a certificate of service as master for home-trade passenger ships:

(4). Every person who before the first day of January, one thousand eight hundred and fifty-four, has served as mate of a home-trade passenger ship, shall be entitled to a certificate of service as mate for home-trade passenger ships:

III. *Certificates of Masters and Mates.*

certificates of service for home-trade passenger ships to be delivered to persons who have served as masters or mates in such ships before 1st January, 1854.

And each of such certificates of service shall contain particulars of the name, place, and time of birth, and of the length and nature of the previous service of the person to whom the same is delivered; and the board of trade shall deliver such certificates of service to the various persons so respectively entitled thereto, upon their proving themselves to have attained such rank or to have served as aforesaid, and upon their giving a full and satisfactory account of the particulars aforesaid.

CXXXVI. No foreign-going ship or home-trade passenger ship shall go to sea from any port in the United Kingdom unless the master thereof, and in the case of a foreign-going ship the first and second mates or only mate (as the case may be), and in the case of a home-trade passenger ship the first or only mate (as the case may be), have obtained and possess valid certificates either of competency or service appropriate to their several stations in such ship, or of a higher grade; and no such ship, if of one hundred tons burden or upwards, shall go to sea as aforesaid, unless at least one officer besides the master has obtained and possesses a valid certificate appropriate to the grade of only mate therein or to a higher grade; and every person who, having been engaged to serve as master or as first or second or only mate of any foreign-going ship, or as master or first or only mate of a home-trade passenger ship, goes to sea as aforesaid as such master or mate without being at the time entitled to and possessed of such a certificate as hereinbefore required, or who employs any person as master or first, second or only mate of any foreign-going ship, or as master or first or only mate of a home-trade passenger ship, without ascertaining that he is at the time entitled to and possessed of such certificate, shall for each such offence incur a penalty not exceeding fifty pounds.

No foreign-going ship or home-trade passenger ship to proceed to sea without certificates of the master and mates.

CXXXVII. Every certificate of competency for a foreign-going ship shall be deemed to be of a higher grade than the corresponding certificate for a home-trade passenger ship, and shall entitle the lawful holder thereof to go to sea in the corresponding grade in such last-mentioned ship; but no certificate for a home-trade passenger ship shall entitle the holder to go to sea as master or mate of a foreign-going ship.

Certificates for foreign-going ships available for home-trade passenger ships.

CXXXVIII. All certificates, whether of competency or service, shall be made in duplicate, and one part shall be delivered to the person entitled to the certificate, and the other shall be kept and recorded by the registrar-general of seamen or by such other person as the board of trade appoints for that purpose; and the board of trade shall give to such registrar or such other person immediate notice of all orders made by it for cancelling, suspending, altering, or otherwise affecting any certificate in pursuance of the powers herein contained; and the registrar or such other person as aforesaid shall thereupon make a corresponding entry in the record of certificates; and a copy purporting to be certified by such registrar or his assistant or by such person as aforesaid of any certificate shall be primâ facie evidence of such certificate, and a copy purporting to be so certified as aforesaid of any entry made as aforesaid in respect of any certificate shall be primâ facie evidence of the truth of the matters stated in such entry.

The registrar to record grants, cancellations, &c., of certificates.

Duplicates and entries to be evidence.

CXXXIX. Whenever any master or mate proves to the satisfaction of the board of trade that he has, without fault on his part, lost or been deprived of any certificate already granted to him, the board of trade shall, upon payment of such fee (if any) as it directs, cause a copy of the certificate to which by the record so kept as aforesaid he appears to be entitled, to be made out and certified as aforesaid, and to be delivered to him; and any

In case of loss a copy to be granted.

III. *Certificates of Masters and Mates.*

copy which purports to be so made and certified as aforesaid shall have all the effect of the original.

Penalties for false representations for forging or altering or fraudulently using or lending any certificate.

CXL. Every person who makes, or procures to be made, or assists in making any false representation for the purpose of obtaining for himself or for any other person a certificate either of competency or service, or who forges, assists in forging, or procures to be forged, or fraudulently alters, assists in fraudulently altering, or procures to be fraudulently altered, any such certificate or any official copy of any such certificate, or who fraudulently makes use of any such certificate or any copy of any such certificate which is forged, altered, cancelled, suspended, or to which he is not justly entitled, or who fraudulently lends his certificate to or allows the same to be used by any other person, shall for each offence be deemed guilty of a misdemeanor.

Apprenticeships to Sea Service.

Apprenticeships to the Sea Service.

Shipping-masters to assist in binding apprentices, and may receive fees.

CXLI. All shipping masters appointed under this Act shall, if applied to for the purpose, give to any board of guardians, overseers, or other persons desirous of apprenticing boys to the sea service, and to masters and owners of ships requiring apprentices, such assistance as is in their power for facilitating the making of such apprenticeships, and may receive from persons availing themselves of such assistance such fees as may be determined in that behalf by the board of trade, with the concurrence, so far as relates to pauper apprentices in England, of the poor law board in England, and so far as relates to pauper apprentices in Ireland, of the poor law commissioners in Ireland.

Indentures of boys bound apprentices to sea service by guardians or overseers to be witnessed by two justices.

CXLII. In the case of every boy bound apprentice to the sea service by any guardians or overseers of the poor, or other persons having the authority of guardians of the poor, the indentures shall be executed by the boy and the person to whom he is bound in the presence of and shall be attested by two justices of the peace, who shall ascertain that the boy has consented to be bound, and has attained the age of twelve years, and is of sufficient health and strength, and that the master to whom the boy is to be bound is a proper person for the purpose.

Indentures of apprenticeship to be exempt from stamp duty and to be recorded.

CXLIII. All indentures of apprenticeship to the sea service shall be exempt from stamp duty; and all such indentures shall be in duplicate: and every person to whom any boy whatever is bound as an apprentice to the sea service in the United Kingdom shall within seven days after the execution of the indentures take or transmit the same to the registrar-general of seamen or to some shipping master; and the said registrar or shipping master shall retain and record one copy, and shall indorse on the other that the same has been recorded, and shall re-deliver the same to the master of the apprentice; and whenever any such indenture is assigned or cancelled, and whenever any such apprentice dies or deserts, the master of the apprentice shall, within seven days after such assignment, cancellation, death, or desertion, if the same happens within the United Kingdom, or if the same happens elsewhere, so soon afterwards as circumstances permit, notify the same either to the said registrar of seamen, or to some shipping master, to be recorded; and every person who fails to comply with the provisions of this section shall incur a penalty not exceeding ten pounds.

Rules to govern apprenticeship of paupers in Great Britain and Ireland respectively.

CXLIV. Subject to the provisions hereinbefore contained, all apprenticeships to the sea service made by any guardians or overseers of the poor, or persons having the authority of guardians of the poor, shall, if made in Great Britain, be made in the same manner and be subject to the same laws and regulations as other apprenticeships made by the same persons, and if made in Ireland shall be subject to the following rules; (that is to say,)

(1). In every union the guardians of the poor, or other persons duly appointed to carry into execution the Acts for the relief of the destitute poor and having the authority of guardians of the poor, may put out and bind as an apprentice to the sea service any boy who or whose parent or parents is or are receiving relief in such union, and who has attained the age of twelve years, and is of sufficient health and strength, and who consents to be so bound:

(2). If the cost of relieving any such boy is chargeable to an electoral division of a union, then (except in cases in which paid officers act in

place of guardians) he shall not be bound as aforesaid unless the consent in writing of the guardians of such electoral division or of a majority of the guardians (if more than one) be first obtained, such consent to be, when possible, indorsed upon the indentures:

(3). The expense incurred in the binding and outfit of any such apprentice shall be charged to the union or electoral division (as the case may be) to which the boy or his parent or parents is or are chargeable at the time of his being apprenticed:

(4). All indentures made in any union may be sued upon by the guardians of the union or persons having the authority of guardians therein for the time being, by their name of office, and actions brought by them upon such indentures shall not abate by reason of death or change in the persons holding the office; but no such action shall be commenced without the consent of the Irish poor law commissioners:

(5). The amount of the costs incurred in any such action and not recovered from the defendant therein, may be charged upon the union or electoral division (as the case may be) to which the boy or his parent or parents was or were chargeable at the time of his being apprenticed.

Apprentices and their indentures to be brought before shipping master before each voyage, in a foreign-going ship.

CXLV. The master of every foreign-going ship shall, before carrying any apprentice to sea from any place in the United Kingdom, cause such apprentice to appear before the shipping master before whom the crew is engaged, and shall produce to him the indenture by which such apprentice is bound, and the assignment or assignments thereof (if any); and the name of such apprentice, with the date of the indenture and of the assignment or assignments thereof (if any), and the name of the port or ports at which the same have been registered, shall be entered on the agreement; and for any default in obeying the provisions of this section the master shall for each offence incur a penalty not exceeding five pounds.

Engagement of Seamen.

Engagement of Seamen.

Board of trade may license persons to procure seamen.

CXLVI. The board of trade may grant to such persons as it thinks fit licences to engage or supply seamen or apprentices for merchant ships in the United Kingdom, to continue for such periods, to be upon such terms, and to be revocable upon such conditions, as such board thinks proper.

CXLVII. The following offences shall be punishable as hereinafter mentioned; (that is to say,)

Penalties:

(1). If any person not licensed as aforesaid, other than the owner or master or a mate of the ship, or some person who is bonâ fide the servant and in the constant employ of the owner, or a shipping master duly appointed as aforesaid, engages or supplies any seaman or apprentice to be entered on board any ship in the United Kingdom, he shall for each seaman or apprentice so engaged or supplied incur a penalty not exceeding twenty pounds:

for supplying seamen without licence;

(2). If any person employs any unlicensed person other than persons so excepted as aforesaid, for the purpose of engaging or supplying any seaman or apprentice to be entered on board any ship in the United Kingdom, he shall for each seaman or apprentice so engaged or supplied incur a penalty not exceeding twenty pounds, and if licensed shall in addition forfeit his licence:

for employing unlicensed persons;

(3). If any person knowingly receives or accepts to be entered on board any ship any seaman or apprentice who has been engaged or supplied contrary to the provisions of this Act, he shall for every seaman or apprentice so engaged or supplied incur a penalty not exceeding twenty pounds.

for receiving seamen illegally supplied.

Penalty for receiving remuneration from seamen for shipping them.

CXLVIII. If any person demands or receives either directly or indirectly, from any seaman or apprentice, or from any person seeking employment as a seaman or apprentice, or from any person on his behalf, any remuneration whatever, other than the fees hereby authorised, for providing him with employment, he shall for every such offence incur a penalty not exceeding five pounds.

III. *Engagement of Seamen.*

Agreements to be made with seamen, containing certain particulars.

CXLIX. The master of every ship, except ships of less than eighty tons registered tonnage exclusively employed in trading between different ports on the coasts of the United Kingdom, shall enter into an agreement with every seaman whom he carries to sea from any port in the United Kingdom, as one of his crew in the manner hereinafter mentioned; and every such agreement shall be in a form sanctioned by the board of trade, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars as terms thereof: (that is to say,)

(1). The nature and, as far as practicable, the duration of the intended voyage or engagement (*m*):

(2). The number and description of the crew, specifying how many are engaged as sailors:

(3). The time at which each seaman is to be on board or to begin work:

(4). The capacity in which each seaman is to serve;

(5). The amount of wages which each seaman is to receive:

(6). A scale of the provisions which are to be furnished to each seaman:

(7). Any regulations as to conduct on board, and as to fines, short allowance of provisions, or other lawful punishments for misconduct, which have been sanctioned by the board of trade as regulations proper to be adopted, and which the parties agree to adopt:

And every such agreement shall be so framed as to admit of stipulations to be adopted at the will of the master and seaman in each case, as to advance and allotment of wages (*n*), and may contain any other stipulations which are not contrary to law: Provided, that if the master of any ship belonging to any British possession has an agreement with his crew made in due form according to the law of the possession to which such ship belongs, or in which her crew were engaged, and engages single seamen in the United Kingdom, such seamen may sign the agreement so made, and it shall not be necessary for them to sign an agreement in the form sanctioned by the board of trade.

Proviso as to forms for colonial ships.

For foreign-going ships such agreements, when made in the U. K., except in special cases, to be made before and attested by a shipping master;

CL. In the case of all foreign-going ships, in whatever part of her Majesty's dominions the same are registered, the following rules shall be observed with respect to agreements; (that is to say,)

(1). Every agreement made in the United Kingdom (except in such cases of agreements with substitutes as are hereinafter specially provided for) shall be signed by each seaman in the presence of a shipping master:

(2). Such shipping master shall cause the agreement to be read over and explained to each seaman, or otherwise ascertain that each seaman understands the same before he signs it, and shall attest each signature:

to be in duplicate;

(3). When the crew is first engaged the agreement shall be signed in duplicate, and one part shall be retained by the shipping master, and the other part shall contain a special place or form for the descriptions and signatures of substitutes or persons engaged subsequently to the first departure of the ship, and shall be delivered to the master:

provision for substitutes.

(4). In the case of substitutes engaged in the place of seamen who have duly signed the agreement, and whose services are lost within twenty-four hours of the ship's putting to sea by death, desertion, or other unforeseen cause, the engagement shall, when practicable, be made before some shipping master duly appointed in the manner hereinbefore specified; and whenever such last-mentioned engagement cannot be so made, the master shall, before the ship puts to sea, if practicable, and if not, as soon afterwards as possible, cause the agreement to be read over and explained to the seamen; and the seamen shall thereupon sign the same in the presence of a witness, who shall attest their signatures.

Foreign-going ships making short voyages

CLI. In the case of foreign-going ships making voyages averaging less than six months in duration, running agreements with the crew may be made to extend over two or more voyages, so that no such agreement

(*m*) See 36 & 37 Vict. c. 85, s. 7, *infra*, as to agreements with fishermen.

(*n*) See 52 & 53 Vict. c. 46, s. 2.

shall extend beyond the next following thirtieth day of June or thirty-first day of December or the first arrival of the ship at her port of destination in the United Kingdom after such date, or the discharge of cargo consequent upon such arrival; and every person entering into such agreement, whether engaged upon the first commencement thereof or otherwise, shall enter into and sign the same in the manner hereby required for other foreign-going ships; and every person engaged thereunder, if discharged in the United Kingdom, shall be discharged in the manner hereby required for the discharge of seamen belonging to other foreign-going ships.

may have running agreements.

CLII. The master of every foreign-going ship for which such a running agreement as aforesaid is made shall, upon every return to any port in the United Kingdom before the final termination of the agreement, discharge or engage before the shipping master at such port any seaman whom he is required by law so to discharge or engage, and shall upon every such return indorse on the agreement a statement (as the case may be) either that no such discharges or engagements have been made or are intended to be made before the ship again leaves port, or that all such discharges or engagements have been duly made as hereinbefore required, and shall deliver the agreement so indorsed to the shipping master; and any master who wilfully makes a false statement in such indorsement shall incur a penalty not exceeding twenty pounds; and the shipping master shall also sign an indorsement on the agreement to the effect that the provisions of this Act relating to such agreement have been complied with, and shall re-deliver the agreement so indorsed to the master.

Engagement and discharge of seamen in the meantime.

CLIII. In cases in which such running agreements are made, the duplicate agreement retained by the shipping master upon the first engagement of the crew shall either be transmitted to the registrar-general of seamen immediately, or be kept by the shipping master until the expiration of the agreement, as the board of trade directs.

Duplicates of running agreements, how to be dealt with.

CLIV. For the purpose of determining the fees to be paid upon the engagement and discharge of seamen belonging to foreign-going ships which have running agreements as aforesaid, the crew shall be considered to be engaged when the agreement is first signed, and to be discharged when the agreement finally terminates, and all intermediate engagements and discharges shall be considered to be engagements and discharges of single seamen.

Fees to be paid on such running agreements.

CLV. In the case of home-trade ships, crews or single seamen may, if the master thinks fit, be engaged before a shipping master in the manner hereinbefore directed with respect to foreign-going ships; and in every case in which the engagement is not so made, the master shall, before the ship puts to sea, if practicable, and if not, as soon afterwards as possible, cause the agreement to be read over and explained to each seaman, and the seaman shall thereupon sign the same in the presence of a witness who shall attest his signature.

In home-trade ships agreement to be entered into before a shipping master or other witness.

CLVI. In cases where several home-trade ships belong to the same owner, the agreement with the seamen may, notwithstanding anything herein contained, be made by the owner instead of by the master, and the seamen may be engaged to serve in any two or more of such ships, provided that the names of the ships and the nature of the service are specified in the agreement; but with the foregoing exception all provisions herein contained which relate to ordinary agreements for home-trade ships shall be applicable to agreements made in pursuance of this section.

Special agreements for home-trade ships belonging to same owners.

CLVII. If in any case a master carries any seaman to sea without entering into an agreement with him in the form and manner and at the place and time hereby in such case required, the master in the case of a foreign-going ship, and the master or owner in the case of a home-trade ship, shall for each such offence incur a penalty not exceeding five pounds.

Penalty for shipping seamen without agreement duly executed.

CLVIII. The master of every foreign-going ship of which the crew has been engaged before a shipping master shall before finally leaving the United Kingdom sign and send to the nearest shipping master a full and accurate statement in a form sanctioned by the board of trade of every change which takes place in his crew before finally leaving the United Kingdom, and in default shall for each offence incur a penalty not exceeding five pounds; and such statement shall be admissible in evidence, subject to all just exceptions.

Changes in crew to be reported.

III. *Engagement of Seamen.*

Seamen engaged in the colonies to be shipped before some shipping master or officer of customs.

CLIX. Every master of a ship who, if such ship be registered in the United Kingdom, engages any seaman in any British possession, or if such ship belongs to any British possession engages any seaman in any British possession other than that to which the ship belongs, shall, if there is at the place where such seaman is engaged any official shipping master or other officer duly appointed for the purpose of shipping seamen, engage such seaman before such shipping master, and if there is no such shipping master or officer, then before some officer of customs; and the same rules, qualifications, and penalties as are hereinbefore specified with respect to the engagement of seamen before shipping masters in the United Kingdom shall apply to such engagements in a British possession; and upon every such engagement such shipping master or officer as aforesaid shall indorse upon the agreement an attestation to the effect that the same has been signed in his presence, and otherwise made as hereby required; and if in any case such attestation is not made, the burden of proving that the seaman was duly engaged as hereby required shall lie upon the master.

Seamen engaged in foreign port to be shipped with the sanction and in the presence of the consul.

CLX. Every master of a British ship who engages any seaman at any place out of Her Majesty's dominions in which there is a British consular officer shall, before carrying such seaman to sea, procure the sanction of such officer, and shall engage such seaman before such officer; and the same rules as are hereinbefore contained with respect to the engagement of seamen before shipping masters in the United Kingdom shall apply to such engagements made before consular officers; and upon every such engagement the consular officer shall indorse upon the agreement his sanction thereof, and an attestation to the effect that the same has been signed in his presence, and otherwise made, as hereby required; and every master who engages any seaman in any place in which there is a consular officer, otherwise than as hereinbefore required, shall incur a penalty not exceeding twenty pounds; and if in any case the indorsement and attestation hereby required is not made upon the agreement, the burden of proving the engagement to have been made as hereinbefore required shall lie upon the master.

Rules as to production of agreements and certificates of masters and mates of foreign-going ships.

CLXI. The following rules shall be observed with respect to the production of agreements and certificates of competency or service for foreign-going ships; (that is to say,)

(1). The master of every foreign-going ship shall, on signing the agreement with his crew, produce to the shipping master before whom the same is signed the certificates of competency or service which the said master and his first and second mate or only mate, as the case may be, are hereby required to possess; and upon such production being duly made, and the agreement being duly executed as hereby required, the shipping master shall sign and give to the master a certificate to that effect:

(2). In the case of running agreements for foreign-going ships the shipping master shall, before the second and every subsequent voyage made after the first commencement of the agreement, sign and give to the master, on his complying with the provisions herein contained with respect to such agreements, and producing to the shipping master the certificate of competency or service of any first, second, or only mate then first engaged by him, a certificate to that effect:

(3). The master of every foreign-going ship shall, before proceeding to sea, produce the certificate so to be given to him by the shipping master as aforesaid, to the collector or comptroller of customs, and no officer of customs shall clear any such ship outwards without such production; and if any such ship attempts to go to sea without a clearance, any such officer may detain her until such certificate as aforesaid is produced:

(4). The master of every foreign-going ship shall, within forty-eight hours after the ship's arrival at her final port of destination in the United Kingdom, or upon the discharge of the crew, whichever first happens, deliver such agreement to a shipping master at the place; and such shipping master shall thereupon give to the master a certificate of such delivery; and no officer of customs shall clear any foreign-going ship inwards without the production of such certificate:

And if the master of any foreign-going ship fails to deliver the agreement to a shipping master at the time and in the manner hereby directed, he shall for every default incur a penalty not exceeding five pounds.

III. *Engagement of Seamen.*

CLXII. The following rules shall be observed with respect to the production of agreements and certificates or competency of service for home-trade ships; (that is to say,)

Rules as to production of agreements and certificates for home-trade ships.

(1). In the case of home-trade ships of more than eighty tons burden, no agreement shall extend beyond the next following thirtieth day of June or thirty-first day of December, or the first arrival of the ship at her final port of destination in the United Kingdom after such date, or the discharge of cargo consequent upon such arrival (*n*).

(2). The master or owner of every such ship shall, within twenty-one days after the thirtieth day of June and the thirty-first day of December in every year, transmit or deliver to some shipping master in the United Kingdom every agreement made within the six calendar months next preceding such days respectively, and shall also in the case of home-trade passenger ships produce to the shipping master the certificates of competency or service which the said master, and his first or only mate, as the case may be, are hereby required to possess:

(3). The shipping master shall thereupon give to the master or owner a certificate of such delivery and production; and no officer of customs shall grant a clearance or transire for any such ship as last aforesaid without the production of such certificate; and if any such ship attempts to ply or go to sea without such clearance or transire, any such officer may detain her until the said certificate is produced:

And if the agreement for any home-trade ship is not delivered or transmitted by the master or owner to a shipping master at the time and in the manner hereby directed, such master or owner shall for every default incur a penalty not exceeding five pounds.

Alterations to be void unless attested to have been made with the consent of all parties.

CLXIII. Every erasure, interlineation, or alteration in any such agreement with seamen as is required by the Third Part of this Act (except additions so made as hereinbefore directed for shipping substitutes or persons engaged subsequently to the first departure of the ship) shall be wholly inoperative, unless proved to have been made with the consent of all the persons interested in such erasure, interlineation, or alteration by the written attestation (if made in Her Majesty's dominions) of some shipping master, justice, officer of customs, or other public functionary, or (if made out of Her Majesty's dominions) of a British consular officer, or, where there is no such officer, of two respectable British merchants.

Penalty for falsifying agreement.

CLXIV. Every person who fraudulently alters, assists in fraudulently altering, or procures to be fraudulently altered, or makes, or assists in making, or procures to be made, any false entry in, or delivers, assists in delivering, or procures to be delivered, a false copy of any agreement, shall for each such offence be deemed guilty of a misdemeanor.

Seamen not bound to produce agreement.

CLXV. Any seaman may bring forward evidence to prove the contents of any agreement or otherwise to support his case, without producing or giving notice to produce the agreement or any copy thereof.

Copy of agreement to be made accessible to crew.

CLXVI. The master shall at the commencement of every voyage or engagement cause a legible copy of the agreement (omitting the signatures) to be placed or posted up in such part of the ship, as to be accessible of the crew, and in default shall for each offence incur a penalty not exceeding five pounds.

Seamen discharged before voyage to have compensation.

CLXVII. Any seaman who has signed an agreement, and is afterwards discharged before the commencement of the voyage, or before one month's wages are earned, without fault on his part justifying such discharge, and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he may have earned, due compensation for the damage thereby caused to him, not exceeding one month's wages, and may, on adducing such evidence as the court hearing the case deems satisfactory of his having been so improperly discharged as aforesaid, recover such compensation as if it were wages duly earned.

(*n*) 35 & 36 Vict. c. 73, s. 16, *infra*.

III. *Allotment of Wages.*

Allotment of Wages.

Regulations as to allotment notes.

CLXVIII. All stipulations for the allotment of any part of the wages of a seaman during his absence which are made at the commencement of the voyage shall be inserted in the agreement, and shall state the amounts and times of the payments to be made; and all allotment notes shall be in forms sanctioned by the board of trade.

Allotment notes may be sued on summarily by certain persons and under certain conditions (*o*).

CLXIX. The wife, or the father or mother, or the grandfather or grandmother, or any child or grandchild, or any brother or sister of any seaman in whose favour an allotment note of part of the wages of such seaman is made, may, unless the seaman is shown in manner hereinafter mentioned to have forfeited or ceased to be entitled to the wages out of which the allotment is to be paid, and subject, as to the wife, to the provision hereinafter contained, sue for and recover the sums allotted by the note when and as the same are made payable, with costs, from the owner or any agent who has authorized the drawing of the note, either in the county court or in the summary manner in which seamen are by this Act enabled to sue for and recover wages not exceeding fifty pounds; and in any such proceeding it shall be sufficient for the claimant to prove that he or she is the person mentioned in the note, and that the note was given by the owner or by the master or some other authorized agent; and the seaman shall be presumed to be duly earning his wages, unless the contrary is shown to the satisfaction of the court, either by the official statement of the change in the crew caused by his absence made and signed by the master, as by this Act is required, or by a duly certified copy of some entry in the official log book to the effect that he has left the ship, or by a credible letter from the master of the ship to the same effect, or by such other evidence, of whatever description, as the court in its absolute discretion considers sufficient to show satisfactorily that the seaman has ceased to be entitled to the wages out of which the allotment is to be paid: Provided that the wife of any seaman who deserts her children, or so misconducts herself as to be undeserving of support from her husband, shall thereupon forfeit all right to further payments of any allotment of his wages which has been made in her favour.

Discharge and Payment of Wages.

Discharge and Payment of Wages.

Discharge from foreign-going ships to be made before shipping master.

CLXX. In the case of all British foreign-going ships, in whatever part of her Majesty's dominions the same are registered, all seamen discharged in the United Kingdom shall be discharged and receive their wages in the presence of a shipping master duly appointed under this Act, except in cases where some competent court otherwise directs; and any master or owner of any such ship who discharges any seaman belonging thereto, or, except as aforesaid, pays his wages within the United Kingdom in any other manner, shall incur a penalty not exceeding ten pounds; and in the case of home-trade ships seamen may, if the owner or master so desires, be discharged and receive their wages in like manner.

Master to deliver account of wages.

CLXXI. Every master shall, not less than twenty-four hours before paying off or discharging any seaman, deliver to him, or if he is to be discharged before a shipping master, to such shipping master (*p*), a full and true account in a form sanctioned by the board of trade of his wages and of all deductions to be made therefrom on any account whatever, and in default shall for each offence incur a penalty not exceeding five pounds; and no deduction from the wages of any seaman (except in respect of any matter happening after such delivery) shall be allowed unless it is included in the account so delivered; and the master shall during the voyage enter the various matters in respect of which such deductions are made, with the amounts of the respective deductions as they occur, in a book to be kept for that purpose, and shall, if required, produce such book at the time of the payment of wages, and also upon the hearing before any competent authority of any complaint or question relating to such payments.

On discharge, masters to give seamen certificates of discharge, and re-

CLXXII. Upon the discharge of any seaman, or upon payment of his wages, the master shall sign and give him a certificate of his discharge, in a form sanctioned by the board of trade, specifying the period of his service and the time and place of his discharge; and if any master fails to

(*o*) See 43 & 44 Vict. c. 16, ss. 2, 3, *infra*.

(*p*) See 43 & 44 Vict. c. 16, s. 4 (2), *infra*.

sign and give to any such seaman such certificate of discharge he shall for each such offence incur a penalty not exceeding ten pounds; and the master shall also, upon the discharge of every certificated mate whose certificate of competency or service has been delivered to and retained by him, return such certificate, and shall in default incur a penalty not exceeding twenty pounds.

Return certificates of competency or service to mates.

CLXXIII. Every shipping master shall hear and decide any question whatever between a master or owner and any of his crew which both parties agree in writing to submit to him; and every award so made by him shall be binding on both parties, and shall in any legal proceeding which may be taken in the matter before any court of justice be deemed to be conclusive as to the right of the parties; and no such submission or award shall require a stamp; and any document purporting to be such submission or award shall be primâ facie evidence thereof.

Shipping master may decide questions which parties refer to him.

CLXXIV. In any proceeding relating to the wages, claims, or discharge of any seaman carried on before any shipping master under the provisions of this Act, such shipping master may call upon the owner or his agent, or upon the master or any mate or other member of the crew, to produce any log books, papers, or other documents in their respective possession or power relating to any matter in question in such proceeding, and may call before him and examine any of such persons being then at or near the place on any such matter; and every owner, agent, master, mate, or other member of the crew who when called upon by the shipping master does not produce any such paper or document as aforesaid, if in his possession or power, or does not appear and give evidence, shall, unless he shows some reasonable excuse for such default for each such offence incur a penalty not exceeding five pounds.

Master and others to produce ship's papers to shipping masters, and give evidence.

CLXXV. The following rules shall be observed with respect to the settlement of wages (*q*); (that is to say,)

Settlement of wages.

(1). Upon the completion before a shipping master of any discharge and settlement, the master or owner and each seaman shall respectively in the presence of the shipping master sign in a form sanctioned by the board of trade a mutual release of all claims in respect of the past voyage or engagement, and the shipping master shall also sign and attest it, and shall retain and transmit it as herein directed:

Release to be signed before and attested by the shipping master;

(2). Such release so signed and attested shall operate as a mutual discharge and settlement of all demands between the parties thereto in respect of the past voyage or engagement:

to be discharge;

(3). A copy of such release certified under the hand of such shipping master to be a true copy shall be given by him to any party thereto requiring the same; and such copy shall be receivable in evidence upon any future question touching such claims as aforesaid, and shall have all the effect of the original of which it purports to be a copy:

and to be evidence.

(4). In cases in which discharge and settlement before a shipping master are hereby required, no payment, receipt, settlement, or discharge otherwise made shall operate or be admitted as evidence of the release or satisfaction of any claim:

No other receipt to be a discharge.

(5). Upon any payment being made by a master before a shipping master, the shipping master shall, if required, sign and give to such master a statement of the whole amount so paid, and such statement shall as between the master and his employer be received as evidence that he has made the payments therein mentioned.

Voucher to be given to master, and to be evidence.

CLXXVI. Upon every discharge effected before a shipping master the master shall make and sign in a form sanctioned by the board of trade a report of the conduct, character, and qualifications of the persons discharged, or may state in a column to be left for that purpose in the said form that he declines to give any opinion upon such particulars or upon any of them; and the shipping master shall transmit the same to the registrar-general of seamen, or to such other person as the board of trade directs, to be recorded, and shall, if desired so to do by any seaman, give to him or indorse on his certificate of discharge a copy of so much of such report as concerns him;

Master to make reports of character.

(*q*) 43 & 44 Vict. c. 16, s. 4 (3), *infra*.

III. *Discharge and Payment of Wages.*

and every person who makes, assists in making, or procures to be made any false certificate or report of the service, qualifications, conduct, or character of any seaman, knowing the same to be false, or who forges, assists in forging, or procures to be forged, or fraudulently alters, assists in fraudulently altering, or procures to be fraudulently altered, any such certificate or report, or who fraudulently makes use of any certificate or report or of any copy of any certificate or report which is forged or altered or does not belong to him, shall for each such offence be deemed guilty of a misdemeanor.

Remittance of Wages and Savings Banks for Seamen.

Remittance of Wages and Savings Banks for Seamen.

Facilities may be given for remitting seamen's wages.

CLXXVII. Facilities shall, if the board of trade so directs, be given for remitting the wages and other monies of seamen and apprentices to their relatives or other persons by means of money orders issued by shipping masters; and the board of trade may make regulations concerning such orders, and the persons by or to whom, and the mode and time in and at which, the same are to be paid, and may from time to time repeal or alter any such regulations; and all such regulations, so long as they are in force, shall be binding upon all persons interested or claiming to be interested in such orders, as well as upon the officers employed in issuing or paying the same; and no legal proceeding shall be instituted against the board of trade, or against any shipping master or other public officer employed about such orders, on account of any such regulations, or on account of any act done or left undone in pursuance thereof, or on account of any refusal, neglect, or omission to pay any such money order, unless such refusal, neglect, or omission arise from fraud or wilful misbehaviour on the part of the person against whom proceedings are instituted.

Power to pay when order is lost.

CLXXVIII. The board of trade may, in any case in which it thinks fit so to do, cause the amount of any such money order as aforesaid to be paid to the person to whom or in whose favour the same may have been granted, or to his personal representatives, legatees, or next of kin, notwithstanding that such order may not be in his or their possession; and in all such cases from and after such payment the board of trade and every shipping master or other officer of the board of trade shall be freed from all liability in respect of such order.

Penalty for issuing money orders with fraudulent intent.

CLXXIX. Every shipping master or other public officer who grants or issues any money order with a fraudulent intent shall in England or Ireland be deemed guilty of felony, and in Scotland of a high crime and offence, and shall be liable to be kept in penal servitude for a term not exceeding four years.

Savings banks for seamen may be established (*r*).

CLXXX. The commissioners for the reduction of the national debt, or the comptroller-general acting under them, may, on the application and recommendation of the board of trade, establish savings banks at such ports and places within the United Kingdom, either of the shipping offices established in such ports or elsewhere, as may appear to be expedient, and may appoint treasurers to receive from or on account of seamen, or the wives and families of seamen desirous to become depositors in such savings banks, deposits to an amount not exceeding one hundred and fifty pounds in the whole in respect of any one account, under such regulations as may be prescribed by the said commissioners or comptroller-general; and such regulations shall be binding on all such treasurers and depositors; and the said commissioners may remove such treasurers, and appoint others in their place; and all the provisions of the Acts now in force relating to savings banks, except so far as relates to the annual amount of deposit, shall apply to all savings banks which may be established under the authority of this Act, and to such treasurers and depositors as aforesaid.

Legal Rights to Wages.

Legal Rights to Wages.

Right to wages and provisions, when to begin.

CLXXXI. A seaman's right to wages and provisions shall be taken to commence either at the time at which he commences work or at the times specified in the agreement for his commencement of work or presence on board, whichever first happens.

(*r*) Extended to seamen in navy by 18 & 19 Vict. c. 91, s. 17, *infra*.

III. *Legal Rights to Wages.*

Seamen not to give up certain rights (*s*).

CLXXXII. No seaman shall by any agreement forfeit his lien upon the ship or be deprived of any remedy for the recovery of his wages to which he would otherwise have been entitled; and every stipulation in any agreement inconsistent with any provision of this Act, and every stipulation by which any seaman consents to abandon his right to wages in the case of the loss of the ship, or to abandon any right which he may have or obtain in the nature of salvage, shall be wholly inoperative (*t*).

Wages not to be dependent on the earning of freight.

CLXXXIII. No right to wages shall be dependent on the earning of freight; and every seaman and apprentice who would be entitled to demand and recover any wages if the ship in which he has served had earned freight, shall, subject to all other rules of law and conditions applicable to the case, be entitled to claim and recover the same, notwithstanding that freight has not been earned: but in all cases of wreck or loss of the ship, proof that he has not exerted himself to the utmost to save the ship, cargo, and stores shall bar his claim.

In case of death such wages to be paid as after mentioned.

CLXXXIV. If any seaman or apprentice to whom wages are due under the last-preceding enactment dies before the same are paid, they shall be paid and applied in the manner hereinafter specified with regard to the wages of seamen who die during a voyage.

Rights to wages in case of termination of service by wreck or illness.

CLXXXV. In cases where the service of any seaman terminates before the period contemplated in the agreement by reason of the wreck or loss of the ship, and also in cases where such service terminates before such period as aforesaid by reason of his being left on shore at any place abroad under a certificate of his unfitness or inability to proceed on the voyage granted as hereinafter mentioned, such seaman shall be entitled to wages for the time of service prior to such termination as aforesaid, but not for any further period.

Wages not to accrue during refusal to work or imprisonment.

CLXXXVI. No seaman or apprentice shall be entitled to wages for any period during which he unlawfully refuses or neglects to work when required, whether before or after the time fixed by the agreement for his beginning work, nor, unless the court hearing the case otherwise directs, for any period during which he is lawfully imprisoned for any offence committed by him.

Period within which wages are to be paid.

CLXXXVII. The master or owner of any ship shall pay to every seaman his wages within the respective periods following; (that is to say,) in the case of a home-trade ship within two days after the termination of the agreement or at the time when such seaman is discharged, whichever first happens; and in the case of all other ships (except ships employed in the southern whale fishery or on other voyages for which seamen by the terms of their agreement are wholly compensated by shares in the profits of the adventure) within three days after the cargo has been delivered, or within five days after the seaman's discharge, whichever first happens; and in all cases the seaman shall at the time of his discharge be entitled to be paid on account a sum equal to one-fourth part of the balance due to him; and every master or owner who neglects or refuses to make payment in manner aforesaid, without sufficient cause, shall pay to the seaman a sum not exceeding the amount of two days' pay for each of the days, not exceeding ten days, during which payment is delayed beyond the respective periods aforesaid, and such sum shall be recoverable as wages.

Mode of recovering Wages.

Mode of recovering Wages.

Seaman may sue for wages in a summary manner.

CLXXXVIII. Any seaman or apprentice, or any person duly authorised on his behalf, may sue in a summary manner before any two justices of the peace acting in or near to the place at which the service has terminated, or at which the seaman or apprentice has been discharged, or at which any person upon whom the claim is made is or resides, or in Scotland either before any such justices or before the sheriff of the county within which any such place is situated, for any amount of wages due to such seaman or apprentice not exceeding fifty pounds over and above the costs of any proceeding for the recovery thereof, so soon as the same becomes payable; and every order made by such justices or sheriff in the matter shall be final.

(*s*) See 25 & 26 Vict. c. 63, s. 18, *infra*.

(*t*) As to fishermen, see 36 & 37 Vict. c. 85, s. 8, *infra*.

III. *Mode of recovering Wages.*

Restrictions on suits for wages in superior courts.

CLXXXIX. No suit or proceeding for the recovery of wages under the sum of fifty pounds shall be instituted by or on behalf of any seaman or apprentice in any court of admiralty or vice-admiralty (*u*), or in the court of session in Scotland, or in any superior court of record in her Majesty's dominions, unless the owner of the ship is adjudged bankrupt or declared insolvent, or unless the ship is under arrest or is sold by the authority of any such court as aforesaid, or unless any justices acting under the authority of this Act refer the case to be adjudged by such court, or unless neither the owner nor master is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore.

No seaman to sue for wages abroad, except in cases of discharge or of danger to life.

CXC. No seaman who is engaged for a voyage or engagement which is to terminate in the United Kingdom shall be entitled to sue in any court abroad for wages, unless he is discharged with such sanction as herein required and with the written consent of the master, or proves such ill-usage on the part of the master or by his authority as to warrant reasonable apprehension of danger to the life of such seaman if he were to remain on board; but if any seaman on his return to the United Kingdom proves that the master or owner has been guilty of any conduct or default which but for this enactment would have entitled the seaman to sue for wages before the termination of the voyage or engagement, he shall be entitled to recover in addition to his wages such compensation not exceeding twenty pounds as the court hearing the case thinks reasonable.

Master to have same remedies for wages as seamen.

CXCI. Every master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages which by this Act or by any law or custom any seaman, not being a master, has for the recovery of his wages; and if in any proceeding in any court of admiralty or vice-admiralty touching the claim of a master to wages any right of set-off or counter claim is set up, it shall be lawful for such court to enter into and adjudicate upon all questions, and to settle all accounts then arising or outstanding and unsettled between the parties to the proceeding, and to direct payment of any balance which is found to be due.

Relief to Seamen's Families out of Poor Rates.

Relief to Seamen's Families out of Poor Rates.

Relief to seamen's families to be chargeable on a certain proportion of their wages.

CXCII. Whenever during the absence of any seaman on a voyage his wife, children, and step-children, or any of them, become or becomes chargeable to any union or parish in the United Kingdom, such union or parish shall be entitled to be reimbursed out of the wages of such seaman earned during such voyage any sums properly expended during his absence in the maintenance of his said relations, or any of them, so that such sums do not exceed the following proportions of his said wages; (that is to say,)

(1). If only one of such relations is chargeable, one half of such wages:

(2). If two or more of such relations are chargeable, two thirds of such wages. But if during the absence of the seaman any sums have been paid by the owner to or on behalf of any such relation as aforesaid, under an allotment note given by the seaman in his, her, or their favour, any such claim for reimbursement as aforesaid shall be limited to the excess (if any) of the proportion of the wages hereinbefore mentioned over the sums so paid.

Notice to be given to owner, and charge to be enforced on the return of the seaman.

CXCIII. For the purpose of obtaining such reimbursement as aforesaid, the guardians of the union or parish, where the relief of the poor is administered by guardians, and the overseers of the poor of any other parish in England, and the guardians or other persons having the authority of guardians in any union in Ireland, and the inspector of the poor in Scotland, may give to the owner of the ship in which the seaman is serving a notice in writing stating the proportion of the seaman's wages upon which it is intended to make the claim, and requiring the owner to retain such proportion in his hands for a period to be therein mentioned, not exceeding twenty-one days from the time of the seaman's return to his port of discharge, and also requiring such owner immediately on such return to give to such guardians, overseers, persons, or inspector notice in writing of such return; and such owner, after receiving such notice as aforesaid, shall be bound to retain the said proportion of wages, and to give notice of the seaman's return accordingly, and shall likewise give to the seaman notice of

(*u*) See, however, 24 Vict. c. 10, s. 10, and the County Courts (Admiralty) Jurisdiction Act, 31 & 32 Vict. c. 71, ss. 3 and 9.

III. *Relief to Seamen's Families out of Poor Rates.*

the intended claim; and the said guardians, overseers, persons, or inspector may upon the seaman's return apply in a summary way in England or Ireland to any two justices having jurisdiction in such union or parish as aforesaid, and in Scotland to the sheriff of the county, for an order for such reimbursement as aforesaid; and such justices or sheriff may hear the case, and may make an order for such reimbursement to the whole extent aforesaid, or to such lesser amount as they or he may under the circumstances think fit, and the owner shall pay to such guardians, overseers, persons, or inspector, out of the seaman's wages, the amount so ordered to be paid by way of reimbursement, and shall pay the remainder of the said wages to the seaman; and if no such order as aforesaid is obtained within the period mentioned in the notice so to be given to the owner as aforesaid, the proportion of wages so to be retained by him as aforesaid shall immediately on the expiration of such period, and without deduction, be payable to the seaman.

Wages and Effects of deceased Seamen.

Wages and Effects of deceased Seamen.

Masters to take charge of or sell effects of deceased seamen which are on board, and enter the same and wages due in the official log.

CXCIV. Whenever any seaman or apprentice belonging to or sent home in any British ship, whether a foreign-going ship or a home-trade ship, employed on a voyage which is to terminate in the United Kingdom, dies during such voyage, the master shall take charge of all money, clothes and effects which he leaves on board, and shall, if he thinks fit, cause all or any of the said clothes and effects to be sold by auction at the mast or other public auction, and shall thereupon sign an entry in the official log-book containing the following particulars; (that is to say,)

(1). A statement of the amount of the money, and a description of the effects so left by the deceased:

(2). In case of a sale, a description of each article sold, and the sum received for each:

(3). A statement of the sum due to the deceased as wages, and the total amount of the deductions (if any) to be made therefrom (*x*).

And shall cause such entry to be attested by a mate and by one of the crew.

Such effects and wages to be paid either to consul or to shipping master, with full accounts.

CXCV. In the cases provided for by the last preceding section the following rules shall be observed; (that is to say,)

(1). If the ship proceeds at once to any port in the United Kingdom without touching on the way at any foreign port, the master shall within forty-eight hours after his arrival deliver any such effects as aforesaid remaining unsold, and pay any money which he has taken charge of or received from such sale as aforesaid, and also the balance of wages due to the deceased, to the shipping master at the port of destination in the United Kingdom:

(2). If the ship touches and remains for forty-eight hours at some foreign port or at some port in her Majesty's dominions abroad before coming to any port in the United Kingdom, the master shall report the case to the British consular officer or officer of customs there, as the case may be, and shall give to such officer any information he requires as to the destination of the ship and probable length of the voyage; and such officer may thereupon, if he considers it expedient so to do, require the said effects, money and wages to be delivered and paid to him, and shall upon such delivery and payment give to the master a receipt, and the master shall within forty-eight hours after his arrival at his port of destination in the United Kingdom produce the same to the shipping master there; and such consular officer or officer of customs shall in such case indorse and certify upon the agreement with the crew such particulars with respect to such delivery and payment as the board of trade requires:

(3). If such officer as aforesaid does not require such payment and delivery to be made to him, the master shall take charge of the said effects, money and wages, and shall within forty-eight hours after his arrival at his port of destination in the United Kingdom deliver and pay the same to the shipping master there:

(4). The master shall in all cases in which any seaman or apprentice dies during the progress of a voyage or engagement give to the board

(*x*) 25 & 26 Vict. c. 63, s. 21, *infra.*

III. *Wages and Effects of deceased Seamen.*

of trade, or to such officer or shipping master as aforesaid, an account in such form as they respectively require of the effects, money and wages so to be delivered and paid; and no deductions claimed in such account shall be allowed unless verified, if there is any official log-book, by such entry therein as hereinbefore required, and also by such other vouchers (if any) as may be reasonably required by the board of trade, or by the officer or shipping master to whom the account is rendered:

(5). Upon due compliance with such of the provisions of this section as relate to acts to be done at the port of destination in the United Kingdom, the shipping master shall grant to the master a certificate to that effect, and no officer of customs shall clear inwards any foreign-going ship without the production of such certificate.

Penalties for not taking charge of, remitting, or accounting for such moneys and effects.

CXCVI. If any master fails to take such charge of the money or other effects of a seaman or apprentice dying during a voyage, or to make such entries in respect thereof, or to procure such attestation to such entries, or to make such payment or delivery of any money, wages or effects of any seaman or apprentice dying during a voyage, or to give such account in respect thereof as hereinbefore respectively directed, he shall be accountable for the money, wages and effects of the seaman or apprentice to the board of trade, and shall pay and deliver the same accordingly; and such master shall in addition for every such offence incur a penalty not exceeding treble the value of the money or effects not accounted for, or if such value is not ascertained, not exceeding fifty pounds; and if any such money, wages or effects are not duly paid, delivered or accounted for by the master, the owner of the ship shall pay, deliver and account for the same, and such money and wages and the value of such effects shall be recoverable from him accordingly; and if he fails to account for and pay the same, he shall, in addition to his liability for the said money and value, incur the same penalty which is hereinbefore mentioned as incurred by the master for the like offence; and all money, wages and effects of any seaman or apprentice dying during a voyage shall be recoverable in the same courts and by the same modes of proceeding by which seamen are hereby enabled to recover wages due to them (*y*).

Officers of customs and consuls to take charge of effects left by seamen abroad, and to remit the same and their wages to board of trade.

CXCVII. If any such seaman or apprentice as last aforesaid dies abroad at any place either in or out of her Majesty's dominions leaving any money or effects not on board his ship, the chief officer of customs or the British consular officer at or nearest to the place, as the case may be, shall claim and take charge of such money and effects; and such officer shall, if he thinks fit, sell all or any of such effects, or any effects of any deceased seamen or apprentice delivered to him under the provisions hereinbefore contained; and every such officer shall, quarterly or at such other times as the board of trade directs, remit to her Majesty's paymaster-general all moneys belonging to or arising from the sale of the effects of or paid as the wages of any deceased seaman or apprentices which have to come to his hands under the provisions hereinbefore contained, and shall render such accounts in respect thereof as the board of trade requires.

Wages and effects of seamen dying at home to be paid in certain cases to board of trade.

CXCVIII. Whenever any seaman or apprentice dies in the United Kingdom, and is at the time of his death entitled to claim from the master or owner of any ship in which he has served any unpaid wages or effects, such master or owner shall pay and deliver or account for the same to the shipping master at the port where the seaman or apprentice was discharged, or was to have been discharged, or to the board of trade, or as it directs.

If less than 50*l.* wages and property of deceased seamen may be paid over without probate or administration to the persons entitled.

CXCIX. If the money and effects of any deceased seaman or apprentice paid, delivered, or remitted to the board of trade or its agents, including the moneys received for any part of the said effects which have been sold either before delivery to the board of trade or by its direction, do not exceed in value the sum of fifty pounds, then, subject to the provisions hereinafter contained, and to all such deductions for expenses incurred in respect of the seaman or apprentice or of his said money and effects as the said board thinks proper to allow, the said board may, if it thinks fit so to do, pay and deliver the said money and effects either to any claimants who can prove themselves to the satisfaction of the said board either to be his widow or children, or to be entitled to the effects of the deceased under his will (if any), or under the statutes for the distribution of the effects of intestates, or under

(*y*) See 25 & 26 Vict. c. 63, s. 20, *infra*.

any other statute, or at common law, or to be entitled to procure probate or take out letters of administration or confirmation, although no probate or letters of administration or confirmation have been taken out, and shall be thereby discharged from all further liability in respect of the money and effects so paid and delivered, or may, if it thinks fit so to do, require probate or letters of administration or confirmation to be taken out, and thereupon pay and deliver the said money and effects to the legal personal representatives of the deceased; and all claimants to whom such money or effects are so paid or delivered shall apply the same in due course of administration; and if such money and effects exceed in value the sum of fifty pounds, then, subject to the provisions hereinafter contained and to deduction for expenses, the board of trade shall pay and deliver the same to the legal personal representatives of the deceased.

Mode of payment under wills made by seamen.

CC. In cases where the deceased seaman or apprentice has left a will, the board of trade shall have the following powers; (that is to say,)

(1.) It may in its discretion refuse to pay or deliver any such wages or effects as aforesaid to any person claiming to be entitled thereto under a will made on board ship unless such will is in writing, and is signed or acknowledged by the testator in the presence of the master or first or only mate of the ship, and is attested by such master or mate:

(2.) It may in its discretion refuse to pay or deliver any such wages or effects as aforesaid to any person not being related to the testator by blood or marriage who claims to be entitled thereto under a will made elsewhere than on board ship, unless such will is in writing, and is signed or acknowledged by the testator in the presence of two witnesses, one of whom is some shipping master appointed under this Act, or some minister or officiating minister or curate of the place in which the same is made, or in a place where there are no such persons, some justice of the peace, or some British consular officer, or some officer of customs, and is attested by such witnesses:

Whenever any claim made under a will is rejected by the board of trade on account of the said will not being made and attested as hereinbefore required, the wages and effects of the deceased shall be dealt with as if no will had been made.

Provision for payment of just claims by creditors, and for preventing fraudulent claims.

CCI. The following rules shall be observed with respect to creditors of deceased seamen and apprentices; (that is to say,)

(1.) No such creditor shall be entitled to claim from the board of trade the wages or effects of any such seaman or apprentice or any part thereof by virtue of letters of administration taken out by him, or by virtue of confirmation in Scotland as executor creditor:

(2.) No such creditor shall be entitled by any means whatever to payment of his debt out of such wages and effects, if the debt accrued more than three years before the death of the deceased, or if the demand is not made within two years after such death:

(3.) Subject as aforesaid, the steps to be taken for procuring payment of such debts shall be as follows; (that is to say,) Every person making a demand as creditor shall deliver to the board of trade an account in writing in such form as it requires, subscribed with his name, stating the particulars of his demand and the place of his abode, and verified by his declaration made before a justice:

(4.) If before such demand is made any claim to the wages and effects of the deceased made by any person interested therein as his widow or child, or under a will or under the statutes for the distribution of the effects of intestates, or under any other statute, or at common law, has been allowed, the board of trade shall give notice to the creditor of the allowance of such person's claim, and the creditor shall thereupon have the same rights and remedies against such person as if he or she had received the said wages and effects as the legal personal representative of the deceased:

(5.) If no claim by any such person has been allowed, the board of trade shall proceed to investigate the creditor's account, and may for that purpose require him to prove the same, and to produce all books, accounts, vouchers and papers relating thereto; and if by such means the creditor duly satisfies the board of trade of the justice of

III. *Wages and Effects of deceased Seamen.*

the demand, either in the whole or in part, the same shall be allowed and paid accordingly, so far as the assets in the hands of the board of trade will extend for that purpose, and such payment shall discharge the board of trade from all further liability in respect of the money so paid; but if such board is not so satisfied, or if such books, accounts, vouchers or papers as aforesaid are not produced, and no sufficient reason is assigned for not producing them, the demand shall be disallowed:

(6.) In any case whatever the board of trade may delay the investigation of any demand made by a creditor for the payment of his debt for one year from the time of the first delivery of the demand; and if in the course of that time a claim to the wages and effects of the deceased is made and substantiated as hereinbefore required by any person interested therein as a widow or child, or under a will, or under the statutes for the distribution of the effects of intestates, or under any other statute, or at common law, the board of trade may pay and deliver the same to such person; and thereupon the creditor shall have the same rights and remedies against such persons as if he or she had received the same as the legal personal representative of the deceased.

Mode of dealing with unclaimed wages of deceased seamen.

CCII. In cases of wages or effects of deceased seamen or apprentices received by the board of trade to which no claim is substantiated within six years after the receipt thereof by such board, it shall be in the absolute discretion of such board, if any subsequent claim is made, either to allow or to refuse the same; [and, subject to the provision hereinafter contained, the board of trade shall from time to time pay any moneys arising from the unclaimed wages and effects of deceased seamen, which in the opinion of such board it is not necessary to retain for the purpose of satisfying claims, into the receipt of her Majesty's Exchequer in such manner as the Treasury directs, and such moneys shall be carried to and form part of the consolidated fund of the United Kingdom (*z*)].

Punishment for forgery and false representations in order to obtain wages and property of deceased seamen.

CCIII. Every person who, for the purpose of obtaining, either for himself or for another, any money or effects of any deceased seaman or apprentice, forges, assists in forging, or procures to be forged, or fraudulently alters, assists in fraudulently altering, or procures to be fraudulently altered, any document purporting to show or assist in showing a right to such wages or effects, and every person who for the purpose aforesaid makes use of any such forged or altered document as aforesaid, or who for the purpose aforesaid gives or makes or procures to be given or made, or assists in giving or making or procuring to be given or made, any false evidence or representation, knowing the same to be false, shall be punishable with penal servitude for a term not exceeding four years, or with imprisonment with or without hard labour for any period not exceeding two years, or if summarily prosecuted and convicted by imprisonment, with or without hard labour, for any period not exceeding six months.

Effects of seamen discharged from navy to be disposed of by accountant-general of navy.

CCIV. In the case of seamen invalided or discharged from any of her Majesty's ships, and sent home in merchant ships, any moneys or effects belonging to them which are paid, remitted or delivered to the board of trade, or its agents, under the provisions hereinbefore contained, shall be paid over and disposed of in such manner as the accountant-general of her Majesty's navy directs.

Leaving Seamen abroad.

Leaving Seamen abroad.

On discharge of seamen abroad, by sale of ship or otherwise, certificates of discharge to be given, and seamen to be sent home at expense of owner.

CCV. Whenever any British ship is transferred or disposed of at any place out of her Majesty's dominions, and any seaman or apprentice belonging thereto does not in the presence of some British consular officer, or, if there is no such consular officer there, in the presence of one or more respectable British merchants residing at the place, and not interested in the said ship, signify his consent in writing to complete the voyage if continued, and whenever the service of any seaman or apprentice belonging to any British ship terminates at any place out of her Majesty's dominions, the master shall give to each such seaman or apprentice a certificate of discharge in the form sanctioned by the board of trade as aforesaid, and in the case of any

(*z*) Words within brackets repealed by 45 & 46 Vict. c. 56, s. 10.

III. *Leaving Seamen abroad.*

certificated mate whose certificate he has retained shall return such certificate to him, and shall also, besides paying the wages to which such seaman or apprentice is entitled, either provide him with adequate employment on board some other British ship bound to the port in her Majesty's dominions at which he was originally shipped, or to such other port in the United Kingdom as is agreed upon by him, or furnish the means of sending him back to such port, or provide him with a passage home, or deposit with such consular officer or such merchant or merchants as aforesaid such a sum of money as is by such officer or merchants deemed sufficient to defray the expenses of his subsistence and passage home; and such consular officer or merchants shall indorse upon the agreement of the ship which the seaman or apprentice is leaving the particulars of such payment, provision or deposit; and if the master refuses or neglects to comply with the requirements of this section, such expenses as last aforesaid, if defrayed by such consular officer or by any other person, shall, unless such seaman or apprentice has been guilty of barratry, be a charge upon the ship to which such seaman or apprentice belonged and upon the owner for the time being thereof, and may be recovered against such owners, with costs, at the suit of the consular officer or other person defraying such expenses, or, in case the same has been allowed to the consular officer out of the public moneys, as a debt due to her Majesty either by ordinary process of law, or in the manner in which seamen are hereby enabled to recover wages; and such expenses, if defrayed by the seaman or apprentice, shall be recoverable as wages due to him.

Forcing seamen on shore a misdemeanor.

CCVI. If the master or any other person belonging to any British ship wrongfully forces on shore and leaves behind, or otherwise wilfully and wrongfully leaves behind, in any place, on shore or at sea, in or out of her Majesty's dominions, any seaman or apprentice belonging to such ship before the completion of the voyage for which such person was engaged or the return of the ship to the United Kingdom, he shall for each such offence be deemed guilty of a misdemeanor.

No seamen to be discharged or left abroad without certificate of some functionary.

CCVII. If the master of any British ship does any of the following things; (that is to say,)

(1.) Discharges any seaman or apprentice in any place situate in any British possession abroad (except the possession in which he was shipped), without previously obtaining the sanction in writing indorsed on the agreement of some public shipping master or other officer duly appointed by the local government in that behalf, or (in the absence of any such functionary) of the chief officer of customs resident at or near the place where the discharge takes place:

(2.) Discharges any seaman or apprentice at any place out of her Majesty's dominions without previously obtaining the sanction so indorsed as aforesaid of the British consular officer there, or (in his absence) of two respectable merchants resident there:

(3.) Leaves behind any seaman or apprentice at any place situate in any British possession abroad on any ground whatever, without previously obtaining a certificate in writing so indorsed as aforesaid from such officer or person as aforesaid, stating the fact and the cause thereof, whether such cause be unfitness or inability to proceed to sea, or desertion or disappearance:

(4.) Leaves behind any seaman or apprentice at any place out of her Majesty's dominions, on shore or at sea, on any ground whatever, without previously obtaining the certificate indorsed in manner and to the effect last aforesaid of the British consular officer there, or (in his absence) of two respectable merchants, if there is any such at or near the place where the ship then is:

He shall for each such default be deemed guilty of a misdemeanor; and the said functionaries shall and the said merchants may examine into the grounds of such proposed discharge, or into the allegation of such unfitness, inability, desertion, or disappearance as aforesaid, in a summary way, and may for that purpose, if they think fit so to do, administer oaths, and may either grant or refuse such sanction or certificate as appears to them to be just.

Proof of such certificate to be upon the master.

CCVIII. Upon the trial of any information, indictment, or other proceeding against any person for discharging or leaving behind any seaman or apprentice contrary to the provisions of this Act, it shall lie upon such person either to produce the sanction or certificate hereby required, or to

III. *Leaving Seamen abroad.*

prove that he had obtained the same previously to having discharged or left behind such seaman or apprentice, or that it was impracticable for him to obtain such sanction or certificate.

Wages to be paid when seamen are left behind on ground of inability (*a*).

CCIX. Every master of any British ship who leaves any seaman or apprentice on shore at any place abroad in or out of her Majesty's dominions, under a certificate of his unfitness or inability to proceed on the voyage, shall deliver to one of the functionaries aforesaid, or (in the absence of such functionaries) to the merchants by whom such certificate is signed, or, if there be but one respectable merchant resident at such place, to him, a full and true account of the wages due to such seaman or apprentice, such account when delivered to a consular officer to be in duplicate, and shall pay the same either in money or by a bill drawn upon the owner (*a*); and in the case of every bill so drawn, such functionary, merchants or merchant as aforesaid, shall by indorsement certify thereon that the same is drawn for money due on account of a seaman's wages, and shall also indorse the amount for which such bill is drawn, with such further particulars in respect of the case as the board of trade requires, upon the agreement of the ship; and every such master as aforesaid who refuses or neglects to deliver a full account of such wages, and pay the amount thereof in money or by bill, as hereinbefore required, shall for every such offence or default be liable, in addition to the payment of the wages, to a penalty not exceeding ten pounds; and every such master who delivers a false account of such wages shall for every such offence, in addition to the payment of the wages, incur a penalty not exceeding twenty pounds.

Such wages to be treated as money due to the seamen, subject to payment of expense of their subsistence and passage home.

CCX. Every such payment as last aforesaid, whether by bill or in money, shall, if made in any British possession, be made to the seaman or apprentice himself, and, if made out of her Majesty's dominions, to the consular officer, who shall, if satisfied with the account, indorse on one of the duplicates thereof a receipt for the amount paid or bill delivered, and shall return the same to the master; and the master shall within forty-eight hours after his return to his port of destination in the United Kingdom, deliver the same to the shipping master there; and the consular officer shall retain the other duplicate of the said account, and shall, if the seaman or apprentice subsequently obtains employment at or otherwise quits the port, deduct out of the sum received by him as aforesaid any expenses which have been incurred by him in respect of the subsistence of the seaman or apprentice under the provisions herein contained, except such as the master or owner of the ship is hereby required to pay, and shall pay the remainder to the seaman or apprentice, and shall also deliver to him an account of the sums so received and expended on his behalf; and shall, if the seaman or apprentice dies before his ship quits the port, deal with the same in the manner hereinafter specified in that behalf, and shall, if the seaman or apprentice is sent home at the public expense under the provisions herein contained, account for the amount received to the board of trade; and such amount shall, after deducting any expenses which have been duly incurred in respect of such seaman or apprentice, except such as the master or owner of the ship is hereby required to pay, be dealt with as wages to which he is entitled, and shall be paid accordingly.

Distressed seamen found abroad may be relieved and sent home at the public expense (*b*).

CCXI. The governors, consular officers, and other officers of her Majesty in foreign countries shall, and in places where there are no such governors or officers, any two resident British merchants may, provide for the subsistence of all seamen or apprentices, being subjects of her Majesty, who have been shipwrecked, discharged, or left behind at any place abroad, whether from any ship employed in the merchant service or from any of her Majesty's ships, or who have been engaged by any person acting either as principal or agent to serve in any ship belonging to any foreign power or to the subject of any foreign state, and who are in distress in any place abroad, until such time as they are able to provide them with a passage home, and for that purpose shall cause such seamen or apprentices to be put on board some ship belonging to any subject of her Majesty bound to any port of the United Kingdom, or to the British possession to which they belong (as the case requires), which is in want of men to make up its complement, and in

(*a*) See 25 & 26 Vict. c. 63, s. 19, *infra*.

(*b*) See 18 & 19 Vict. c. 91, s. 16, and 25 & 26 Vict. c. 63, s. 22, *infra*.

III. *Leaving Seamen abroad.*

default of any such ship shall provide them with a passage home as soon as possible in some ship belonging to a subject of her Majesty so bound as aforesaid, and shall indorse on the agreement of any ship on board of which any seaman or apprentice is so taken or sent the name of every person so sent on board thereof, with such particulars concerning the case as the board of trade requires, and shall be allowed for the subsistence of any such seaman or apprentice such sum per diem as the board of trade from time to time appoints; and the amount due in respect of such allowance shall be paid [out of any moneys applicable to the relief of distressed British seamen, and granted by Parliament for the purpose] (*c*), on the production of the bills of the disbursements, with the proper vouchers.

Masters of British ships compelled to take them (*d*).

CCXII. The master of every British ship so bound as aforesaid shall receive and afford a passage and subsistence to all seamen or apprentices whom he is required to take on board his ship under the provisions hereinbefore contained, not exceeding one for every fifty tons burden, and shall during the passage provide every such seaman or apprentice with a proper berth or sleeping place effectually protected against sea and weather; and on the production of a certificate signed by any governor, consular officer, or merchants by whose directions any such seaman or apprentice was received on board, specifying the number and names of such seamen or apprentices, and the time when each of them respectively was received on board, and on a declaration made by such person before a justice, and verified by the registrar-general of seamen, stating the number of days during which each seaman or apprentice received subsistence and was provided for as aforesaid on board his ship, and stating also the number of men and boys forming the complement of his crew; and the number of seamen and apprentices employed on board his ship during such time, and every variation (if any) of such number, such person shall be entitled to be paid out of the same moneys applicable to the relief of distressed British seamen, in respect of the subsistence and passage of every seaman or apprentice so conveyed, subsisted, and provided for by him exceeding the number (if any) wanted to make up the complement of his crew, such sum per diem as the board of trade from time to time appoints; and if any person having charge of any such ship fails or refuses to receive on board his ship, or to give a passage home, or subsistence to, or to provide for any such seaman or apprentice as aforesaid, contrary to the provisions of this Act, he shall incur a penalty not exceeding one hundred pounds for each seaman or apprentice with respect to whom he makes such default or refusal.

Power to sue for the amount advanced for the relief of seamen left abroad.

CCXIII. If any seaman or apprentice belonging to any British ship is discharged or left behind at any place out of the United Kingdom, without full compliance on the part of the master with all the provisions in that behalf in this Act contained, and becomes distressed and is relieved under the provisions of this Act, or if any subject of her Majesty, after having been engaged by any person (whether acting as principal or agent) to serve in any ship belonging to any foreign power, or to the subject of any foreign power, becomes distressed and is relieved as aforesaid, the wages (if any) due to such seaman or apprentice, and all expenses incurred for his subsistence, necessary clothing, conveyance home, and burial, in case he should die abroad before reaching home, shall be a charge upon the ship, whether British or foreign, to which he so belonged as aforesaid; and the board of trade may in the name of her Majesty (besides suing for any penalties which may have been incurred) sue for and recover the said wages and expenses, with costs, either from the master of such ship as aforesaid, or from the person who is owner thereof for the time being, or, in the case of such engagement as aforesaid for service in a foreign ship, from such master or owner, or from the person by whom such engagement was so made as aforesaid; and such sums shall be recoverable either in the same manner as other debts due to her Majesty, or in the same manner and by the same form and process in which wages due to the seaman would be recoverable by him; and in any proceedings for that purpose production of the account (if any) to be furnished as hereinbefore is provided in such cases, together with proof of payment by the board of trade or by the paymaster-general of the charges incurred on account of any such seaman, apprentice, or other person, shall

(*c*) Words within brackets repealed by 45 & 46 Vict. c. 55, s. 10.

(*d*) See 25 & 26 Vict. c. 63, s. 22, *infra*.

be sufficient evidence that he was relieved, conveyed home, or buried (as the case may be) at her Majesty's expense.

Volunteering into the Navy.

Volunteering into the Navy.

Seamen allowed to leave their ships in order to enter the navy.

CCXIV. Any seaman may leave his ship for the purpose of forthwith entering into the naval service of her Majesty, and such leaving his ship shall not be deemed a desertion therefrom, and shall not render him liable to any punishment or forfeiture whatever; and all stipulations introduced into any agreement whereby any seaman is declared to incur any forfeiture or be exposed to any loss in case he enters into her Majesty's naval service shall be void, and every master or owner who causes any such stipulation to be so introduced shall incur a penalty not exceeding twenty pounds.

Clothes to be delivered at once.

Wages to be given to the Queen's officer on account of the seamen.

CCXV. Whenever any seamen, without having previously committed any act amounting to and treated by the master as desertion, leaves his ship in order to enter into the naval service of her Majesty and is received into such service, the master shall deliver to him his clothes and effects on board such ship, and shall pay the proportionate amount of his wages down to the time of such entry, subject to all just deductions, as follows; (that is to say,) the master of the said ship shall pay the same to the officer authorized to receive such seaman into her Majesty's service, either in money or by bill drawn upon the owner and payable at sight to the order of the accountant-general of the navy: and the receipt of such officer shall be a discharge for the money or bill so given; and such bill shall be exempt from stamp duty; and if such wages are paid in money, such money shall be credited in the muster book of the ship to the account of the said seaman; and if such wages are paid by bill, such bill shall be noted in the said muster book and shall be sent to the said accountant-general, who shall present the same or cause the same to be presented for payment, and shall credit the produce thereof to the account of the said seaman; and such money or produce (as the case may be) shall not be paid to the said seaman until the time at which he would have been entitled to receive the same if he had remained in the service of the ship which he had so quitted as aforesaid; and if any such bill is not duly paid when presented, the said accountant-general or the seaman on whose behalf the same is given may sue thereon or may recover the wages due by all or any of the means by which wages due to merchant seamen are recoverable; and if upon any seaman leaving his ship in the manner and for the purpose aforesaid, the master fails to deliver his clothes and effects, or to pay his wages as hereinbefore required, he shall, in addition to his liability to pay and deliver the same, incur a penalty not exceeding twenty pounds; provided that no officer who receives any such bill as aforesaid shall be subject to any liability in respect thereof, except for the safe custody thereof until sent to the said accountant-general as aforesaid.

Repayment to owner of advance paid and not duly earned.

CCXVI. If upon any seaman leaving his ship for the purpose of entering the naval service of her Majesty, the owner or master of such ship shows to the satisfaction of the Admiralty that he has paid or properly rendered himself liable to pay an advance of wages to or on account of such seaman, and that such seaman has not at the time of quitting his ship duly earned such advance by service therein, and, in the case of such liability as aforesaid, if such owner or master actually satisfies the same, it shall be lawful for the Admiralty to pay to such owner or master so much of such advance as has not been duly earned, and to deduct the sum so paid from the wages of the seaman earned or to be earned in the naval service of her Majesty.

If new seamen are engaged instead of the original seamen, the owner may apply for repayment of any extra expense he has been put to.

CCXVII. If, in consequence of any seaman so leaving his ship without the consent of the master or owner thereof, it becomes necessary for the safety and proper navigation of the said ship to engage a substitute or substitutes, and if the wages or other remuneration paid to such substitute or substitutes for subsequent service exceed the wages or remuneration which would have been payable to the said seaman under his agreement for similar service, the master or owner of the said ship may apply to the registrar of the High Court of Admiralty in England for a certificate authorizing the repayment of such excess; and such application shall be in such form, and shall be accompanied by such documents, and by such statements, whether on oath or otherwise, as the judge of the said court from time to time directs.

Application how to be decided on, and amount of

CCXVIII. The said registrar shall, upon receiving any such application as aforesaid, give notice thereof in writing, and of the sum claimed, to the

III. *Volunteering into the Navy.*

secretary to the admiralty, and shall proceed to examine the said application, and may call upon the registrar-general of seamen to produce any papers in his possession relating thereto, and may call for further evidence; and if the whole of the claim appears to him to be just, he shall give a certificate accordingly; but if he considers that such claim or any part thereof is not just, he shall give notice of such his opinion in writing under his hand to the person making the said application, or his attorney or agent; and if within sixteen days from the giving of such notice such person does not leave or cause to be left at the office of the registrar of the said court a written notice demanding that the said application shall be referred to the judge of the said court, then the said registrar shall finally decide thereon, and certify accordingly; but if such notice is left as aforesaid, then the said application shall stand referred to the said judge in his chambers, and his decision thereon shall be final, and the said registrar shall certify the same accordingly; and the said registrar and judge respectively shall in every proceeding under this Act have full power to administer oaths, and to exercise all the ordinary powers of the court, as in any other proceeding within its jurisdiction; and the said registrar or judge (as the case may be) may, if he think fit, allow for the costs of any proceeding under this Act any sum not exceeding five pounds for each seaman so quitting his ship as aforesaid; and such sum shall be added to the sum allowed, and shall be certified by the said registrar accordingly.

repayment how to be ascertained.

CCXIX. Every certificate so given shall be sent by post or otherwise to the person making the application, his attorney or agent, and a copy thereof shall be sent to the accountant-general of the navy; and such accountant-general shall, upon delivery to him of the said original certificate, together with a receipt in writing purporting to be a receipt from the master or owner making the application, pay to the person delivering the same out of the moneys applicable to the naval service of her Majesty, and granted by Parliament for the purpose, the amount mentioned in such certificate; and such certificate and receipt shall absolutely discharge the said accountant-general and her Majesty from all liability in respect of the moneys so paid or of the said application.

Accountant-general to pay sums when ascertained.

CCXX. Every person who, in making or supporting any such application as aforesaid to the registrar of the High Court of Admiralty, forges, assists in forging or procures to be forged, or fraudulently alters, assists in fraudulently altering or procures to be fraudulently altered, any document, and every person who in making or supporting any such application presents or makes use of any such forged or altered document, or who in making or supporting any such application makes or gives, or assists in making or giving, or procures to be made or given, any false evidence or representation, knowing the same to be false, shall be deemed guilty of a misdemeanor.

Penalty for forgery and false representations in support of such application.

Provisions, Health and Accommodation.

Provisions, Health and Accommodation.

CCXXI. Any three or more of the crew of any British ship may complain to any officer in command of any of her Majesty's ships, or any British consular officer, or any shipping master, or any chief officer of customs, that the provisions or water for the use of the crew are at any time of bad quality, unfit for use or deficient in quantity; and such officer may thereupon examine the said provisions or water, or cause them to be examined; and if on examination such provisions or water are found to be of bad quality and unfit for use, or to be deficient in quantity, the person making such examination shall signify the same in writing to the master of the ship; and if such master does not thereupon provide other proper provisions or water in lieu of any so signified to be of a bad quality and unfit for use, or does not procure the requisite quantity of any so signified to be insufficient in quantity, or uses any provisions or water which have been so signified as aforesaid to be of a bad quality and unfit for use, he shall in every such case incur a penalty not exceeding twenty pounds; and upon every such examination as aforesaid the officers making or directing the same shall enter a statement of the result of the examination in the official log, and shall send a report thereof to the Board of Trade, and such report, if produced out of the custody of such Board or its officers, shall be received in evidence in any legal proceeding.

Survey of provisions and water on complaint made.

CCXXII. If the officer to whom any such complaint as last aforesaid is made certifies in such statement as aforesaid that there was no reasonable

Forfeiture for frivolous complaint.

III. *Provisions, Health and Accommodation.*

ground for such complaint, each of the parties so complaining shall be liable to forfeit to the owners out of his wages a sum not exceeding one week's wages.

Allowance for short or bad provisions.

CCXXIII. In the following cases; (that is to say,)

(1.) If during a voyage the allowance of any of the provisions which any seaman has by his agreement stipulated for is reduced (except in accordance with any regulations for reduction by way of punishment contained in the agreement, and also except for any time during which such seaman wilfully and without sufficient cause refuses or neglects to perform his duty, or is lawfully under confinement for misconduct, either on board or on shore);

(2.) If it is shown that any of such provisions are or have during the voyage been bad in quality and unfit for use;

The seaman shall receive by way of compensation for such reduction or bad quality, according to the time of its continuance, the following sums, to be paid to him in addition to and to be recoverable as wages; (that is to say,)

(1.) If his allowance is reduced by any quantity not exceeding one third of the quantity specified in the agreement, a sum not exceeding fourpence a day;

(2.) If his allowance is reduced by more than one third of such quantity, eightpence a day;

(3.) In respect of such bad quality as aforesaid, a sum not exceeding one shilling a day;

But if it is shown to the satisfaction of the court before which the case is tried that any provisions, the allowance of which has been reduced, could not be procured or supplied in proper quantities, and that proper and equivalent substitutes were supplied in lieu thereof, the court shall take such circumstances into consideration, and shall notify or refuse compensation as the justice of the case may require.

CCXXIV. Repealed, 30 & 31 Vict. c. 124, s. 3.

Masters to keep weights and measures on board.

CCXXV. Every master shall keep on board proper weights and measures for the purpose of determining the quantities of the several provisions and articles served out, and shall allow the same to be used at the time of serving out such provisions and articles in the presence of a witness whenever any dispute arises about such quantities, and in default shall for every offence incur a penalty not exceeding ten pounds.

Board of trade and local boards may appoint inspectors of medicines who are to see that ships are properly provided.

CCXXVI. Any local marine board may, upon being required by the board of trade so to do, appoint and remove a medical inspector of ships for the port, and may fix his remuneration, such remuneration to be subject to the control of the board of trade; and at ports where there are no local marine boards the board of trade may appoint and remove such inspectors, and fix their remuneration; and it shall be the duty of such inspectors to inspect the medicines, medical stores, lime or lemon juice or other articles, sugar and vinegar, required to be kept on board any such ships as aforesaid; and such inspection, if made at places where there are local marine boards, shall be made under their direction, and also in any special cases under the direction of the board of trade, and if made at places where there are no local marine boards, shall be made under the direction of the board of trade; and such medical inspectors shall for the purposes of such inspection have the same powers as the inspectors appointed by the board of trade under the First Part of this Act; but every such inspector, if required by timely notice in writing from the master, owner or consignee, shall make his inspection three days at least before the ship proceeds to sea, and if the result of the inspection is satisfactory shall not again make inspection before the commencement of the voyage, unless he has reason to suspect that some of the articles inspected have been subsequently removed, injured or destroyed; and whenever any such medical inspector is of opinion that in any ship hereby required to carry such articles as aforesaid the same or any of them are deficient in quantity or quality, or are placed in improper vessels, he shall signify the same in writing to the chief officer of customs of the port where such ship is lying, and also to the master, owner or consignee thereof, and thereupon the master of such ship, before proceeding to sea, shall produce to such chief officer of customs a certificate under the hand of such medical inspector or of some other medical inspector, to the effect that such deficiency has been supplied or remedied, or that such improper vessels have been replaced by proper vessels, as the case may require; and such chief officer of

customs shall not grant a clearance for such ship without the production of such certificate, and if such ship attempts to go to sea without a clearance, may detain her until such certificate is produced; and if such ship proceeds to sea without the production of such certificate, the owner, master or consignee thereof shall incur a penalty not exceeding twenty pounds.

III. *Provisions, Health and Accommodation.*

CCXXVII. Repealed, 30 & 31 Vict. c. 124, s. 3.

CCXXVIII. The following rules shall be observed with respect to expenses attendant on illness and death; (that is to say,)

Expense of medical attendance and subsistence in cases of illness, and of burial in case of death, how to be defrayed.

(1.) If the master or any seaman or apprentice receives any hurt or injury in the service of the ship to which he belongs, the expense of providing the necessary surgical and medical advice, with attendance and medicines, and of his subsistence until he is cured, or dies, or is brought back to some port in the United Kingdom, if shipped in the United Kingdom, or if shipped in some British possession to some port in such possession, and of his conveyance to such port, and the expense (if any) of his burial, shall be defrayed by the owner of such ship, without any deduction on that account from the wages of such master, seaman or apprentice:

(2.) If the master or any seaman or apprentice is on account of any illness temporarily removed from his ship for the purpose of preventing infection, or otherwise for the convenience of the ship, and subsequently returns to his duty, the expense of such removal and of providing the necessary advice with attendance and medicines and of his subsistence whilst away from the ship, shall be defrayed in like manner:

(3.) The expense of all medicines and surgical or medical advice and attendance given to any master, seaman or apprentice whilst on board his ship shall be defrayed in like manner:

(4.) In all other cases any reasonable expenses duly incurred by the owner for any seaman in respect of illness, and also any reasonable expenses duly incurred by the owner in respect of the burial of any seaman or apprentice who dies whilst on service, shall if duly proved, be deducted from the wages of such seaman or apprentice.

Expenses, if paid by consul, to be recoverable from owner.

CCXXIX. If any such expenses in respect of the illness, injury or hurt of any seaman or apprentice, as are to be borne by the owner, are paid by any consular officer or other person on behalf of her Majesty, or if any other expenses in respect of the illness, injury or hurt of any seaman or apprentice whose wages are not accounted for to such officer under the provisions hereinbefore contained in that behalf are so paid, such expenses shall be repaid to such officer or other person by the master of the ship, and if not so repaid, the amount thereof, with costs, shall be a charge upon the ship, and be recoverable from the said master or from the owner of the ship for the time being as a debt due to her Majesty, and shall be recoverable either by ordinary process of law or in the manner in which seamen are hereby enabled to recover wages: and in any proceeding for the recovery thereof the production of a certificate of the facts, signed by such officer or other person, together with such vouchers (if any) as the case requires, shall be sufficient proof that the said expenses were duly paid by such consular officer or other person as aforesaid.

Certain ships to carry medical practitioners.

CCXXX. Every foreign-going ship having one hundred persons or upwards on board shall carry on board as part of her complement some person duly authorized by law to practise as physician, surgeon or apothecary; and in default the owner shall for every voyage of any such ship made without such medical practitioner incur a penalty not exceeding one hundred pounds: provided that nothing herein contained shall in anywise affect any provision contained in the "Passengers Act, 1852" (*e*), concerning the carriage of medical practitioners by the class of ships therein named passenger ships, nor shall any such passenger ship, if not thereby required to carry a medical practitioner, be hereby required to do so.

CCXXXI. Repealed, 30 & 31 Vict. c. 124, s. 3.

(*e*) Repealed by Passengers Act, 1855, 18 & 19 Vict. c. 119.

III. *Power of making Complaint.*

Power of making Complaint.

Seamen to be allowed to go ashore to make complaint to a justice.

CCXXXII. If any seaman or apprentice whilst on board any ship states to the master that he desires to make complaint to a justice of the peace or consular officer, or naval officer in command of any of her Majesty's ships, against the master or any of the crew, the said master shall, if the ship is then at a place where there is a justice or any such officer as aforesaid, as soon as the service of the ship will permit, and if the ship is not then at such a place, so soon after her arrival at such a place as the service of the ship will permit, allow such seaman or apprentice to go ashore or send him ashore in proper custody so that he may be enabled to make such complaint, and shall, in default, incur a penalty not exceeding ten pounds.

Protection of Seamen from Imposition.

Protection of Seamen from Imposition.

Sale of and charge upon wages to be invalid.

CCXXXIII. No wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court; and every payment of wages to a seamen or apprentice shall be valid in law, notwithstanding any previous sale or assignment of such wages, or of any attachment, incumbrance or arrestment thereon; and no assignment or sale of such wages or of salvage made prior to the accruing thereof shall bind the party making the same; and no power of attorney or authority for the receipt of any such wages or salvage shall be irrevocable.

No debt exceeding 5*s.* recoverable till end of voyage.

CCXXXIV. No debt exceeding in amount five shillings, incurred by any seaman after he has engaged to serve, shall be recoverable until the service agreed for is concluded.

Penalty for overcharges by lodging-house keepers.

CCXXXV. If any person demands or receives from any seaman or apprentice to the sea service payment in respect of his board or lodging in the house of such person for a longer period than such seaman or apprentice has actually resided or boarded therein, he shall incur a penalty not exceeding ten pounds.

Penalty for detaining seamen's effects.

CCXXXVI. If any person receives or takes into his possession or under his control any moneys, documents or effects of any seaman or apprentice to the sea service, and does not return the same or pay the value thereof, when required by such seaman or apprentice, subject to such deduction as may be justly due to him from such seaman or apprentice in respect of board or lodging or otherwise, or absconds therewith, he shall incur a penalty not exceeding ten pounds, and any two justices may, besides inflicting such penalty, by summary order direct the amount or value of such moneys, documents or effects, subject to such deduction as aforesaid, to be forthwith paid to such seaman or apprentice.

Persons not to go on board before the final arrival of ship without permission.

CCXXXVII. Every person who, not being in her Majesty's service, and not being duly authorized by law for the purpose, goes on board any ship about to arrive at the place of her destination (*f*), before her actual arrival in dock or at the place of her discharge, without the permission of the master, shall for every such offence incur a penalty not exceeding twenty pounds; and the master or person in charge of such ship may take any such person so going on board as aforesaid into custody, and deliver him up forthwith to any constable or peace officer, to be by him taken before a justice or justices or the sheriff of the county in Scotland, and to be dealt with according to the provisions of this Act.

Penalty for soliciting by lodging-house keepers.

CCXXXVIII. If, within twenty-four hours after the arrival of any ship at any port in the United Kingdom, any person then being on board such ship solicits any seaman to become a lodger at the house of any person letting lodgings for hire, or takes out of such ship any effects of any seaman, except under his personal direction and with the permission of the master, he shall for every such offence incur a penalty not exceeding five pounds.

Discipline.

Discipline.

Misconduct endangering ship or life or

CCXXXIX. Any master of or any seaman or apprentice belonging to any British ship who by wilful breach of duty, or by neglect of duty, or by reason of drunkenness, does any act tending to the immediate loss, destruc-

(*f*) See 43 & 44 Vict. c. 16, s. 5; *Atwood* v. *Cave*, L. R. 1 Q. B. D. 134.

tion, or serious damage of such ship, or tending immediately to endanger the life or limb of any person belonging to or on board of such ship, or who by wilful breach of duty, or by neglect of duty, or by reason of drunkenness, refuses or omits to do any lawful act proper and requisite to be done by him for preserving such ship from immediate loss, destruction, or serious damage, or for preserving any person belonging to or on board of such ship from immediate danger to life or limb, shall for every such offence be deemed guilty of a misdemeanor (*g*).

Limb a misdemeanor.

CCXL. Any court having admiralty jurisdiction in any of her Majesty's dominions may, upon application by the owner of any ship being within the jurisdiction of such court, or by the part owner or consignee, or by the agent of the owner, or by any certificated mate, or by one third or more of the crew of such ship, and upon proof on oath to the satisfaction of such court that the removal of the master of such ship is necessary, remove him accordingly; and may also, with the consent of the owner or his agent, or the consignee of the ship, or if there is no owner or agent of the owner or consignee of the ship within the jurisdiction of the court, then without such consent, appoint a new master in his stead; and may also make such order, and may require such security in respect of costs in the matter, as it thinks fit.

Power of admiralty courts to remove master.

CCXLI. If the board of trade or any local marine board has reason to believe that any master or mate is from incompetency or misconduct unfit to discharge his duties, the board of trade may either institute an investigation or may direct the local marine board at or nearest to the place at which it may be convenient for the parties and witnesses to attend to institute the same, and thereupon such persons as the board of trade may appoint for the purpose, or, as the case may be, the local marine board, shall, with the assistance of a local stipendiary magistrate (if any), and if there is no such magistrate, of a competent legal assistant to be appointed by the board of trade, conduct the investigation, and may summon the master or mate to appear, and shall give him full opportunity of making a defence either in person or otherwise, and shall for the purpose of such investigation have all the powers given by the first part of this Act to inspectors appointed by the board of trade, and may make such order with respect to the costs of such investigation as they may deem just; and shall on the conclusion of the investigation make a report upon the case to the board of trade; and in cases where there is no local marine board before which the parties and witnesses can conveniently attend, or where such local marine board is unwilling to institute the investigation, the board of trade may direct the same to be instituted before two justices or a stipendiary magistrate; and thereupon such investigation shall be conducted, and the results thereof reported, in the same manner and with the same powers in and with which formal investigations into wrecks and casualties are directed to be conducted, and the results thereof reported, under the provisions contained in the Eighth Part of this Act, save only that, if the board of trade so directs, the person bringing the charge of incompetency or misconduct to the notice of the board of trade shall be deemed to be the party having the conduct of the case.

Power to investigate cases of alleged incompetency and misconduct (*h*).

CCXLII. The board of trade may suspend or cancel the certificate (whether of competency or service) of any master or mate in the following cases; (that is to say,)

Board of trade may cancel or suspend certificate in certain cases (*i*).

(1.) If upon any investigation made in pursuance of the last preceding section, he is reported to be incompetent, or to have been guilty of any gross act of misconduct, drunkenness or tyranny:

(2.) If upon any investigation conducted under the provisions contained in the Eighth Part of this Act, or upon any investigation made by a naval court constituted as hereinafter mentioned, it is reported that the loss or abandonment of or serious damage to any ship or loss of life has been caused by his wrongful act or default:

(3.) If he is superseded by the order of any admiralty court or of any naval court constituted as hereinafter mentioned:

(4.) If he is shown to have been convicted of any offence:

(5.) If upon any investigation made by any court or tribunal authorized

(*g*) 43 & 44 Vict. c. 16, s. 10, *infra*.
(*h*) 25 & 26 Vict. c. 63, s. 11, *infra*.
(*i*) 25 & 26 Vict. c. 63, s. 23, and 39 & 40 Vict. c. 80, s. 29, *infra*.

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or hereafter to be authorized by the legislative authority in any British possession to make inquiry into charges of incompetency or misconduct, on the part of masters or mates of ships, or as to shipwrecks or other casualties affecting ships, a report is made by such court or tribunal to the effect that he has been guilty of any gross act of misconduct, drunkenness or tyranny, or that the loss or abandonment of or serious damage to any ship or loss of life has been caused by his wrongful act or default [and such report is confirmed by the governor or person administering the government of such possession] (*k*):

And every master or mate whose certificate is cancelled or suspended shall deliver it to the board of trade or as it directs, and in default shall for each offence incur a penalty not exceeding fifty pounds; and the board of trade may at any subsequent time grant to any person whose certificate has been cancelled a new certificate of the same or of any lower grade.

Offences of seamen and apprentices and their punishments.

CCXLIII. Whenever any seaman who has been lawfully engaged or any apprentice to the sea service commits any of the following offences he shall be liable to be punished summarily as follows (that is to say):

Desertion:

(1.) For desertion he shall be liable [to imprisonment for any period not exceeding twelve weeks, with or without hard labour, and also] (*l*) forfeit all or any part of the clothes and effects he leaves on board, and all or any part of the wages or emoluments which he has then earned, and also, if such desertion takes place abroad, at the discretion of the court, to forfeit all or any part of the wages or emoluments he may earn in any other ship in which he may be employed until his next return to the United Kingdom, and to satisfy any excess of wages paid by the master or owner of the ship from which he deserts to any substitute engaged in his place at a higher rate of wages than the rate stipulated to be paid to him:

Neglecting or refusing to join, or to proceed to sea, absence within twenty-four hours before sailing, and absence without leave:

(2.) For neglecting or refusing, without reasonable cause (*m*), to join his ship, or to proceed to sea in his ship, or for absence without leave at any time within twenty-four hours of the ship's sailing from any port either at the commencement or during the progress of any voyage, or for absence at any time without leave and without sufficient reason from his ship or from his duty not amounting to desertion or not treated as such by the master, he shall be liable [to imprisonment for any period not exceeding ten weeks, with or without hard labour, and also] (*l*) at the discretion of the court, to forfeit out of his wages a sum not exceeding the amount of two days' pay, and in addition for every twenty-four hours of absence either a sum not exceeding six days' pay, or any expenses which have been properly incurred in hiring a substitute:

Quitting without leave before ship is secured:

(3.) For quitting the ship without leave after arrival at her port of delivery and before she is placed in security, he shall be liable to forfeit out of his wages a sum not exceeding one month's pay:

Act of disobedience:

(4.) For wilful disobedience to any lawful command he shall be liable to imprisonment for any period not exceeding four weeks, with or without hard labour, and also, at the discretion of the court, to forfeit out of his wages a sum not exceeding two days' pay:

Continued disobedience:

(5.) For continued wilful disobedience to lawful commands, or continued wilful neglect of duty, he shall be liable to imprisonment for any period not exceeding twelve weeks, with or without hard labour, and also, at the discretion of the court, to forfeit for every twenty-four hours' continuance of such disobedience or neglect either a sum not exceeding six days' pay, or any expenses which have been properly incurred in hiring a substitute:

Assault on officers:

(6.) For assaulting any master or mate he shall be liable to imprisoment for any period not exceeding twelve weeks, with or without hard labour:

Combining to disobey:

(7.) For combining with any other or others of the crew to disobey lawful commands, or to neglect duty, or to impede the navigation of the

(*k*) The words within brackets are repealed by 45 & 46 Vict. c. 76, s. 7.

(*l*) The words within brackets repealed by 43 & 44 Vict. c. 16, s. 12.

(*m*) See 34 & 35 Vict. c. 110, ss. 7 and 8, *infra*.

ship or the progress of the voyage, he shall be liable to imprisonment for any period not exceeding twelve weeks, with or without hard labour:

Wilful damage and embezzlement:

(8.) For wilfully damaging the ship, or embezzling or wilfully damaging any of her stores or cargo, he shall be liable to forfeit out of his wages a sum equal in amount to the loss thereby sustained, and also, at the discretion of the court, to imprisonment for any period not exceeding twelve weeks, with or without hard labour:

Acts of smuggling causing loss to owner.

(9.) For any act of smuggling of which he is convicted, and whereby loss or damage is occasioned to the master or owner, he shall be liable to pay to such master or owner such a sum as is sufficient to reimburse the master or owner for such loss or damage; and the whole or a proportionate part of his wages may be retained in satisfaction or on account of such liability, without prejudice to any further remedy.

Entry of offences to be made in official log, and to be read over or a copy given to the offender, and his reply, if any, to be also entered.

CCXLIV. Upon the commission of any of the offences enumerated in the last preceding section an entry thereof shall be made in the official log-book, and shall be signed by the master and also by the mate or one of the crew; and the offender, if still in the ship, shall before the next subsequent arrival of the ship at any port, or if she is at the time in port, before her departure therefrom, either be furnished with a copy of such entry or have the same read over distinctly and audibly to him, and may thereupon make such reply thereto as he thinks fit; and a statement that a copy of the said entry has been so furnished, or that the same has been so read over as aforesaid, and the reply (if any) made by the offender, shall likewise be entered and signed in manner aforesaid; and in any subsequent legal proceedings the entries hereinbefore required shall, if practicable, be produced or proved, and in default of such production or proof the court hearing the case may, at its discretion, refuse to receive evidence of the offence.

Seamen whom masters of ships are compelled to convey, and persons going in ships without leave to be subject to penalties for breach of discipline.

CCXLV. Every seafaring person whom the master of any ship is, under the authority of this Act or of any other Act of Parliament, compelled to take on board and convey, and every person who goes to sea in any ship without the consent of the master or owner or other person entitled to give such consent, shall, so long as he remains in such ship, be subject to the same laws and regulations for preserving discipline, and to the same penalties and punishments for offences constituting or tending to a breach of discipline, to which he would be subject if he were a member of the crew and had signed the agreement.

CCXLVI. Repealed by 43 & 44 Vict. c. 16, s. 12.

Deserters may be sent on board in lieu of being imprisoned.

CCXLVII. Whenever any seaman or apprentice is brought before any court on the ground of his having neglected or refused to join or to proceed to sea in any ship in which he is engaged to serve, or of having deserted or otherwise absented himself therefrom without leave, such court may, if the master or the owner or his agent so requires [instead of committing the offender to prison] (*n*), cause him to be conveyed on board for the purpose of proceeding on the voyage, or deliver him to the master or any mate of the ship, or the owner or his agent, to be by them so conveyed, and may in such case order any costs and expenses properly incurred by or on behalf of the master or owner by reason of the offence to be paid by the offender, and, if necessary, to be deducted from any wages which he has then earned, or which by virtue of his then existing engagement he may afterwards earn.

CCXLVIII. Repealed by 43 & 44 Vict. c. 16, s. 12.

Entries and certificates of desertion abroad to be copied, sent home, and admitted in evidence.

CCXLIX. In all cases of desertion from any ship in any place abroad the master shall produce the entry of such desertion in the official log-book to the person or persons hereby required to indorse on the agreement a certificate of such desertion; and such person or persons shall thereupon make and certify a copy of such entry and also a copy of the said certificate of desertion; and if such person is a public functionary he shall, and in other cases the said master shall forthwith transmit such copies to the registrar-general of seamen in England (*o*); and the said registrar shall, if required, cause the same to be produced in any legal proceeding; and such copies, if purporting to be so made and certified as aforesaid, and certified to have come from the custody

(*n*) See 43 & 44 Vict. c. 16, s. 10, *infra*.

(*o*) Now called Registrar-General of Shipping and Seamen: 35 & 36 Vict. c. 73, s. 4, *infra*.

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of the said registrar, shall in any legal proceeding relating to such desertion be received as evidence of the entries therein appearing.

Facilities for proving desertion, so far as concerns forfeiture of wages.

CCL. Whenever a question arises whether the wages of any seaman or apprentice are forfeited for desertion, it shall be sufficient for the party insisting on the forfeiture to show that such seaman or apprentice was duly engaged in or that he belonged to the ship from which he is alleged to have deserted, and that he quitted such ship before the completion of the voyage or engagement, or if such voyage was to terminate in the United Kingdom and the ship has not returned, that he is absent from her, and that an entry of the desertion has been duly made in the official log-book; and thereupon the desertion shall, so far as relates to any forfeiture of wages or emoluments under the provisions hereinbefore contained, be deemed to be proved, unless the seaman or apprentice can produce a proper certificate of discharge, or can otherwise show to the satisfaction of the court that he had sufficient reasons for leaving his ship.

Costs of procuring imprisonment may to the extent of 3*l.* be deducted from wages.

CCLI. Whenever in any proceeding relating to seamen's wages it is shown that any seaman or apprentice has in the course of the voyage been convicted of any offence by any competent tribunal and rightfully punished therefor by imprisonment or otherwise, the court hearing the case may direct a part of the wages due to such seaman, not exceeding three pounds, to be applied in reimbursing any costs properly incurred by the master in procuring such conviction and punishment.

Amount of forfeiture how to be ascertained when seamen contract for the voyage.

CCLII. Whenever any seaman contracts for wages by the voyage or by the run or by the share and not by the month or other stated period of time, the amount of forfeiture to be incurred under this Act shall be taken to be an amount bearing the same proportion to the whole wages or share as a calendar month or other the period hereinbefore mentioned in fixing the amount of such forfeiture (as the case may be) bears to the whole time spent in the voyage; and if the whole time spent in the voyage does not exceed the period for which the pay is to be forfeited, the forfeit shall extend to the whole wages or share.

Application of forfeitures.

CCLIII. All clothes, effects, wages and emoluments which under the provisions hereinbefore contained are forfeited for desertion shall be applied in the first instance in or towards the reimbursement of the expenses occasioned by such desertion to the master or owner of the ship from which the desertion has taken place; and may, if earned subsequently to the desertion, be recovered by such master, or by the owner or his agent, in the same manner as the deserter might have recovered the same if they had not been forfeited; and in any legal proceeding relating to such wages the court may order the same to be paid accordingly; and subject to such reimbursements the same shall be paid into the receipt of her Majesty's exchequer in such manner as the treasury may direct, and shall be carried to and form part of the consolidated fund of the United Kingdom; and in all other cases of forfeiture of wages under the provisions hereinbefore contained the forfeiture shall, in the absence of any specific directions to the contrary, be for the benefit of the master or owner by whom the wages are payable.

Questions of forfeitures may be decided in suits for wages.

CCLIV. Any question concerning the forfeiture of or deductions from the wages of any seaman or apprentice may be determined in any proceeding lawfully instituted with respect to such wages, notwithstanding that the offence in respect of which such question arises, though hereby made punishable by imprisonment as well as forfeiture, has not been made the subject of any criminal proceeding.

Penalty for false statement as to last ship or name.

CCLV. If any seaman on or before being engaged wilfully and fraudulently makes a false statement of the name of his last ship or last alleged ship, or wilfully and fraudulently makes a false statement of his own name, he shall incur a penalty not exceeding five pounds; and such penalty may be deducted from any wages he may earn by virtue of such engagement as aforesaid, and shall, subject to reimbursement of the loss and expenses (if any) occasioned by any previous desertion, be paid and applied in the same manner as other penalties payable under this Act.

Fines to be deducted from wages, and paid to shipping master.

CCLVI. Whenever any seaman commits an act of misconduct for which his agreement imposes a fine, and which it is intended to punish by enforcing such fine, an entry thereof shall be made in the official log-book, and a copy of such entry shall be furnished or the same shall be read over to the offender, and an entry of such reading over, and of the reply (if any) made by the offender, shall be made, in the manner and subject to the conditions

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hereinbefore specified with respect to the offences against discipline specified in and punishable under this Act; and such fine shall be deducted and paid over as follows, (that is to say,) if the offender is discharged in the United Kingdom, and the offence and such entries in respect thereof as aforesaid are proved, in the case of a foreign-going ship to the satisfaction of the shipping master before whom the offender is discharged, and in the case of a home trade ship to the satisfaction of the shipping master at or nearest to the place at which the crew is discharged, the master or owner shall deduct such fine from the wages of the offender, and pay the same over to such shipping master; and if before the final discharge of the crew in the United Kingdom any such offender as aforesaid enters into any of her Majesty's ships, or is discharged abroad, and the offence and such entries as aforesaid are proved to the satisfaction of the officer in command of the ship into which he so enters, or of the consular officer, officer of customs, or other person by whose sanction he is so discharged, the fine shall thereupon be deducted as aforesaid, and an entry of such deduction shall then be made in the official log book (if any) and signed by such officer or other person; and on the return of the ship to the United Kingdom the master or owner shall pay over such fine, in the case of foreign-going ships, to the shipping master before whom the crew is discharged, and in the case of home trade ships to the shipping master at or nearest to the place at which the crew is discharged; and if any master or owner neglects or refuses to pay over any such fine in manner aforesaid, he shall for each such offence incur a penalty not exceeding six times the amount of the fine retained by him: provided that no act or misconduct for which any such fine as aforesaid has been inflicted and paid shall be otherwise punished under the provisions of this Act.

Penalty for enticing to desert, and harbouring deserters.

CCLVII. Every person who by any means whatever persuades or attempts to persuade any seaman or apprentice to neglect or refuse to join or to proceed to sea in or to desert from his ship, or otherwise to absent himself from his duty, shall for each such offence in respect of each such seaman or apprentice incur a penalty not exceeding ten pounds; and every person who wilfully harbours or secretes any seaman or apprentice who has deserted from his ship, or who has wilfully neglected or refused to join, or has deserted from his ship, knowing or having reason to believe such seaman or apprentice to have so done, shall for every such seaman or apprentice so harboured or secreted incur a penalty not exceeding twenty pounds.

Penalty for obtaining passage surreptitiously.

CCLVIII. Any person who secretes himself and goes to sea in any ship without the consent of either the owner, consignee or master, or of a mate or of any person in charge of such ship, or of any other person entitled to give such consent, shall incur a penalty not exceeding twenty pounds, or be liable to imprisonment with or without hard labour, for any period not exceeding four weeks (*p*).

On change of masters, documents hereby required to be handed over to successor.

CCLIX. If during the progress of a voyage the master is superseded or for any other reason quits the ship and is succeeded in command by some other person, he shall deliver to his successor the various documents relating to the navigation of the ship and to the crew thereof which are in his custody, and shall in default incur a penalty not exceeding one hundred pounds; and such successor shall immediately, on assuming the command of the ship, enter in the official log a list of the documents so delivered to him.

Naval Courts on the High Seas and Abroad.

Naval Courts.

Naval courts may be summoned for hearing complaints and investigating wrecks on the high seas or abroad.

CCLX. Any officer in command of any ship of her Majesty on any foreign station, or, in the absence of such officer, any consular officer, may summon a court, to be termed a "Naval Court," in the following cases (that is to say):

(1.) Whenever a complaint which appears to such officer to require immediate investigation is made to him by the master of any British ship, or by any certificated mate, or by one or more of the seamen belonging to any such ship:

(2.) Whenever the interest of the owner of any British ship or of the cargo of any such ship appears to such officer to require it:

(*p*) As to persons secreting themselves on passenger vessels, 18 & 19 Vict. c. 119, s. 18.

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(3.) Whenever any British ship is wrecked or abandoned or otherwise lost at or near the place where such officer may be, or whenever the crew or part of the crew of any British ship which has been wrecked, abandoned, or lost abroad, arrives at such place.

Constitution of such courts.

CCLXI. Every such naval court as aforesaid shall consist of not more than five and not less than three members, of whom, if possible, one shall be an officer in the naval service of her Majesty not below the rank of lieutenant, one a consular officer, and one a master of a British merchant ship, and the rest shall be either officers in the naval service of her Majesty, masters of British merchant ships or British merchants; and such court may include the naval consular officer summoning the same, but shall not include the master or consignee of the ship to which the parties complaining or complained against may belong; and the naval or consular officer in such court, if there is only one such officer in the court, or if there is more than one, the naval or consular officer who, according to any regulations for settling their respective ranks for the time being in force, is of the highest rank, shall be president of such court (*q*).

General functions and mode of action of such courts.

CCLXII. Every such naval court shall hear and investigate the complaint brought before it, or the cause of the wreck or abandonment (as the case may be), and may for that purpose summon and compel the attendance of parties and witnesses, and administer oaths, and order the production of documents, and shall conduct the investigation in such manner as to give any person against whom any charge is made an opportunity of making a defence.

Powers of such courts:

CCLXIII. Every such naval court may, after hearing the case, exercise the following powers; (that is to say,)

To supersede the master:

(1.) It may, if unanimous that the safety of the ship or crew, or the interest of the owner, absolutely requires it, supersede the master, and may appoint another person to act in his stead; but no such appointment shall be made without the consent of the consignee of the ship, if then at the place:

To discharge a seaman:

(2.) It may discharge any seaman from his ship:

To forfeit wages:

(3.) It may order the wages of any seaman so discharged or any part of such wages to be forfeited, and may direct the same either to be retained by way of compensation to the owner, or to be paid into the receipt of her Majesty's exchequer in the same manner as other penalties and forfeitures under this Act:

To decide disputes as to wages, &c.:

(4.) It may decide any questions as to wages, or fines, or forfeitures, arising between any of the parties to the proceedings:

To direct costs of imprisonment to be paid out of wages:

(5.) It may direct that all or any of the costs incurred by the master or owner of any ship in procuring the imprisonment of any seaman or apprentice in a foreign port, or in his maintenance whilst so imprisoned, shall be paid out of and deducted from the wages of such seaman or apprentice, whether then or subsequently earned:

To send home offenders for trial:

(6.) It may exercise the same powers with regard to persons charged before it with the commission of offences at sea or aboard as are by this Act given to British consular officers:

To order payment of costs, &c.

(7.) It may order the costs of the proceeding before it (if any), or any portion thereof, to be paid by any of the parties thereto, and may order any person making a frivolous or vexatious complaint to pay compensation for any loss or delay caused thereby; and any cost or compensation so ordered shall be paid by such person accordingly, and may be recovered in the same manner in which the wages of seamen are recoverable, or may, if the case admits, be deducted from his wages:

And all orders duly made by any such court under the powers hereby given to it shall in any subsequent legal proceedings be deemed conclusive as to the rights of the parties.

Orders to be entered in official log.

CCLXIV. All orders made by any such naval court shall, whenever practicable, be entered in the official log-book of the ship to which the parties to the proceedings before it belong, and shall be signed by the president of the court.

Report to be made of proceedings of naval courts.

CCLXV. Every such naval court shall make a report to the board of trade, containing the following particulars; (that is to say,)

(*q*) See sect. 8 of 35 & 36 Vict. c. 73, *infra*.

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(1.) A statement of the proceedings, with the order made by the court, and a report of the evidence:

(2.) An account of the wages of any seaman or apprentice who is discharged from his ship by such court:

(3.) If summoned in order to inquire into a case of wreck or abandonment, a statement of the opinion of the court as to the cause of such wreck or abandonment, with such remarks on the conduct of the master and crew as the circumstances require:

And every such report shall be signed by the president of the court; and every document purporting to be such a report and to be so signed as aforesaid shall, if produced out of the custody of some officer of the board of trade, be deemed to be such report, unless the contrary be proved, and shall be received in evidence subject to all just exceptions.

Penalty for preventing complaint or obstructing investigation.

CCLXVI. Any person who wilfully and without due cause prevents or obstructs the making of any such complaint as last aforesaid, or the conduct of any case or investigation by any naval court, shall for each such offence incur a penalty not exceeding fifty pounds, or be liable to imprisonment with or without hard labour for any period not exceeding twelve weeks.

Crimes committed on the High Seas and Abroad.

Crimes committed Abroad.

Offences committed by British seamen at foreign ports to be within admiralty jurisdiction.

CCLXVII. All offences against property or person committed in or at any place either ashore or afloat out of her Majesty's dominions by any master, seaman or apprentice who at the time when the offence is committed is or within three months previously has been employed in any British ship shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively, and be inquired of, heard, tried, determined and adjudged in the same manner and by the same courts and in the same places as if such offences had been committed within the jurisdiction of the admiralty of England; and the costs and expenses of the prosecution of any such offence may be directed to be paid as in the case of costs and expenses of prosecutions for offences committed within the jurisdiction of the admiralty of England.

Conveyance of offenders and witnesses to United Kingdom or some British possession.

CCLXVIII. The following rules shall be observed with respect to offences committed on the high seas or abroad (that is to say):

(1.) Whenever any complaint is made to any British consular officer of any of the offences mentioned in the last preceding section; or of any offence on the high seas having been committed by any master, seaman or apprentice belonging to any British ship, such consular officer may inquire into the case upon oath, and may, if the case so requires, take any steps in his power for the purpose of placing the offender under necessary restraint, and of sending him as soon as practicable in safe custody to the United Kingdom, or to any British possession in which there is a court capable of taking cognisance of the offence, in any ship belonging to her Majesty or to any of her subjects, to be there proceeded against according to law:

(2.) For the purpose aforesaid such consular officer may order the master of any ship belonging to any subject of her Majesty bound to the United Kingdom, or to such British possession as aforesaid, to receive and afford a passage and subsistence during the voyage to any such offender as aforesaid, and to the witnesses, so that such master be not required to receive more than one offender for every one hundred tons of his ship's registered tonnage, or more than one witness for every fifty tons of such tonnage; and such consular officer shall indorse upon the agreement of the ship such particulars with respect to any offenders or witnesses sent in her as the board of trade requires:

(3.) Every such master shall on his ship's arrival in the United Kingdom, or in such British possession as aforesaid, give every offender so committed to his charge into the custody of some police officer or constable, who shall take the offender before a justice of the peace or other magistrate by law empowered to deal with the matter, and such justice or magistrate shall deal with the matter as in cases of offences committed upon the high seas.

And any such master as aforesaid who, when required by any British consular officer to receive and afford a passage and subsistence to any offender

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or witness, does not receive him and afford such passage and subsistence to him, or who does not deliver any offender committed to his charge into the custody of some police officer or constable as hereinbefore directed, shall for each such offence incur a penalty not exceeding fifty pounds, [and the expense of imprisoning any such offender and of conveying him and the witnesses to the United Kingdom or to such British possession as aforesaid in any manner other than in the ship to which they respectively belong, shall be part of the costs of the prosecution, or be paid as costs incurred on account of seafaring subjects of her Majesty left in distress in foreign parts (*r*).]

Inquiry into cause of death on board.

CCLXIX. Whenever any case of death happens on board any foreign-going ship, the shipping master shall on the arrival of such ship at the port where the crew is discharged inquire into the cause of such death, and shall make on the list of the crew delivered to him as herein required an indorsement to the effect either that the statement of the cause of death therein contained is in his opinion true or otherwise, as the result of the inquiry requires; and every such shipping master shall for the purpose of such inquiry have the powers hereby given to inspectors appointed by the board of trade under the first part of this Act; and if in the course of such inquiry it appears to him that any such death as aforesaid has been caused by violence or other improper means, he shall either report the matter to the board of trade, or, if the emergency of the case so require, shall take immediate steps for bringing the offender or offenders to justice.

Depositions to be received in evidence when witness cannot be produced.

CCLXX. Whenever in the course of any legal proceedings instituted in any part of her Majesty's dominions before any judge or magistrate, or before any person authorized by law or by consent of parties to receive evidence, the testimony of any witness is required in relation to the subject-matter of such proceeding, then upon due proof, if such proceeding is instituted in the United Kingdom, that such witness cannot be found in that kingdom, or if in any British possession, that he cannot be found in the same possession, any deposition that such witness may have previously made on oath in relation to the same subject-matter before any justice or magistrate in her Majesty's dominions, or any British consular officer elsewhere, shall be admissible in evidence, subject to the following restrictions; (that is to say,)

(1.) If such deposition was made in the United Kingdom, it shall not be admissible in any proceeding instituted in the United Kingdom:

(2.) If such a deposition was made in any British possession, it shall not be admissible in any proceeding instituted in the same British possession:

(3.) If the proceeding is criminal it shall not be admissible, unless it was made in the presence of the person accused:

Every deposition so made as aforesaid shall be authenticated by the signature of the judge, magistrate or consular officer before whom the same is made: and such judge, magistrate or consular officer shall, when the same is taken in a criminal matter, certify if the fact is so, and that the accused was present at the taking thereof, but it shall not be necessary in any case to prove the signature or official character of the person appearing to have signed any such deposition; and in any criminal proceeding such certificate as aforesaid shall, unless the contrary is proved, be sufficient evidence of the accused having been present in manner thereby certified; but nothing herein contained shall affect any case in which depositions taken in any proceeding are rendered admissible in evidence by any Act of Parliament, or by any Act or ordinance of the legislature of any colony, so far as regards such colony, or to interfere with the power of any colonial legislature to make such depositions admissible in evidence, or to interfere with the practice of any court in which depositions not authenticated as hereinbefore mentioned are admissible.

Registration and Returns respecting Seamen.

Registration of and Returns respecting Seamen.

Establishment of register office.

CCLXXI. There shall be in the port of London an office, to be called the "General Register and Record Office of Seamen," and the board of trade shall have control over the same, and may appoint and from time to time remove a registrar-general, and such assistants, clerks and servants as

(*r*) Words within brackets repealed by 45 & 46 Vict. c. 55, s. 10.

may be necessary, and may from time to time, with the consent of the treasury, regulate their salaries and allowances; and such salaries and allowances, and all other necessary expenses, shall be paid by the treasury out of any monies to be granted by Parliament for that purpose; and the board of trade may direct the business of the register office at any of the outports to be transacted at the shipping office, or with the consent of the commissioners of customs at the custom house of the port, and may appoint the shipping master, or with such consent as aforesaid some officer of customs to conduct the same; and such business shall thereupon be conducted accordingly, but shall in all cases be subject to the immediate control of the board of trade.

Register of seamen to be kept.

CCLXXII. The said registrar-general of seamen shall by means of the agreements, lists and other papers to be transmitted to him as herein directed, or by such other means as are in his power, keep a register of all persons who serve in ships subject to the provisions of this Act.

Lists to be made for all ships containing certain particulars.

CCLXXIII. Every master of every foreign-going ship of which the crew is discharged in the United Kingdom, in whatever part of her Majesty's dominions the same is registered, and of every home trade ship, shall make out and sign a list in a form sanctioned by the board of trade, containing the following particulars; (that is to say,)

(1.) The number and date of the ship's register and her registered tonnage:
(2.) The length and general nature of the voyage or employment:
(3.) The christian names, surnames, ages and places of birth of all the crew, including the master and apprentices; their qualities on board, their last ships or other employments, and the dates and places of their joining the ship:
(4.) The names of any members of the crew who have died or otherwise ceased to belong to the ship, with the times, places, causes and circumstances thereof:
(5.) The names of any members of the crew who have been maimed or hurt, with the times, places, causes and circumstances thereof:
(6.) The wages due to any of the crew who have died, at the times of their respective deaths:
(7.) The clothes and other effects belonging to any of the crew who have died, with a statement of the manner in which they have been dealt with, and the money for which any of them have been sold:
(8.) The name, age and sex of every person, not being one of the crew, who dies on board, with the date and the cause thereof (*s*):
(9.) Every birth which happens on board, with the date thereof, the sex of the infant, and the names of the parents (*s*):
(10.) Every marriage which takes place on board, with the date thereof, and the names and ages of the parties.

Lists for foreign going ships to be delivered to shipping master on arrival.

CCLXXIV. In the case of foreign-going ships the master shall, within forty-eight hours after the ship's arrival at her final port of destination in the United Kingdom, or upon the discharge of the crew, which ever first happens, deliver to the shipping master before whom the crew is discharged such list as hereinbefore required, and if he faile so to do shall for every default incur a penalty not exceeding five pounds; and such shipping master shall thereupon give to the master a certificate of such delivery; and no officer of customs shall clear inwards any foreign-going ship without the production of such certificate, and any such officer may detain any such ship until the same is produced.

Lists to be delivered by home trade ships half-yearly.

CCLXXV. The master or owner of every home trade ship shall, within twenty-one days after the thirtieth day of June and the thirty-first day of December in every year, transmit or deliver to some shipping master in the United Kingdom such list as hereinbefore required for the preceding half-year, and shall in default incur a penalty not exceeding five pounds; and such shipping master shall give to the master or owner a certificate of such transmission or delivery; and no officer of customs shall grant a clearance or transire for any home trade ship without the production of such certificate, and any such officer may detain any such ship until the same is produced.

Lists to be sent home in case of transfer of ship,

CCLXXVI. If any ship ceases by reason of transfer of ownership or change of employment to fall within the definition of a foreign-going or of a

(*s*) See 37 & 38 Vict. c. 88, s. 54.

III. *Registration and Returns respecting Seamen.*

home trade ship, the master or owner thereof shall, if such ship is then in the United Kingdom, within one month, and if she is elsewhere, within six months, deliver or transmit to the shipping master at the port to which the ship has belonged such list as hereinbefore mentioned, duly made out to the time at which she ceased to be a foreign-going or home trade ship, and in default shall for each offence incur a penalty not exceeding ten pounds; and if any ship is lost or abandoned, the master or owner thereof shall, if practicable and as soon as possible, deliver or transmit to the shipping master at the port to which the ship belonged such list as hereinbefore mentioned duly made out to the time of such loss or abandonment, and in default shall for each offence incur a penalty not exceeding ten pounds.

and in case of loss.

Shipping masters and other officers to transmit documents to registrar.

CCLXXVII. All shipping masters and officers of customs shall take charge of all documents which are delivered or transmitted to or retained by them in pursuance of this Act, and shall keep them for such time (if any) as may be necessary for the purpose of settling any business arising at the place where such documents come into their hands, or for any other proper purpose, and shall, if required, produce them for any of such purposes, and shall then transmit them to the registrar-general of seamen, to be by him recorded and preserved (*t*); and the said registrar shall, on payment of a moderate fee to be fixed by the board of trade, or without payment of any fee if the board of trade so directs, allow any person to inspect the same; and in cases in which the production of the original of any such document in any court of justice or elsewhere is essential, shall produce the same, and in other cases shall make and deliver to any person requiring it a certified copy of any such document or of any part thereof; and every copy purporting to be so made and certified shall be received in evidence, and shall have all the effect of the original of which it purports to be a copy.

Registrar to permit inspection, to produce originals and give copies.

Officers of customs to make returns of ships to registrar.

CCLXXVIII. The collector or comptroller of customs at every port in the United Kingdom shall on or before the first day of February and the first day of August in every year transmit to the registrar-general of seamen a list of all ships registered in such port, and also of all ships whose registers have been transferred or cancelled in such port since the last preceding return.

Agreements, indentures, and assignments, on arrival at a foreign port, to be deposited with the consul, and at a colony with the officers of customs.

CCLXXIX. The following rules shall be observed with respect to the delivery of documents to British consular officers; (that is to say,)

(1.) Whenever any ship, in whatever part of her Majesty's dominions the same is registered (except ships whose business for the time being is to carry passengers), arrives at any foreign port where there is a British consular officer, or at any port in any British possession abroad, and remains thereat for forty-eight hours, the master shall, within forty-eight hours of the ship's arrival, deliver to such consular officer, or to the chief officer of customs (as the case may be), the agreement with the crew, and also all indentures and assignments of apprenticeships, or in the case of a ship belonging to a British possession, such of the said documents as such ship is provided with:

(2.) Such officer shall keep such documents during the ship's stay in such port, and, in cases where any indorsements upon the agreement are hereby required, shall duly make the same, and shall return the said documents to the master a reasonable time before his departure, with a certificate indorsed on the agreement, stating when the same were respectively delivered and returned:

(3.) If it appears that the required forms have been neglected, or that the existing laws have been transgressed, such officer shall make an indorsement to that effect on the agreement, and forthwith transmit a copy of such indorsement, with the fullest information he can collect regarding such neglect or transgression, to the registrar-general of seamen:

And if any master fails to deliver any such document as aforesaid he shall for every such default incur a penalty not exceeding twenty pounds; and in any prosecution for such penalty it shall lie upon the master either to produce the certificate of the consular officer or officer of customs hereinbefore required, or to prove that he duly obtained the same, or that it was impracticable for him so to do.

(*t*) See 50 & 51 Vict. c. 62, s. 4.

Official Logs.

III. *Official Logs.*

CCLXXX. The board of trade shall sanction forms of official log books which may be different for different classes of ships, so that each such form contains blanks for the entries hereinafter required; and an official log of every ship (except ships employed exclusively in trading between ports on the coasts of the United Kingdom) shall be kept in the appropriate sanctioned form; and such official log may, at the discretion of the master or owner, either be kept distinct from the ordinary ship's log or united therewith, so that in all cases all the blanks in the official log be duly filled up. Official logs to be kept in forms sanctioned by board of trade.

CCLXXXI. Every entry in every official log shall be made as soon as possible after the occurrence to which it relates, and if not made on the same day as the occurrence to which it relates, shall be made and dated so as to show the date of the occurrence and of the entry respecting it; and in no case shall any entry therein in respect of any occurrence happening previously to the arrival of the ship at her final port of discharge be made more than twenty-four hours after such arrival. Entries to be made in due time.

CCLXXXII. Every master of a ship for which an official log book is hereby required shall make or cause to be made therein entries of the following matters; (that is to say,) Entries required in official log.

(1.) Every legal conviction of any member of his crew and the punishment inflicted: Convictions.

(2.) Every offence committed by any member of his crew for which it is intended to prosecute, or to enforce a forfeiture, or to exact a fine, together with such statement concerning the reading over such entry, and concerning the reply (if any) made to the charge, as hereinbefore required (*u*): Offences.

(3.) Every offence for which punishment is inflicted on board, and the punishment inflicted. Punishments.

(4.) A statement of the conduct, character, and qualifications of each of his crew, or a statement that he declines to give an opinion on such particulars: Conduct, &c., of crew.

(5.) Every case of illness or injury happening to any member of the crew, with the nature thereof, and the medical treatment adopted (if any): Illnesses and injuries.

(6.) Every case of death happening on board, and of the cause thereof (*v*): Deaths.

(7.) Every birth happening on board, with the sex of the infant and the names of the parents (*v*): Births.

(8.) Every marriage taking place on board, with the names and ages of the parties: Marriages.

(9.) The name of every seaman or apprentice who ceases to be a member of the crew, otherwise than by death, with the place, time, manner and cause thereof: Quitting ship.

(10.) The amount of wages due to any seaman who enters her Majesty's service during the voyage: Wages of men entering navy.

(11.) The wages due to any seaman or apprentice who dies during the voyage, and the gross amount of all deductions to be made therefrom: Wages of deceased seamen.

(12.) The sale of the effects of any seaman or apprentice who dies during the voyage, including a statement of each article sold, and of the sum received for it: Sale of deceased men's effects.

(13.) Every collision with any other ship, and the circumstances under which the same occurred. Collisions.

CCLXXXIII. The entries hereby required to be made in official log books shall be signed as follows; that is to say, every such entry shall be signed by the master and by the mate or some other of the crew, and every entry of illness, injury or death shall be also signed by the surgeon or medical practitioner on board (if any); and every entry of wages due to or of the sale of the effects of, any seaman or apprentice who dies shall be signed by the master and by the mate and some other member of the crew; and every entry of wages due to any seaman who enters her Majesty's service shall be signed Entries, how to be signed.

(*u*) See sect. 244, *supra*, p. 877. (*v*) See 37 & 38 Vict. c. 88, s. 54.

III. *Official Logs.*

by the master, and by the seaman or by the officer authorized to receive the seaman into such service.

Penalties in respect of official logs.

CCLXXXIV. The following offences in respect of official log books shall be punishable as hereinafter mentioned; (that is to say,)

(1.) If in any case an official log book is not kept in the manner hereby required, or if any entry hereby directed to be made in any such log book is not made at the time and in the manner hereby directed, the master shall for each such offence incur the specific penalty herein mentioned in respect thereof, or where there is no such specific penalty, a penalty not exceeding five pounds:

(2.) Every person who makes or procures to be made or assists in making any entry in any official log book in respect of any occurrence happening previously to the arrival of the ship at her final port of discharge more than twenty-four hours after such arrival, shall for each such offence incur a penalty not exceeding thirty pounds:

(3.) Every person who wilfully destroys or mutilates or renders illegible any entry in any official log book, or who wilfully makes or procures to be made or assists in making any false or fraudulent entry or omission in any such log book, shall for each such offence be deemed guilty of a misdemeanor.

Entries in official logs to be received in evidence.

CCLXXXV. All entries made in any official log book as hereinbefore directed shall be received in evidence in any proceeding in any court of justice, subject to all just exceptions.

Official logs to be delivered to shipping master.

CCLXXXVI. In the case of foreign-going ships the master shall, within forty-eight hours after the ship's arrival at her final port of destination in the United Kingdom or upon the discharge of the crew, whichever first happens, deliver to the shipping master before whom the crew is discharged the official log book of the voyage; and the master or owner of every home trade ship, not exclusively employed in trading between ports on the coasts in the United Kingdom, shall within twenty-one days after the thirtieth day of June and the thirty-first day of December in every year transmit or deliver to some shipping master in the United Kingdom the official log book for the preceding half-year; and every master or owner who refuses or neglects to deliver his official log book as hereby required, shall be subject to the same consequences and liabilities to which he is hereby made subject for the non-delivery of the list of his crew hereinbefore mentioned.

Official logs to be sent home in case of transfer of ship, and in case of loss.

CCLXXXVII. If any ship ceases by reason of transfer of ownership or change of employment to fall within the definition of a foreign-going or of a home trade ship, the master or owner thereof shall, if such ship is then in the United Kingdom, within one month, and if she is elsewhere within six months, deliver or transmit to the shipping master at the port to which the ship belonged the official log book (if any) duly made out to the time at which she ceased to be a foreign-going or home trade ship, and in default shall for each offence incur a penalty not exceeding ten pounds; and if any ship is lost or abandoned, the master or owner thereof shall, if practicable, and as soon as possible, deliver or transmit to the shipping master at the port to which the ship belonged the official log book (if any) duly made out to the time of such loss or abandonment, and in default shall for each offence incur a penalty not exceeding ten pounds.

East Indies and Colonies.

East Indies and Colonies.

Provisions of Act, as applied by East Indian and colonial governments to their own ships may be enforced throughout the empire.

CCLXXXVIII. If the governor-general of India in council, or the respective legislative authorities in any British possession abroad, by any acts, ordinances or other appropriate legal means, apply or adapt any of the provisions in the Third Part of this Act contained to any British ships registered at, trading with, or being at any place within their respective jurisdictions, and to the owners, masters, mates and crews thereof, such provisions, when so applied and adapted as aforesaid, and as long as they remain in force, shall in respect of the ships and persons to which the same are applied be enforced, and penalties and punishments for the breach thereof shall be recovered and inflicted, throughout her Majesty's dominions, in the same manner as if such provisions had been hereby so adopted and applied, and such penalties and punishments had been hereby expressly imposed.

III. *East Indies and Colonies.*

East Indian and colonial Acts to be subject to disallowance, and require sanction as in other cases.

CCLXXXIX. Every act, ordinance or other form of law to be passed or promulgated by the governor-general of India in council, or by any other legislative authority in pursuance of this Act, shall respectively be subject to the same right of disallowance or repeal, and require the same sanction or other acts and formalities, and be subject to the same conditions in all respects as exist and are required in order to the validity of any other act, ordinance or other form of law passed by such governor-general in council or other legislative authority respectively.

Conflict of laws.

CCXC. If in any matter relating to any ship or to any person belonging to any ship there appears to be a conflict of laws, then, if there is in the Third Part of this Act any provision on the subject which is hereby expressly made to extend to such ship, the case shall be governed by such provision, and if there is no such provision, the case shall be governed by the law of the place in which such ship is registered.

PART IV.

SAFETY AND PREVENTION OF ACCIDENTS.

Sects. CCXCI. to CCCXXIX.

PART V.

PILOTAGE (*x*).

Sects. CCCXXX. to CCCLXXXVII.

V. *Saving of Owners' and Masters' Rights.*

Saving of Owners' and Masters' Rights.

Limitation of liability of owner where pilotage is compulsory.

CCCLXXXVIII. No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law.

PART VI.

LIGHTHOUSES.

Sects. CCCLXXXIX. to CCCCXVI.

PART VII.

MERCANTILE MARINE FUND.

Sects. CCCCXVII. to CCCCXXXI.

(*x*) See the Merchant Shipping (Pilotage) Act, 1889 (52 & 53 Vict. c. 68).

PART VIII.

Wrecks, Casualties and Salvage (y).

VIII. *Inquiries into Wrecks.*

Inquiries into Wrecks.

Inquiries to be instituted in cases of wreck and casualty (z).

CCCCXXXII. In any of the cases following; (that is to say,)

Whenever any ship is lost, abandoned or materially damaged on or near the coasts of the United Kingdom;

Whenever any ship causes loss or material damage to any other ship on or near such coasts;

Whenever by reason of any casualty happening to or on board of any ship on or near such coasts loss of life ensues;

Whenever any such loss, abandonment, damage or casualty happens elsewhere, and any competent witnesses thereof arrive or are found at any place in the United Kingdom:

It shall be lawful for the inspecting officer of the coast guard or the principal officer of customs residing at or near the place where such loss, abandonment, damage or casualty occurred, if the same occurred on or near the coasts of the United Kingdom, but if elsewhere, at or near the place where such witnesses as aforesaid arrive or are found or can be conveniently examined, or for any other person appointed for the purpose by the board of trade to make inquiry respecting such loss, abandonment, damage or casualty; and he shall for that purpose have all the powers given by the First Part of this Act to inspectors appointed by the said board.

Formal investigation before justices.

CCCCXXXIII. If it appears to such officer or person as aforesaid, either upon or without any such preliminary inquiry as aforesaid, that a formal investigation is requisite or expedient, or if the board of trade so directs, he shall apply to any two justices or to a stipendiary magistrate to hear the case; and such justices or magistrates shall thereupon proceed to hear and try the same, and shall for that purpose, so far as relates to the summoning of parties, compelling the attendance of witnesses and the regulation of the proceedings, have the same powers as if the same were a proceeding relating to an offence or cause of complaint upon which they or he have power to make a summary conviction or order, or as near thereto as circumstances permit, and it shall be the duty of such officer or person as aforesaid to superintend the management of the case, and to render such assistance to the said justices or magistrate as is in his power; and, upon the conclusion of the case, the said justices or magistrate shall send a report to the board of trade, containing a full statement of the case and of their or his opinion thereon, accompanied by such report of or extracts from the evidence, and such observations (if any) as they or he may think fit.

CCCCXXXIV. Repealed by 39 & 40 Vict. c. 80, s. 45.

Stipendiary magistrate to be the magistrate who is member of local marine board, and to be paid.

CCCCXXXV. In places where there is a local marine board, and where a stipendiary magistrate is a member of such board, all such investigations as aforesaid shall, whenever he happens to be present, be made before such magistrate; and there shall be paid to such magistrate in respect of his services under this Act, such remuneration, whether by way of annual increase of salary or otherwise as her Majesty's secretary of state for the home department, with the consent of the board of trade, may direct; and such remuneration shall be paid out of the mercantile marine fund.

Costs of such investigations.

CCCCXXXVI. The said justices or magistrate may make such order with respect to the costs of any such investigation or any portion thereof as they or he may deem just, and such costs shall be paid accordingly, and shall be recoverable in the same manner as other costs incurred in summary proceedings before them or him; and the board of trade may, if in any case it thinks fit so to do, pay the expense of any such investigation, and may pay to such assessor as aforesaid such remuneration as it thinks fit.

Investigations in Scotland.

CCCCXXXVII. In the case of any such investigation as aforesaid to be held in Scotland, the board of trade may, if it so think fit, remit the same to the lord advocate, to be prosecuted in such manner as he may direct [and in

(y) See 18 & 19 Vict. c. 91, ss. 19, 20, and 39 & 40 Vict. c. 80, s. 29, *infra*.

(z) See 39 & 40 Vict. c. 80, s. 29, *infra*.

case he so requires, with the assistance of such person of nautical skill and knowledge as the board of trade may appoint for the purpose] (a).

VIII. *Inquiries into Wrecks.*

Master or mate may be required to deliver certificates to be held until close of inquiry.

CCCCXXXVIII. Such justices or magistrate as aforesaid may, or in Scotland such person or persons as is or are directed by the lord advocate to conduct the investigation may, if they or he think fit, require any master or mate possessing a certificate of competency or service whose conduct is called in question or appears to them or him likely to be called in question in the course of such investigation, to deliver such certificate to them or him, and they or he shall hold the certificate so delivered until the conclusion of the investigation, and shall then either return the same to such master or mate, or, if their report is such as to enable the board of trade to cancel or suspend such certificate under the powers given to such board by the Third Part of this Act, shall forward the same to the board of trade, to be dealt with as such board thinks fit; and if any master or mate fails so to deliver his certificate when so required, he shall incur a penalty not exceeding fifty pounds.

Appointment and Duties of Receivers.

Appointment and Duties of Receivers.

Board of trade superintendents of wreck, with power to appoint receivers.

CCCCXXXIX. The board of trade shall throughout the United Kingdom have the general superintendence of all matters relating to wreck; and it may, with the consent of the commissioners of her Majesty's treasury, appoint any officer of customs or of the coast guard, or any officer of inland revenue, or when it appears to such board to be more convenient, any other person to be a receiver of wreck in any district, and to perform such duties as are hereinafter mentioned, and shall give due notice of every such appointment.

Admiral not to interfere with wreck.

CCCCXL. No admiral, vice-admiral, or other person, under whatever denomination, exercising admiralty jurisdiction, shall as such, by himself, or his agents, receive, take, or interfere with any wreck except as hereinafter mentioned.

Duty of receiver whenever any ship is stranded or in distress.

CCCCXLI. Whenever any ship or boat is stranded or in distress at any place on the shore of the sea or of any tidal water within the limits of the United Kingdom, the receiver of the district within which such place is situate shall, upon being made acquainted with such accident, forthwith proceed to such place, and upon his arrival there he shall take the command of all persons present, and assign such duties to each person, and issue such directions, as he may think fit with a view to the preservation of such ship or boat, and the lives of the persons belonging thereto, and the cargo and apparel thereof; and if any person wilfully disobeys such directions he shall forfeit a sum not exceeding fifty pounds; but it shall not be lawful for such receiver to interfere between the master of such ship or boat and his crew in matters relating to the management thereof, unless he is requested so to do by such master.

Powers of receiver in case of such accident to any ship or boat.

CCCCXLII. The receiver may, with a view to such preservation as aforesaid of the ship or boat, persons, cargo and apparel, do the following things; (that is to say,)

(1.) Summon such number of men as he thinks necessary to assist him:

(2.) Require the master or other person having the charge of any ship or boat near at hand to give such aid with his men, ship or boats as may be in his power:

(3.) Demand the use of any waggon, cart or horses that may be near at hand:

And any person refusing without reasonable cause to comply with any summons, requisition or demand so made as aforesaid, shall for every such refusal incur a penalty not exceeding one hundred pounds; but no person shall be liable to pay any duty of assessed taxes in respect of any such waggon, cart or horses, by reason of the user of the same under this section.

All articles washed on shore or lost, or taken from any ship or boat, to be delivered to the receiver.

CCCCXLIII. All cargo and other articles belonging to such ship or boat as aforesaid as may be washed on shore, or otherwise be lost or taken from such ship or boat, shall be delivered to the receiver; and any person, whether he is the owner or not, who secretes or keeps possession of any such cargo or article, or refuses to deliver the same to the receiver or to any person authorised by him to demand the same, shall incur a penalty not

(a) Words within brackets repealed by 39 & 40 Vict. c. 80, s. 45.

VIII. *Appointment and Duties of Receivers.*

exceeding one hundred pounds; and it shall be lawful for such receiver or other person as aforesaid to take such cargo or article by force from the person so refusing to deliver the same.

Power of receiver to suppress plunder and disorder by force.

CCCCXLIV. Whenever any accident as aforesaid occurs to any ship or boat, and any person plunders, creates disorder or obstructs the preservation of such ship, boat, lives or cargo as aforesaid, it shall be lawful for the receiver to cause such person to be apprehended, and to use force for the suppression of any such plundering, disorder or obstruction as aforesaid, with power to command all her Majesty's subjects to assist him in the use of such force; and if any person is killed, maimed or hurt by reason of his resisting the receiver in the execution of the duties hereby committed to him, or any person acting under his orders, such receiver or any other person shall be free and fully indemnified as well against the Queen's Majesty, her heirs and successors, as against all persons so killed, maimed or hurt.

Certain officers to exercise powers of receiver in his absence.

CCCCXLV. During the absence of the receiver from the place where any such accident as aforesaid occurs, or in places where no receiver has been appointed under this Act, the following officers in succession, each in the absence of the other, in the order in which they are named, that is to say, any principal officer of customs or of the coast guard, or officer of inland revenue, and also any sheriff, justice of the peace, commissioned officer on full pay in the naval service of her Majesty, or commissioned officer on full pay in the military service of her Majesty, may do all matters and things hereby authorised to be done by the receiver, with this exception, that with respect to any goods or articles belonging to any such ship or boat, the delivery up of which to the receiver is hereinbefore required, any officer so acting shall be considered as the agent of the receiver, and shall place the same in the custody of the receiver, and no person so acting as substitute for any receiver shall be entitled to any fees payable to receivers, or be deprived by reason of his so acting of any right to salvage to which he would otherwise be entitled.

Power in case of a ship being in distress to pass over adjoining lands with carriages.

CCCCXLVI. Whenever any such accident as aforesaid occurs to any ship or boat, all persons may, for the purpose of rendering assistance to such ship or boat, or saving the lives of the persons on board the same, or the cargo or apparel thereof, unless there is some public road equally convenient, pass and repass either with or without carriages or horses over any adjoining lands, without being subject to interruption by the owner or occupier, so that they do as little damage as possible, and may also, on the like condition, deposit on such lands any cargo or other article recovered from such ship or boat; and all damage that may be sustained by any owner or occupier in consequence of any such passing or repassing or deposit as aforesaid shall be a charge on the ship, boat, cargo or articles in respect of or by which such damage was occasioned, and shall, in default of payment, be recoverable in the same manner as salvage is hereby made recoverable; and the amount payable in respect thereof, if disputed, shall be determined in the same manner as the amount of salvage is hereby in case of dispute directed to be determined.

Penalty on owners and occupiers of land refusing to allow carriages, &c., to pass over their land.

CCCCXLVII. If the owner or occupier of any land over which any person is hereby authorised to pass or repass, for any of the purposes hereinbefore mentioned does any of the following things; (that is to say,)

(1.) Impedes or hinders any such person from so passing or repassing, with or without carriages, horses and servants, by locking his gates, refusing upon request to open the same or otherwise however:

(2.) Impedes or hinders the deposit of any cargo or other article recovered from any such ship or boat, as hereinbefore mentioned:

(3.) Prevents such cargo or other article from remaining so deposited for a reasonable time, until the same can be removed to a safe place of public deposit:

he shall for every such offence incur a penalty not exceeding one hundred pounds.

Power of receiver to institute examination with respect to ships in distress (*b*).

CCCCXLVIII. Any receiver, or in his absence any justice of the peace, shall, as soon as conveniently may be, examine upon oath (which oath they are hereby respectively empowered to administer) any person belonging to any ship which may be or may have been in distress on the coasts of the

(*b*) 39 & 40 Vict. c. 80, ss. 31, 32, 33, *infra*.

United Kingdom, or any other person who may be able to give any account thereof, or of the cargo or stores thereof, as to the following matters; (that is to say,)

(1.) The name and description of the ship:
(2.) The name of the master and of the owners:
(3.) The names of the owners of the cargo:
(4.) The ports or places from and to which the ship was bound:
(5.) The occasion of the distress of the ship:
(6.) The services rendered:
(7.) Such other matters or circumstances relating to such ship, or to the cargo on board the same, as the receiver or justice thinks necessary;

and such receiver or justice shall take the examination down in writing, and shall make two copies of the same, of which he shall send one to the board of trade, and the other to the secretary of the committee for managing the affairs of Lloyd's in London, and such last-mentioned copy shall be placed by the said secretary in some conspicuous situation for the inspection of persons desirous of examining the same; and for the purposes of such examination every such receiver or justice as aforesaid shall have all the powers given by the First Part of this Act to inspectors appointed by the board of trade.

CCCCXLIX. Repealed by 39 & 40 Vict. c. 80.

Rules to be observed by persons finding wreck.

CCCCL. The following rules shall be observed by any person finding or taking possession of wreck within the United Kingdom; (that is to say,)

(1.) If the person so finding or taking possession of the same is the owner, he shall as soon as possible give notice to the receiver of the district within which such wreck is found, stating that he had so found or taken possession of the same; and he shall describe in such notice the marks by which such wreck is distinguished:
(2.) If any person not being the owner finds or takes possession of any wreck, he shall as soon as possible deliver the same to such receiver as aforesaid:

and any person making default in obeying the provisions of this section shall incur the following penalties; (that is to say,)

(3.) If he is the owner, and makes default in performing the several things the performance of which is hereby imposed on an owner, he shall incur a penalty not exceeding one hundred pounds:
(4.) If he is not the owner, and makes default in performing the several things, the performance of which is hereby imposed on any person not being an owner,

He shall forfeit all claim to salvage;

He shall pay to the owner of such wreck, if the same is claimed, but if the same is unclaimed then to the person entitled to such unclaimed wreck, double the value of such wreck (such value to be recovered in the same way as a penalty of like amount); and

He shall incur a penalty not exceeding one hundred pounds.

Power for receivers to seize concealed wreck.

CCCCLI. If any receiver suspects or receives information that any wreck is secreted, or in the possession of some person who is not the owner thereof, or otherwise improperly dealt with, he may apply to any justice of the peace for a warrant, and such justice shall have power to grant a warrant, by virtue whereof it shall be lawful for the receiver to enter into any house or other place wherever situate, and also into any ship or boat, and to search for, and to seize and detain any such wreck as aforesaid there found; and if any such seizure is made in consequence of information that may have been given by any person to the receiver, the informer shall be entitled by way of salvage to such sum not exceeding in any case five pounds as the receiver may allow.

Notice of wreck to be given by receiver.

CCCCLII. Every receiver shall within forty-eight hours after taking possession of any wreck cause to be posted up in the custom-house of the port nearest to the place where such wreck was found or seized a description of the same and of any marks by which it is distinguished, and shall also, if the value of such wreck exceeds twenty pounds, but not otherwise, transmit a similar description to the secretary of the committee of Lloyd's aforesaid; and such secretary shall post up the description so sent, or a copy thereof, in some conspicuous place, for the inspection of all persons desirous of examining the same.

VIII. *Appointment and Duties of Receivers.*

Goods deemed perishable or of small value may be sold immediately.

CCCCLIII. In cases where any wreck in the custody of any receiver is under the value of five pounds, or is of so perishable a nature or so much damaged that the same cannot, in his opinion, be advantageously kept, or if the value thereof is not sufficient to defray the charge of warehousing, the receiver may sell the same before the expiration of the period hereinafter mentioned, and the money raised by such sale, after defraying the expenses thereof, shall be held by the receiver for the same purposes and subject to the same claims for and to which the article sold would have been held and liable if it had remained unsold.

In cases where any lord of the manor or other person is entitled to unclaimed wreck, receiver to give notice to him.

CCCCLIV. In cases where any admiral, vice-admiral, lord of the manor or other person is entitled for his own use to unclaimed wreck found on any place situate within a district for which a receiver is appointed, such admiral, vice-admiral, lord of the manor, or other person shall deliver to such receiver a statement containing the particulars of his title, and the address to which notices are to be sent; and upon such statement being so delivered, and proof made to the satisfaction of the receiver of the validity of such title, it shall be his duty, whenever he takes possession of any wreck found at any such place, to send within forty-eight hours thereafter a description of the same and of any marks by which it is distinguished, directed to such address as aforesaid.

Payments to be made to receiver.

CCCCLV. There shall be paid to all receivers appointed under this Act the expenses properly incurred by them in the performance of their duties, and also in respect of the several matters specified in the table marked (V) in the Schedule hereto, such fees, not exceeding the amounts therein mentioned, as may from time to time be directed by the board of trade; and the receiver shall have the same lien, and be entitled to the same remedies for the recovery of such expenses and fees as a salvor has or is entitled to in respect of salvage due to him; but, save as aforesaid, no receiver appointed under this Act shall, as such, be entitled to any remuneration whatsoever.

Disputes as to sums payable to receiver to be determined by board of trade.

CCCCLVI. Whenever any dispute arises in any part of the United Kingdom as to the amount payable to any receiver in respect of expenses or fees, such dispute shall be determined by the board of trade, whose decision shall be final.

Application of fees.

CCCCLVII. All fees received by any receiver appointed under this Act, in respect of any services performed by him as receiver, shall be carried to and form part of the mercantile marine fund, and a separate account thereof shall be kept, and the moneys arising therefrom shall be applied in defraying any expenses duly incurred in carrying into effect the purposes of the Eighth Part of this Act, in such manner as the board of trade directs.

Salvage in the United Kingdom.

Salvage in the United Kingdom (c).

Salvage in respect of services rendered in the United Kingdom.

CCCCLVIII. In the following cases (that is to say,)

Whenever any ship or boat is stranded or otherwise in distress on the shore of any sea or tidal water situate within the limits of the United Kingdom, and services are rendered by any person,

(1.) In assisting such ship or boat:

(2.) In saving the lives of the persons belonging to such ship or boat:

(3.) In saving the cargo or apparel of such ship or boat, or any portion thereof:

And whenever any wreck is saved by any person other than a receiver within the United Kingdom;

There shall be payable by the owners of such ship or boat, cargo, apparel or wreck, to the person by whom such services or any of them are rendered or by whom such wreck is saved, a reasonable amount of salvage, together with all expenses properly incurred by him in the performance of such services or the saving of such wreck, the amount of such salvage and expense (which expenses are hereinafter included under the term salvage) to be determined in case of dispute in manner hereinafter mentioned.

Salvage for life may be paid by board of trade out of mercantile marine fund.

CCCCLIX. Salvage in respect of the preservation of the life or lives of any person or persons belonging to any such ship or boat as aforesaid shall be payable by the owners of the ship or boat in priority to all other claims for salvage; and in cases where such ship or boat is destroyed, or where the value thereof is insufficient, after payment of the actual expenses incurred,

(c) See 18 & 19 Vict. c. 91, s. 20, *infra*.

to pay the amount of salvage due in respect of any life or lives, the board of trade may in its discretion award to the salvors of such life or lives, out of the mercantile marine fund, such sum or sums as it deems fit, in whole or part satisfaction of any amount of salvage so left unpaid in respect of such life or lives.

Disputes as to salvage, how to be settled.

CCCCLX. Disputes with respect to salvage arising within the boundaries of the cinque ports shall be determined in the manner in which the same have hitherto been determined; but whenever any dispute arises elsewhere in the United Kingdom between the owners of any such ship, boat, cargo, apparel or wreck as aforesaid, and the salvors, as to the amount of salvage, and the parties to the dispute cannot agree as to the settlement thereof by arbitration or otherwise,

Then, if the sum claimed does not exceed two hundred pounds (*d*),

Such dispute shall be referred to the arbitration of any two justices of the peace resident as follows; (that is to say,)

In case of wreck, resident at or near the place where such wreck is found:

In case of services rendered to any ship or boat, or to the persons, cargo or apparel belonging thereto, resident at or near the place where such ship or boat is lying, or at or near the first port or place in the United Kingdom into which such ship or boat is brought after the occurrence of the accident by reason whereof the claim to salvage arises:

But if the sum claimed exceeds two hundred pounds (*d*),

Such dispute may, with the consent of the parties, be referred to the arbitration of such justices as aforesaid, but if they do not consent shall in England be decided by the high court of admiralty of England, in Ireland by the high court of admiralty of Ireland (*e*), and in Scotland by the court of session; subject to this proviso, that if the claimants in such dispute do not recover in such court of admiralty or court of session a greater sum than two hundred pounds, they shall not, unless the court certifies that the case is a fit one to be tried in a superior court, recover any costs, charges or expenses incurred by them in the prosecution of their claim (*f*):

And every dispute with respect to salvage may be heard and adjudicated upon on the application either of the salvor or of the owner of the property salved, or of their respective agents.

Manner in which justices may decide disputes.

CCCCLXI. Whenever in pursuance of this Act any dispute as to salvage is referred to the arbitration of two justices, they may either themselves determine the same, with power to call to their assistance any person conversant with maritime affairs as assessor, or they may, if a difference of opinion arises between them, or without such difference if they think fit, appoint some person conversant with maritime affairs as umpire to decide the point in dispute; and such justices or their umpire shall make an award as to the amount of salvage payable, within the following times, that is to say, the said justices within forty-eight hours after such dispute has been referred to them, and the said umpire within forty-eight hours after his appointment, with power nevertheless for such justice or umpire by writing under their or his hands or hand to extend the time within which they and he are hereby respectively directed to make their or his award.

Costs of arbitration.

CCCCLXII. There shall be paid to every assessor and umpire who may be so appointed as aforesaid in respect of his services such sum not exceeding five pounds as the board of trade may from time to time direct; and all the costs of such arbitration, including any such payments as aforesaid, shall be paid by the parties to the dispute, in such manner and in such shares and proportions as the said justices or as the said umpire may direct by their or his award.

Justices may call for documents and administer oaths.

CCCCLXIII. The said justices or their umpire may call for the production of any documents in the possession or power of either party, which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose.

(*d*) But see now 25 & 26 Vict. c. 63, s. 49, *infra*.

(*e*) 30 & 31 Vict. c. 114, s. 27.

(*f*) 31 & 32 Vict. c. 71, s. 3.

VIII. *Salvage in the United Kingdom.*

Appeal to Courts of Admiralty.

CCCCLXIV. If any person is aggrieved by the award made by such justices or such umpire as aforesaid, he may in England appeal to the high court of admiralty of England, in Ireland to the high court of admiralty of Ireland, and in Scotland to the court of session; but no such appeal shall be allowed unless the sum in dispute exceeds fifty pounds, nor unless within ten days after the date of the award the appellant gives notice to the justices to whom the matter was referred of his intention to appeal, nor unless the appellant proceeds to take out a monition or to take such other proceeding as according to the practice of the court of appeal is necessary for the institution of an appeal, within twenty days from the date of the award.

Justices to transmit copy of proceedings and certificate of value to Court of Appeal.

CCCCLXV. Whenever any appeal is made in manner hereinbefore provided, the justices shall transmit to the proper officer of the court of appeal a copy on unstamped paper certified under their hands to be a true copy of the proceedings had before such justices or their umpire, if any, and of the award so made by them or him, accompanied by their or his certificate in writing of the gross value of the article respecting which salvage is claimed; and such copy and certificate shall be admitted in the court of appeal as evidence in the cause.

Payment of salvage, to whom to be made in case of dispute as to apportionment.

CCCCLXVI. Whenever the aggregate amount of salvage payable in respect of salvage services rendered in the United Kingdom has been finally ascertained either by agreement or by the award of such justices or their umpire, but a dispute arises as to the apportionment thereof amongst several claimants, then, if the amount does not exceed two hundred pounds, it shall be lawful for the party liable to pay the amount so due to apply to the receiver of the district for liberty to pay the amount so ascertained to him; and he shall, if he thinks fit, receive the same accordingly, and grant a certificate under his hand, stating the fact of such payment and the services in respect of which it is made; and such certificate shall be a full discharge and indemnity to the person or persons to whom it is given and to their ship, boats, cargo, apparel and effects, against the claims of all persons whomsoever in respect of the services therein mentioned; but if the amount exceeds two hundred pounds it shall be apportioned in manner hereinafter mentioned.

Apportionment of salvage.

CCCCLXVII. Upon the receipt of any such amount as aforesaid the receiver shall with all convenient speed proceed to distribute the same among the several persons entitled thereto, upon such evidence and in such shares and proportions as he thinks fit, with power to retain any moneys that may appear to him to be payable to any absent parties; but any distribution made in pursuance of this section shall be final and conclusive against the rights of all persons claiming to be entitled to any portion of the moneys so distributed.

Manner of enforcing payment of salvage.

CCCCLXVIII. Whenever any salvage is due to any person under this Act, the receiver shall act as follows; (that is to say,)

(1.) If the same is due in respect of services rendered in assisting any ship or boat, or in saving the lives of persons belonging to the same, or the cargo or apparel thereof,

He shall detain such ship or boat and the cargo and apparel belonging thereto until payment is made, or process has been issued by some competent court for the detention of such ship, boat, cargo or apparel:

(2.) If the same is due in respect of the saving of any wreck, and such wreck is not sold as unclaimed in pursuance of the provisions hereinafter contained,

He shall detain such wreck until payment is made, or process has been issued in manner aforesaid:

But it shall be lawful for the receiver, if at any time previously to the issue of such process security is given to his satisfaction for the amount of salvage due, to release from his custody any ship, boat, cargo, apparel, or wreck so detained by him as aforesaid (*g*): and in cases where the claim for salvage exceeds two hundred pounds, it shall be lawful in England for the high court of admiralty of England, in Ireland for the high court of admiralty of Ireland, and in Scotland for the court of session (*h*), to determine any question that may arise concerning the amount of the security to be given or the sufficiency of the sureties; and in all cases where bond or other security

(*g*) 25 & 26 Vict. c. 63, s. 50, *infra*. (*h*) Id. s. 51, *infra*.

VIII. *Salvage in the United Kingdom.*

is given to the receiver for an amount exceeding two hundred pounds, it shall be lawful for the salvor or for the owner of the property salved, or their respective agents, to institute proceedings in such last-mentioned courts for the purpose of having the questions arising between them adjudicated upon, and the said courts may enforce payment of the said bond or other security, in the same manner as if bail had been given in the said courts.

Power of receiver to sell property salved in cases of non-payment.

CCCCLXIX. Whenever any ship, boat, cargo, apparel or wreck is detained by any receiver for non-payment of any sums so due as aforesaid, and the parties liable to pay the same are aware of such detention, then, in the following cases, (that is to say,)

(1.) In cases where the amount is not disputed, and payment thereof is not made within twenty days after the same has become due:

(2.) In cases where the amount is disputed, but no appeal lies from the first tribunal to which the dispute is referred, and payment thereof is not made within twenty days after the decision of such first tribunal:

(3.) In cases where the amount is disputed, and an appeal lies from the decision of the first tribunal to some other tribunal, and payment thereof is not made within such twenty days as last aforesaid, or such monition as hereinbefore mentioned is not taken out within such twenty days, or such other proceedings as are according to the practice of such other tribunal necessary for the prosecution of an appeal are not instituted within such twenty days:

The receiver may forthwith sell such ship, boat, cargo, apparel or wreck, or a sufficient part thereof, and out of the proceeds of the sale, after payment of all expenses thereof, defray all sums of money due in respect of expenses, fees and salvage, paying the surplus, if any, to the owners of the property sold, or other the parties entitled to receive the same.

Subject to payment of expenses, fees and salvage, owner entitled to wreck.

CCCCLXX. Subject to the payment of such expenses, fees and salvage as aforesaid, the owner of any wreck who establishes his claim thereto to the satisfaction of the receiver within one year from the date at which such wreck has come into the possession of the receiver, shall be entitled to have the same delivered up to him (*i*).

Unclaimed Wreck in the United Kingdom.

Unclaimed Wreck in the United Kingdom.

Receiver to deliver up possession of unclaimed wreck to lord of manor or other person entitled.

CCCCLXXI. In the event of no owner (*k*) establishing a claim to a wreck found in any place in the United Kingdom before the expiration of a year from the date at which the same has come into the possession of the receiver, then, if any such admiral, vice-admiral, lord of any manor, or other person as aforesaid has given notice to and has proved to the satisfaction of the receiver, that he is entitled to wreck found at such place, the receiver shall, upon payment of all expenses, fees and salvage due in respect of such wreck, deliver up possession thereof to such admiral, vice-admiral, lord of the manor, or other person (*l*); and in case of dispute as to the amount of the sums so payable, and also in case of default being made in payment thereof, such dispute shall be determined and payment enforced in the manner in which such amount and payment is hereby directed to be determined and enforced in cases where any owner establishes his claim to wreck.

Disputed title to wreck, how to be decided.

CCCCLXXII. If any dispute arises between the receiver and any such admiral, vice-admiral, lord of any manor, or other person as aforesaid, as to the validity of his title to wreck, or if divers persons claim to be entitled to wreck found at the same place, the matter in dispute may be decided by two justices in the same manner in which disputes as to salvage coming within the jurisdiction of justices are hereinbefore directed to be determined.

Appeal from decision of justices.

CCCCLXXIII. If any party to such dispute is unwilling to refer the same to two justices, or, having so referred the same, is dissatisfied with their decision, he may within three months from the expiration of such year as aforesaid, or from the date of such decision as aforesaid, as the case may be, take such proceedings as he may be advised in any court of law, equity, or admiralty having jurisdiction in the matter, for establishing his title.

Power of the board of trade

CCCCLXXIV. The board of trade shall have power, with the consent of

(*i*) See 18 & 19 Vict. c. 91, s. 19, *infra*.

(*k*) 25 & 26 Vict. c. 63, s. 52, *infra*.

(*l*) Id. s. 53, *infra*.

VIII. *Unclaimed Wreck in the United Kingdom.*

on behalf of the Crown to purchase right to wreck.

the Treasury, out of the revenue arising under the Eighth Part of this Act, for and on behalf of her Majesty, her heirs and successors, to purchase all such rights to wreck as may be possessed by any person or body corporate other than her Majesty; and for the purpose of facilitating such purposes the provisions of the Lands Clauses Consolidation Act, 1845, and the Lands Clauses Consolidation (Scotland) Act, 1845, relating to the purchase of lands by agreement, shall be incorporated with this Act; and in the construction of this Act and the said incorporated Acts this Act shall be considered to be the "special Act;" and any such rights to wreck as aforesaid shall be considered as an interest in land authorized to be taken by the special Act, and her Majesty, her heirs and successors, shall be considered as the promoters of the undertaking.

Unclaimed wreck to be sold (*m*).

CCCCLXXV. If no owner establishes his claim to wreck found at any place before the expiration of such period of a year as aforesaid, and if no admiral, vice-admiral, lord of any manor, or person other than her Majesty, her heirs and successors, is proved to be entitled to such wreck, the receiver shall forthwith sell the same, and after payment of all expenses attending such sale, and deducting therefrom his fees and all expenses (if any) incurred by him, and paying to the salvors such amount of salvage as the board of trade may in each case or by any general rule determine, pay the same into the receipt of her Majesty's Exchequer in such manner as the Treasury may direct, and the same shall be carried to and form part of the consolidated fund of the United Kingdom.

Jurisdiction of the High Court of Admiralty.

Jurisdiction of the High Court of Admiralty.

High court of admiralty may decide on all salvage cases, whether on sea or land.

CCCCLXXVI. Subject to the provisions of this Act, the High Court of Admiralty shall have jurisdiction to decide upon all claims whatsoever relating to salvage, whether the services in respect of which salvage is claimed were performed upon the high seas, or within the body of any county, or partly in one place and partly in the other, and whether the wreck is found at sea or cast upon the land, or partly in the sea and partly on land (*n*).

Offences in respect of Wreck.

Offences in respect of Wreck.

In case of ship wrecked being plundered by a tumultuous assemblage, the hundred to be liable for damages.

CCCCLXXVII. Whenever any ship or boat is stranded or otherwise in distress on or near the shore of any sea or tidal water in the United Kingdom, and such ship or boat, or any part of the cargo or apparel thereof, is plundered, damaged or destroyed by any persons riotously and tumultuously assembled together, whether on shore or afloat, full compensation shall be made to the owner of such ship, boat, cargo, or apparel, as follows; (that is to say,)

In England, by the inhabitants of the hundred, wapentake, ward, or district in the nature of a hundred, by whatever name denominated, in or nearest to which the said offence is committed, in manner provided by an Act of the eighth year of the reign of King George the Fourth, chapter thirty-one, in case of the destruction of churches and other buildings by a riotous assemblage, or as near thereto as circumstances permit:

In Ireland, by the inhabitants of the county, county of a city or town barony, town or towns, parish or parishes, in or nearest to which such offence is committed, in manner provided by an Act of the fourth year of the reign of King William the Fourth, chapter thirty-seven, for the recovery of satisfaction and amends for the malicious demolition of or injury to churches, chapels and other buildings used for religious worship, according to the usage of the United Church of England, and Ireland, or as near thereto as circumstances permit.

In Scotland, by the inhabitants of the county, city or borough in or nearest to which such offence is committed, in manner provided by an Act of the first year of King George the First, statute two, chapter five, with respect to prosecutions for repairing the damages

(*m*) See 25 & 26 Vict. c. 63, s. 53, *infra*.

(*n*) Extended by 24 Vict. c. 10, s. 9, to claims for salvage of life.

of any churches and other buildings, or as near thereto as circumstances permit.

VIII. *Offences in respect of Wreck.*

CCCCLXXVIII. Every person who does any of the following acts; (that is to say,)

Penalty for plundering in cases of shipwreck, for obstructing the saving of shipwrecked property, and for secreting the same.

(1.) Wrongfully carries away or removes any part of any ship or boat stranded or in danger of being stranded or otherwise in distress on or near the shore of any sea or tidal water, or any part of the cargo or apparel thereof, or any wreck; or

(2.) Endeavours in any way to impede or hinder the saving of such ship, boat, cargo, apparel or wreck; or

(3.) Secretes any wreck, or obliterates or defaces any marks thereon;

Shall, in addition to any other penalty or punishment he may be subject to under this or any other act or law, for each such offence incur a penalty not exceeding fifty pounds; and every person, not being a receiver or a person hereinbefore authorized to take the command in cases of ships being stranded or in distress, or not acting under the orders of such receiver or person, who without the leave of the master, endeavours to board any such ship or boat as aforesaid, shall for each offence incur a penalty not exceeding fifty pounds; and it shall be lawful for the master of such ship or boat to repel by force any such person so attempting to board the same (*o*).

Penalty for selling wreck in foreign ports.

CCCCLXXIX. If any person takes into any foreign port or place any ship or boat stranded, derelict, or otherwise in distress on or near the shore of the sea or of any tidal water situate within the limits of the United Kingdom, or any part of the cargo or apparel thereof, or anything belonging thereto, or any wreck found within such limits as aforesaid, and there sells the same, he shall be guilty of felony, and be subject to penal servitude for a term not exceeding four years.

Dealers in Marine Stores and Manufacturers of Anchors.

Dealers in Marine Stores and Manufacturers of Anchors.

CCCCLXXX. Every person dealing in, buying and selling anchors, cables, sails or old junk, old iron, or marine stores of any description, shall conform to the following regulations; (that is to say,)

Regulations to be observed by dealers in marine stores.

(1.) He shall have his name, together with the words "Dealer in Marine Stores," painted distinctly in letters of not less than six inches in length on every warehouse or other place of deposit belonging to him;

If he does not he shall incur a penalty not exceeding twenty pounds:

(2.) He shall keep a book or books, fairly written, and shall enter therein an account of all such marine stores as he may from time to time become possessed of, stating, in respect of each article, the time at which and the person from whom he purchased or received the same, adding, in the case of every such last-mentioned person, a description of his business and place of abode:

If he does not he shall incur for the first offence a penalty not exceeding twenty pounds, and for every subsequent offence a penalty not exceeding fifty pounds:

(3.) He shall not, by himself or his agents, purchase marine stores of any description from any person apparently under the age of sixteen years;

If he does so he shall incur for the first offence a penalty not exceeding five ponnds, and for every subsequent offence a penalty not exceeding twenty pounds:

(4.) He shall not cut up any cable, or any similar article exceeding five fathoms in length, or unlay the same into twine or paper stuff, on any pretence whatever, without obtaining such permit and publishing such notice of his having so obtained the same as is hereinafter mentioned;

If he does so he shall incur for the first offence a penalty not exceeding twenty pounds, and for every subsequent offence a penalty not exceeding fifty pounds (*p*).

(*o*) 24 & 25 Vict. c. 96, ss. 65, 66, *infra;* 24 & 25 Vict. c. 100, ss. 17, 37.

(*p*) 38 & 39 Vict. c. 25.

VIII. *Dealers in Marine Stores and Manufacturers of Anchors.*

Manner of obtaining permit to cut up cables.

CCCCLXXXI. In order to obtain such permit as aforesaid, a dealer in marine stores shall make a declaration before some justice of the peace, having jurisdiction over the place where such dealer resides, containing the following particulars; (that is to say,)

(1.) A statement of the quality and description of the cable or other like article about to be cut up or unlaid:

(2.) A statement that he purchased or otherwise acquired the same bonâ fide and without fraud, and without any knowledge or suspicion that the same had been come by dishonestly:

(3.) A statement of the name and description of the person from whom he purchased or received the same:

And it shall be lawful for the justice before whom any such declaration is made, or for the receiver of the district in which such dealer in marine stores resides, upon the production of any such declaration as aforesaid, to grant a permit authorizing him to cut up or unlay such cable or other like article.

Permit to be advertised before dealer proceeds to act thereon.

CCCCLXXXII. No dealer in marine stores who has obtained such permit as aforesaid shall proceed by virtue thereof to cut up or unlay any cable or other like article until he has for the space of one week at the least before doing any such act published in some newspaper published nearest to the place where he resides one or more advertisements notifying the fact of his having so obtained a permit, and specifying the nature of the cable or other article mentioned in the permit, and the place where the same is deposited, and the time at which the same is intended to be so cut up or unlaid; and if any person suspects or believes that such cable or other article is his property, he may apply to any justice of the peace for a warrant; and such justice of the peace may, on the applicant making oath, or, if a person entitled to make an affirmation, making an affirmation, in support of such his suspicion or belief, grant a warrant by virtue whereof the applicant shall be entitled to require the production by such dealer as aforesaid of the cable or other article mentioned in the permit, and also of the book of entries hereinbefore directed to be kept by every dealer in marine stores; and upon such cable or other article and book of entries being produced, to inspect and examine the same; and if any dealer in marine stores makes default in complying with any of the provisions of this section, he shall for the first offence incur a penalty not exceeding twenty pounds, and for every subsequent offence a penalty not exceeding fifty pounds.

Manufacturers to place marks on anchors.

CCCCLXXXIII. Every manufacturer of anchors shall, in case of each anchor which he manufactures, mark in legible characters on the crown and also on the shank under the stock his name or initials, with the addition of a progressive number and the weight of such anchor; and if he makes default in doing so he shall for each offence incur a penalty not exceeding five pounds.

Salvage by H. M. Ships.

Salvage by Her Majesty's Ships.

No claim for salvage services to be allowed in respect of loss or risk of her Majesty's ships or property.

CCCCLXXXIV. In cases where salvage services are rendered by any ship belonging to her Majesty or by the commander or crew thereof, no claim shall be made or allowed for any loss, damage or risk thereby caused to such ship, or to the stores, tackle or furniture thereof, or for the use of any stores or other articles belonging to her Majesty supplied in order to effect such services, or for any other expense or loss sustained by her Majesty by reason of such services.

Claims for salvage by her Majesty's officers not to be determined without consent of admiralty.

CCCCLXXXV. No claim whatever on account of any salvage services rendered to any ship or cargo or to any appurtenances of any ship by the commander or crew or part of the crew of any of her Majesty's ships shall be finally adjudicated upon unless the consent of the admiralty has been first obtained, such consent to be signified by writing under the hand of the secretary to the admiralty; and if any person who has originated proceedings in respect of any such claim fails to prove such consent to the satisfaction of the court, his suit shall stand dismissed and he shall pay all the costs of such proceedings; provided that any document purporting to give such consent and to be signed by the secretary to the admiralty shall be primâ facie evidence of such consent having been given.

Steps to be taken when salvage services have been rendered by her

CCCCLXXXVI. Whenever services for which salvage is claimed are rendered to any ship or cargo, or to any part of any ship or cargo, or to any appurtenances of any ship, at any place out of the United Kingdom and the four seas adjoining thereto, by the commander or crew or part of the crew

VIII. *Salvage by H. M. Ships.*

Majesty's ships abroad.

of any of her Majesty's ships, the property alleged to be salved shall, if the salvor is justified by the circumstances of the case in detaining it at all, be taken to some port where there is either a consular officer or a vice-admiralty court; and within twenty-four hours after arriving at such port the said salvor and the master or other person in charge of the property alleged to be salved shall each deliver to the consular officer or vice-admiralty judge there a statement verified on oath, specifying, so far as they respectively can, and so far as the particulars required apply to the case,

(1.) The place, condition, and circumstances in which the said ship, cargo, or property was at the time when the services were rendered for which salvage is claimed:

(2.) The nature and duration of the services rendered:

And the salvor shall add to his statement,

(3.) The proportion of the value of the said ship, cargo, and property, and of the freight which he claims for salvage, or the values at which he estimates the said ship, freight, cargo, and property respectively, and the several amounts that he claims for salvage in respect of the same:

(4.) Any other circumstances he thinks relevant to the said claim:

And the said master or other person in charge of the said ship, cargo, or property shall add to his statement,

(3.) A copy of the certificate of registry of the said ship, and of the indorsements thereon, stating any change which (to his knowledge or belief) has occurred in the particulars contained in such certificate; and stating also, to the best of his knowledge and belief, the state of the title to the ship for the time being, and of the incumbrances and certificates of mortgage or sale, if any, affecting the same, and the names and places of business of the owners and incumbrancers:

(4.) The name and place of business or residence of the freighter (if any) of the said ship, and the freight to be paid for the voyage she is then on:

(5.) A general account of the quantity and nature of the cargo at the time the salvage services were rendered:

(6.) The name and place of business or residence of the owner of such cargo, and of the consignee thereof:

(7.) The value at which the said master estimates the said ship, cargo, and property, and the freight respectively, or, if he thinks fit, in lieu of such estimated value of the cargo, a copy of the ship's manifest:

(8.) The amounts which the master thinks should be paid as salvage for the services rendered:

(9.) An accurate list of the property saved, in cases where the ship is not saved:

(10.) An account of the proceeds of the sale of the said ship, cargo, or property, in cases where the same or any of them are sold at such port as aforesaid:

(11.) The number, capacities, and condition of the crew of the said ship at the time the said services were rendered:

(12.) Any other circumstances he thinks relevant to the matters in question:

(13.) A statement of his willingness to execute a bond, in the form in the table marked (W) in the Schedule hereto, in such amount as the said consular officer or vice-admiralty judge may fix.

Consular officer or judge to fix amount for which a bond is to be given.

CCCCLXXXVII. The said consular officer or judge, as the case may be, shall within four days after receiving the aforesaid statements, fix the amount to be inserted in the said bond at such sum as he thinks sufficient to answer the demand for the salvage services rendered; but such sum shall not exceed one-half of the value which in his estimation the said ship, freight, and cargo, or any parts thereof in respect of which salvage is claimed, are worth; and the said consular officer or judge may, if either of the aforesaid statements is not delivered to him within the time hereby required, proceed ex parte, but he shall in no case under this Act require the cargo to be unladen; and the said consular officer may in any proceeding under this Act relating to salvage, take affidavits and receive affirmations.

VIII. *Salvage by H. M. Ships.*

On master executing bond, the right of detention to cease.

CCCCLXXXVIII. The said consular officer or judge shall send notice of the sum which he has so fixed as aforesaid to the said salvor and the said master; and upon such master executing a bond in such form as aforesaid, with the said sum inserted therein, in the presence of the said officer or judge (who shall attest the same), and delivering the same to the said salvor, the right of the said salvor to detain or retain possession of the said ship, cargo, or property, or any of them, in respect of the said salvage claim, shall cease.

Provision for additional security in the case of ships owned by persons resident out of her Majesty's dominions.

CCCCLXXXIX. If the ship, cargo, or property in respect of which the claim for salvage is made is not owned by persons domiciled in her Majesty's dominions, the right of the salvor to detain or retain possession thereof shall not cease unless the master procures, in addition to the said bond, such security for the due performance of the conditions thereof as the said officer or judge considers sufficient for the purpose, and places the same in the possession or custody of the said officer or judge, or, if the salvor so desires, in the possession or custody of the said officer or judge jointly with any other person whom the said salvor appoints for the purpose.

Documents to be sent to England.

CCCCXC. The said consular officer or judge shall at the earliest opportunity transmit the said statements and documents so sent to him as aforesaid, and a notice of the sum he has so fixed as aforesaid, to the high court of admiralty of England, or if the said salvor and the said master or other person in charge as aforesaid agree that the said bond shall be adjudicated upon by any vice-admiralty court, to such Court.

Whom the bond shall bind.

CCCCXCI. The said bond shall bind the respective owners of the said ship, freight, and cargo, and their respective heirs, executors, and administrators, for the salvage adjudged to be payable in respect of the said ship, freight, and cargo respectively.

Court in which it is to be adjudicated on.

CCCCXCII. The said bond shall be adjudicated on and enforced by the high court of admiralty in England, or if the said salvor and master at the time of the execution of the said bond agree upon any vice-admiralty court, then by such vice-admiralty court; and any such vice-admiralty court may in every proceeding under this Act have and exercise all powers and authorities whatsoever which the said high court of admiralty now has or at any time may have in any proceeding whatsoever before it; and in cases where any security for the due performance of the conditions of the said bond has been placed in the possession or custody of the said consular officer or vice-admiralty judge or of such officer or judge jointly with any other person, the person or persons having the custody of such security shall respectively deal with the same in such manner as the court that adjudicates on the bond directs.

Power of high court of admiralty to enforce bonds.

CCCCXCIII. The said high court of admiralty shall have power to enforce any bond given in pursuance of this Act in any vice-admiralty court in any part of her Majesty's dominions; and all courts in Scotland, Ireland, and the islands of Jersey, Guernsey, Alderney, Sark, and Man exercising admiralty jurisdiction shall, upon application, aid and assist the high court of admiralty in enforcing the said bonds.

Saving clause.

CCCCXCIV. Any such salvor as aforesaid of any ship, cargo, or property who elects not to proceed under this Act shall have no power to detain the said ship, cargo, or property, but may proceed otherwise for the enforcement of his salvage claim as if this Act had not been passed; and nothing in this Act contained shall abridge or affect the rights of salvors, except in the cases by it provided for.

Documents free from duty.

CCCCXCV. All bonds, statements, agreements and other documents made or executed in pursuance of the Eighth Part of this Act shall, if so made or executed out of the United Kingdom, be exempt from stamp duty.

Punishment for forgery and false representations.

CCCCXCVI. Every person who, in any proceeding under provisions contained in the Eighth Part of this Act relating to salvage by her Majesty's ships, forges, assists in forging, or procures to be forged, fraudulently alters, assists in fraudulently altering, or procures to be fraudulently altered, any document, and every person who in any such proceeding puts off or makes use of any such forged or altered document, knowing the same to be so forged or altered, or who in any such proceeding gives or makes, or assists in giving or making, or procures to be given or made, any false evidence or representation, knowing the same to be false, shall be punishable with imprisonment, with or without hard labour, for any period not exceeding two years, or, if summarily prosecuted

and convicted, by imprisonment, with or without hard labour, for any period not exceeding six months.

Salvage (General).

VIII. *Salvage (General).*

Voluntary agreement may be made which shall have the same effect as the bond above mentioned.

CCCCXCVII. Whenever services for which salvage is claimed are rendered either by the commander or crew or part of the crew of any of her Majesty's ships, or of any other ship, and the salvor voluntarily agrees to abandon his lien upon the ship, cargo and property alleged to be salved, upon the master or other person in charge thereof entering into a written agreement attested by two witnesses to abide the decision of the said high court of admiralty or of any vice-admiralty court, and thereby giving security in that behalf to such amount as may be agreed on by the parties to the said agreement, such agreement shall bind the said ship and the said cargo and the freight payable therefor respectively, and the respective owners of the said ship, freight and cargo for the time being, and their respective heirs, executors and administrators, for the salvage which may be adjudged to be payable in respect of the said ship, cargo and freight respectively to the extent of the security so given as aforesaid, and may be adjudicated upon and enforced in the same manner as the bonds provided for by the Eighth Part of this Act, in the case of detention for salvage services rendered by her Majesty's ships; and upon such agreement being made the salvor and the master or other person in charge as aforesaid shall respectively make such statements as are hereinbefore required to be made by them in case of a bond being given, except that such statements need not be made upon oath; and the salvor shall, as soon as practicable, transmit the said agreement and the said statements to the court in which the said agreement is to be adjudicated upon.

Powers for courts having admiralty jurisdiction to apportion salvage.

CCCCXCVIII. Whenever the aggregate amount of salvage payable in respect of salvage services rendered in the United Kingdom has been finally ascertained, and exceeds two hundred pounds, and whenever the aggregate amount of salvage payable in respect of salvage services rendered elsewhere has been finally ascertained, whatever such amount may be, then if any delay or dispute arise as to the apportionment thereof, any court having admiralty jurisdiction may cause the same to be apportioned amongst the persons entitled thereto in such manner as it thinks just; and may for that purpose, if it thinks fit, appoint any person to carry such apportionment into effect, and may compel any person in whose hands or under whose control such amount may be to distribute the same, or to bring the same into court, to be there dealt with as the court may direct, and may for the purpose aforesaid issue such monitions or other processes as it thinks fit.

Miscellaneous.

Miscellaneous.

Foreign goods found derelict to be subject to the same duties as on importation.

CCCCXCIX. All wreck, being foreign goods brought or coming into the United Kingdom or the Isle of Man, shall be subject to the same duties as if the same were imported into the United Kingdom or the Isle of Man respectively; and if any question arises as to the origin of such goods, they shall be deemed to be the produce of such country as the commissioners of customs may upon investigation determine.

Goods saved from ships wrecked to be forwarded to the ports of their original destination.

D. The commissioners of customs and excise shall permit all goods, wares, and merchandise saved from any ship stranded or wrecked on its homeward voyage to be forwarded to the port of its original destination, and all goods, wares, and merchandise saved from any ship stranded or wrecked on its outward voyage to be returned to the port at which the same were shipped; but such commissioners are to take security for the due protection of the revenue in respect of such goods, wares, and merchandise.

Provision as to certain terms in Scotland.

DI. All matters and things that may in pursuance of the Eighth Part of this Act be done by or to any justice, or any two justices, may in Scotland be done also by or to the sheriff of the county, including the sheriff substitute; and the expression "lord or lady of a manor" shall in the Eighth Part of this Act, so far as regards Scotland, include "heritable proprietor duly infeft."

PART IX.

Liability to Shipowners (q).

IX. *Application.*

Application.

Application of Part IX. of Act.

DII. The Ninth Part of this Act shall apply to the whole of her Majesty's dominions.

Limitation of Liability.

Limitation of Liability.

Owner not liable in respect of certain articles.

DIII. No owner of any sea-going ship or share therein shall be liable to make good any loss or damage that may happen without his actual fault or privity of or to any of the following things; (that is to say,)

(1.) Of or to any goods, merchandise, or other things whatsoever taken in or put on board any such ship, by reason of any fire happening on board such ship:

(2.) Of or to any gold, silver, diamonds, watches, jewels, or precious stones taken in or put on board any such ship, by reason of any robbery, embezzlement, making away with or secreting thereof, unless the owner or shipper thereof has, at the time of shipping the same, inserted in his bills of lading or otherwise declared in writing, to the master or owner of such ship the true nature and value of such articles,

To any extent whatever.

DIV. Repealed, 25 & 26 Vict. c. 63, s. 2, and see s. 54 of that statute, *post*.

DV. Repealed, 25 & 26 Vict. c. 63, s. 2.

Provision for separate losses (r).

DVI. The owner of every sea-going ship or share therein shall be liable in respect of every such loss of life (s), personal injury, loss of or damage to goods as aforesaid arising on distinct occasions to the same extent as if no other loss, injury or damage had arisen.

Mode of Procedure.

Mode of Procedure.

In case of loss of life or personal injury, board of trade may direct proceedings.

DVII. Whenever any such liability as aforesaid has been or is alleged to have been incurred in respect of loss of life or personal injury, the board of trade may, in its discretion, after giving not less than three days' notice by post or otherwise to the party to be made defendant or defender, by warrant sealed with the seal of such board or signed by one of its secretaries or assistant secretaries, require the sheriff having jurisdiction over any place in the United Kingdom to summon a jury at a time and place to be specified in such warrant for the purpose of determining the following question; (that is to say,)

The number, names and descriptions of all persons killed or injured by reason of any wrongful act, neglect or default:

And upon the receipt of such warrant the sheriff shall summon a jury of twenty-four indifferent persons, duly qualified to act as common jurymen in the superior courts, to meet at such time and place as aforesaid.

Either party may require question to be tried by a special jury.

DVIII. If either party to the inquiry desire any such question as aforesaid to be tried before a special jury, such question shall be so tried, provided that notice of such desire, if coming from the other party, is given to the board of trade before it has issued its warrant to the sheriff; and for that purpose the board of trade shall, by its warrant to the sheriff, require him to nominate a special jury for such trial; and thereupon the sheriff shall, as soon as conveniently may be after the receipt by him of such warrant, summon both the parties to appear before him by themselves or their attorneys or agents at some convenient time and place appointed by him for the purpose of nominating a special jury; and at the place and time so appointed the sheriff shall proceed to nominate and strike a special jury in the manner in which such juries are required by the laws for the time being in force to be nominated or struck by the proper officers of the superior courts; and the sheriff shall appoint a day and shall on the day so appointed proceed to

(q) Amended by 25 & 26 Vict. c. 63, s. 54, *infra*.

(r) See 53 Geo. 3, c. 159, s. 53.

(s) 25 & 26 Vict. c. 63, s. 56, *infra*.

reduce the said special jury to the number of twenty, in the manner used and accustomed by the proper officers of the superior courts.

IX. *Mode of Procedure.*

DIX. The following provisions shall be applicable to the conduct of proceedings by the board of trade; (that is to say,)

Provisions for conduct of proceedings.

(1.) The sheriff shall preside at such inquiry; and the board of trade shall be deemed in England and Ireland to be the plaintiff, and in Scotland the pursuer, both of which terms are hereinafter included in the term plaintiff, with power to appoint any agent to act on its behalf, and shall have all such rights and privileges as the plaintiff is entitled to in actions at law; and the owner or owners of the ship or ships by whom such liability as last aforesaid is alleged to have been incurred shall be deemed in England and Ireland to be the defendant, and in Scotland the defender, both of which terms are hereinafter included in the term defendant:

(2.) Not less than ten days' notice of the time and place of the inquiry shall be served by the board of trade on the defendant:

(3.) Service on the master of any ship shall be deemed good service on the owner thereof, and the master shall, in respect of the proceedings on such inquiry, be deemed the agent and representative of the owner, with power to appear for him on such inquiry, and to do all matters and things which he might himself have done:

(4.) If the defendant does not appear at the time of such inquiry, the same shall be proceeded with as if he had appeared, upon due proof of service of notice having been made on him in pursuance of this Act:

(5.) The empannelling of the jury and the summoning and attendance of witnesses shall be conducted and enforced in England and Ireland in manner provided by the Lands Clauses Consolidation Act, 1845, in cases of disputed compensation as to land, and in Scotland in manner provided by the Lands Clauses Consolidation (Scotland) Act, 1845, in like cases, or as near thereto as circumstances permit; and all provisions in the said acts having reference to cases where any question of dispute and compensation requires to be determined by the verdict of a jury shall, with the requisite alterations, be considered as incorporated with this Act, and to have reference to cases where the question of the liability of any owner in respect of any such accident as aforesaid require to be determined by the verdict of a jury:

(6.) In England and Ireland the sheriff shall, if the board of trade so requires, or if the defendant so requires and the board of trade consents thereto, appoint as assessor a barrister at law of competent knowledge and standing:

(7.) The costs incurred by all parties in and incidental to any such inquiry as aforesaid shall in England and Ireland be taxed by the master of one of her Majesty's superior courts of common law as between attorney and client, and in Scotland by the auditor of the court of session as between agent and client; and shall, if the verdict in any inquiry is in favour of the plaintiff, be paid by the defendant, but if such verdict is in favour of the defendant, be paid by the board of trade out of the mercantile marine fund:

(8.) The payment of all damages and costs in any such inquiry as aforesaid shall, upon application made to such superior court as aforesaid by the party entitled thereto, be enforced by the rule or order of such court or a judge thereof, or otherwise as such court or judge thinks fit:

(9.) The board of trade may make any compromise it thinks fit as to the damages payable in respect of personal injury, or of the death of any person; and any damages received in pursuance of such compromise shall, so far as the same extend, be applied in the same manner and be subject to the same rules as if the same were damages recovered on an inquiry instituted by the board of trade.

DX. The following rules shall be observed as to the damages recovered in any such inquiry, and the application thereof; (that is to say,)

Rules as to damages and application thereof.

(1.) The damages payable in each case of death or injury shall be assessed at thirty pounds:

(2.) The damages found due on any such inquiry as aforesaid shall be the

IX. *Mode of Procedure.*

first charge on the aggregate amount for which the owner is liable, and shall be paid thereout in priority to all other claims:

(3.) All such damages as aforesaid shall be paid to her Majesty's paymaster general, and shall be distributed and dealt with by him in such manner as the board of trade directs; and in directing such distribution the board of trade shall have power in the first place to deduct and retain any costs incidental thereto; and in the next place, as regards the sums paid in respect of injuries, shall direct payment to each person injured of such compensation, not exceeding in any case the statutory amount, as the said board thinks fit; and as regards the sums paid in respect of deaths shall direct payment thereof for the benefit of the husband, wife, parent and child of the deceased, or any of them, in such shares, upon such evidence, and in such manner as the said board thinks fit:

(4.) The board of trade shall refund to the owner any surplus remaining under its control after making such distribution as aforesaid, and the sum so refunded shall form part of the residue hereinafter mentioned:

(5.) The board of trade shall not, nor shall any person acting under it, be liable to any action, suit, account, claim or demand whatsoever for or in respect of any act or matter done, or omitted to be done, in the distribution of such damages as aforesaid:

(6.) If the amount paid to her Majesty's paymaster general in manner aforesaid is insufficient to meet the demands upon it, the several claims thereon shall abate proportionally.

Any person who is dissatisfied with the amount of statutory damage may bring an action on his own account.

DXI. After the completion of such inquiry as aforesaid, if any person injured estimates the damages payable in respect of such injury, or if the executor or administrator of any deceased person estimates the damages payable in respect of his death at a greater sum than such statutory amount, or, in case of a compromise having been made by the board of trade, than the amount accepted by such board by way of compensation for such injury or such death as aforesaid, the person so estimating the same shall, upon repaying or obtaining the repayment by the board of trade to the owner of the amount paid by him to the board of trade in respect of such injury or death, be at liberty to bring an action for the recovery of damages in the same manner as if no power of instituting an inquiry had hereinbefore been given to the board of trade, subject to the following proviso; (that is to say,) that any damages recoverable by such person shall be payable only out of the residue, if any, of the aggregate amount for which the owner is liable, after deducting all sums paid to her Majesty's paymaster general in manner aforesaid; and if the damages recovered in such action do not exceed double the statutory amount, such person shall pay to the defendant in such action all the costs thereof, such costs to be taxed in England and Ireland as between attorney and client, and in Scotland as between agent and client.

If board of trade decline to institute proceedings individuals may bring actions.

DXII. In cases where loss of life or personal injury has occurred by any accident in respect of which the owner of any such ship as aforesaid is or is alleged to be liable in damages, no person shall be entitled to bring any action or institute any suit or other legal proceeding in the United Kingdom, until the completion of the inquiry (if any) instituted by the board of trade, or until the board of trade has refused to institute the same; and the board of trade shall, for the purpose of entitling any person to bring an action or institute a suit or other legal proceeding, be deemed to have refused to institute such inquiry whenever notice has been served on it by any person of his desire to bring such action or institute such suit or other legal proceeding, and no inquiry is instituted by the board of trade in respect of the subject-matter of such intended action, suit or proceeding for the space of one month after the service of such notice.

Proceedings by board of trade after refusal.

DXIII. Whenever the board of trade, having refused in manner aforesaid to institute any inquiry, afterwards determines to institute the same, the damages and costs (if any) recovered on such inquiry shall be payable rateably with and not in priority to the costs and damages recovered in any other action, suit or legal proceeding.

Proceedings in case of several claims being made on owner of ship.

DXIV. In cases where any liability has been or is alleged to have been incurred by any owner in respect of loss of life, personal injury or loss of or damage to ships, boats or goods, and several claims are made or apprehended in respect of such liability, then subject to the right hereinbefore given to the

board of trade of recovering damages in the United Kingdom in respect of loss of life or personal injury, it shall be lawful in England (*t*) or Ireland (*u*) for the High Court of Chancery, and in Scotland for the Court of Session, and in any British possession for any competent court, to entertain proceedings at the suit of any owner for the purpose of determining the amount of such liability subject as aforesaid, and for the distribution of such amount rateably amongst the several claimants, with power for any such court to stop all actions and suits pending in any other court in relation to the same subject-matter; and any proceeding entertained by such Court of Chancery or Court of Session, or other competent court, may be conducted in such manner and subject to such regulations as to making any persons interested parties to the same, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of costs, as the court thinks just.

IX. *Mode of Procedure.*

DXV. All sums of money paid for or on account of any loss or damage in respect whereof the liability of the owners of any ship is limited by the Ninth Part of this Act, and all costs incurred in relation thereto, may be brought into account among part owners of the same ship in the same manner as money disbursed for the use thereof.

Money paid for damage how to be accounted for between part owners.

Saving Clause.

Saving Clause.

DXVI. Nothing in the Ninth Part of this Act contained shall be construed—

Saving clause.

To lessen or take away any liability to which any master or seaman, being also owner or part owner of the ship to which he belongs, is subject in his capacity of master or seaman; or

To extend to any British ship not being a recognized British ship within the meaning of this Act.

PART X.

LEGAL PROCEDURE (*x*).

PART XI.

MISCELLANEOUS.

Table V.—(See Section 455.)

FEES AND REMUNERATION OF RECEIVERS.

	£	s.	d.
For every examination on oath instituted by a receiver with respect to any ship or boat which may be or may have been in distress, a fee not exceeding	1	0	0
But so that in no case shall a larger fee than two pounds be charged for examination taken in respect of the same ship and the same occurrence, whatever may be the number of the deponents.			

(*t*) See 24 Vict. c. 10, s. 13.
(*u*) 30 & 31 Vict. c. 114, s. 36.
(*x*) See 18 & 19 Vict. c. 91, s. 21, *infra*.

	£	s.	d.
For every report required to be sent by the receiver to the secretary of the committee for managing the affairs of Lloyd's in London, the sum of	0	10	0

For wreck taken by the receiver into his custody, a percentage of five per cent. upon the value thereof,

But so that in no case shall the whole amount of percentage so payable exceed twenty pounds.

In cases where any services are rendered by a receiver, in respect of any ship or boat in distress, not being wreck, or in respect of the cargo or other articles belonging thereto, the following fees instead of a percentage; (that is to say,)

If such ship or boat with her cargo equals or exceeds in value six hundred pounds, the sum of two pounds for the first, and the sum of one pound for every subsequent day during which the receiver is employed on such service; but if such ship or boat with her cargo is less in value than six hundred pounds, one moiety of the above-mentioned sum.

Table W.—(See Section 486.)

SALVAGE BOND.

[*N.B.—Any of the Particulars not known, or not required, by reason of the Claim being only against the Cargo, &c., may be omitted.*]

WHEREAS certain salvage services are alleged to have been rendered by the ship [*insert names of ship and of commander*], commander, to the merchant ship [*insert names of ship and master*], master, belonging to [*name of place of business or residence of owner of ship*], freighted by [*the same of the freighter*], and to the cargo therein, consisting of [*state very shortly the descriptions and quantities of the goods, and the names and addresses of their owners and consignees*].

And whereas the said ship and cargo have been brought into the port of [*insert name and situation of port*], and a statement of the salvage claim has been sent to [*insert the name of the consular officer or vice-admiralty judge, and of the office he fills*], and he has fixed the amount to be inserted in this bond at the sum of [*state the sum*]:

Now I, the said [*master's name*], do hereby, in pursuance of the Merchant Shipping Act, 1854, bind the several owners for the time being of the said ship and of the cargo therein, and of the freight payable in respect of such cargo, and their respective heirs, executors, and administrators, to pay among them such sum not exceeding the said sum of [*state the sum fixed*] in such proportions and to such persons as [*if the parties agree on any other court, substitute the name of it here*], the high court of admiralty in England shall adjudge to be payable as salvage for the services so alleged to have been rendered as aforesaid.

In witness whereof I have hereunto set my hand and seal, this [*insert the date*] day of

Signed, sealed, and delivered by the said [*master's name*], (L.S.)

In the presence of [*name of consular officer or vice-admiralty judge, and of the office he fills*].

Registry of Ships.

PART II. of Merchant Shipping Act, 1854.

18 & 19 VICT. C. 91.

An Act to facilitate the Erection and Maintenance of Colonial Lighthouses, and otherwise to amend the Merchant Shipping Act, 1854.

[*14th August*, 1855.]

Penalty on false

IX. Any person who, in any declaration made in the presence of or produced to any registrar of shipping, in pursuance of the Second Part of the

Merchant Shipping Act, 1854, or in any documents or other evidence produced to such registrar, wilfully makes, or assists in making or procures to be made, any false statement concerning the title to or the ownership of or the interests existing in any ship, or any share or shares in any ship, or who utters, produces or makes use of any declaration or document containing any such false statement, knowing the same to be false, shall be guilty of a misdemeanor.

declarations under Part II. of Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 103.

X. Shares in ships registered under the said Merchant Shipping Act, 1854, shall be deemed to be included in the word "stock," as defined by the Trustee Act, 1850, and the provisions of such last mentioned Act shall be applicable to such shares accordingly.

Shares in shipping within the Trustee Act, 1850, 13 & 14 Vict. c. 60.

XI. In any case in which any bill of sale, mortgage or other instrument for the disposal or transfer of any ship or any share or shares therein, or of any interest therein, is made in any form or contains any particulars other than the form and particulars prescribed and approved for the purpose by or in pursuance of the Merchant Shipping Act, 1854, no registrar shall be required to record the same without the express direction of the commissioners of her Majesty's customs.

Forms of instruments. 17 & 18 Vict. c. 104, s. 96.

XII. Upon the transfer of the registry of a ship from one port to another, the certificate of registry required by the nineteenth section of the Merchant Shipping Act, 1854, to be delivered up for that purpose, may be delivered up to the registrar of either of such ports.

Delivery of certificate upon transfer of registry. 17 & 18 Vict. c. 104, s. 90.

XIII. [Repealed by 34 & 35 Vict. c. 110, s. 12 (*y*).]

XIV. The owner of any ship which is measured under Rule II. contained in the twenty-second section of the Merchant Shipping Act, 1854, may at any subsequent period apply to the commissioners of customs (*z*) to have the said ship remeasured under Rule I. contained in the twenty-first section of the same Act, and the said commissioners may thereupon and upon payment of such fee not exceeding seven shillings and sixpence for each transverse section as they may authorize, direct the said ship to be remeasured accordingly, and the number denoting the register tonnage shall be altered accordingly.

Ships measured under Rule II. may be measured under Rule I. 17 & 18 Vict. c. 104, ss. 21 & 22.

XV. The copy or transcript of the register of any British ship which is kept by the chief registrar of shipping at the Custom House in London, or by the registrar-general of seamen, under the direction of her Majesty's commissioners of customs or of the board of trade, shall have the same effect to all intents and purposes as the original register of which the same is a copy or transcript.

General register books in London. 17 & 18 Vict. c. 104, s. 107.

Masters and Seamen.

PART III. of Merchant Shipping Act, 1854.

XVI. The board of trade may issue instructions concerning the relief to be administered to distressed seamen and apprentices, in pursuance of the two hundred and eleventh and two hundred and twelfth sections of the Merchant Shipping Act, 1854, and may by such instructions determine in what cases and under what circumstances and conditions such relief is to be administered; and all powers of recovering expenses incurred with respect to distressed seamen and apprentices, which by the two hundred and thirteenth section of the said Act are given to the board of trade, shall extend to all expenses incurred by any foreign government for the purposes aforesaid, and repaid to such government by her Majesty's government, and shall likewise extend to any expenses incurred by the conveying home such seamen or apprentices in foreign as well as British ships; and all provisions concerning the relief of distressed seamen and apprentices, being subjects of her Majesty, which are contained in the said sections of the said Act, and in this section shall extend to such seamen and apprentices, not being subjects of her Majesty, as are reduced to distress in foreign parts by reason of their having been shipwrecked, discharged, or left behind from any British ship; subject nevertheless to such modifications and directions concerning the cases in which relief is to be given to such foreigners, and the country to which they are to be sent, as the board of trade may, under the circumstances, think fit to make and issue.

Extension of provisions concerning the relief of destitute seamen. 17 & 18 Vict. c. 104, ss. 211, 212, and 213.

XVII. The enactment of the Merchant Shipping Act, 1854, relating to saving banks shall apply to all seamen, and to their wives and families, whether such seamen belong to the royal navy or to the merchant service, or to any other sea service.

Enactment concerning savings banks extended to seamen in the navy. 17 & 18 Vict. c. 104, s. 180.

(*y*) See 36 & 37 Vict. c. 85, s. 3, *infra*.

(*z*) See 35 & 36 Vict. c. 73, s. 4, *infra*.

Additional powers of naval courts. 17 & 18 Vict. c. 104, ss. 260 to 266.

XVIII. Any naval court summoned, under the provisions of the Merchant Shipping Act, 1854, to hear any complaint touching the conduct of the master or any of the crew of any ship, shall, in addition to the powers given to it by the said Act, have power to try the said master or any of the said crew for any offences against the Merchant Shipping Act, 1854, in respect of which two justices would, if the case were tried in the United Kingdom, have power to convict summarily, and by order duly made to inflict the same punishments for such offences which two justices might in the case aforesaid inflict upon summary conviction; provided, that in cases where an offender is sentenced to imprisonment the sentence shall be confirmed in writing by the senior naval or consular officer present at the place where the court is held, and the place of imprisonment, whether on land or on board ship, shall be approved by him as a proper place for the purpose, and copies of all sentences made by any naval court summoned to hear any such complaint as aforesaid shall be sent to the commander-in-chief or senior naval officer of the station.

Wrecks, Casualties, and Salvage.

Part VIII. of Merchant Shipping Act, 1854.

XIX. Whenever any articles belonging to or forming part of any foreign ship which has been wrecked on or near the coasts of the United Kingdom, or belonging to or forming part of the cargo thereof, are found on or near such coasts, or are brought into any port in the United Kingdom, the consul general of the country to which such ship, or, in the case of cargo, to which the owners of such cargo, may have belonged, or any consular officer of such country, authorized in that behalf by any treaty or agreement with such country, shall, in the absence of the owner of such ship or articles, and of the master or other agent of the owner, be deemed to be the agent of the owner, so far as relates to the custody and disposal of such articles.

In case of wreck of foreign ships consul general to be deemed agent of owner.

Remuneration for services by coast guard.

XX. In cases where services are rendered by officers or men of the coast guard service in watching or protecting shipwrecked property, then, unless it can be shown that such services have been declined by the owner of such property or his agent at the time they were tendered, or that salvage has been claimed and awarded for such services, the owner of the shipwrecked property shall pay in respect of the said services remuneration according to a scale to be fixed by the board of trade, so, however, that such scale shall not exceed any scale by which payment to officers and men of the coast guard for extra duties in the ordinary service of the commissioners of customs is for the time being regulated; and such remuneration shall be recoverable by the same means and shall be paid to the same persons and accounted for and applied in the same manner as fees received by receivers appointed under the Merchant Shipping Act, 1854.

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18 & 19 Vict. c. 111.

An Act to amend the Law relating to Bills of Lading.
[11*th August*, 1855.]

Whereas by the custom of merchants a bill of lading of goods being transferable by indorsement the property in the goods may thereby pass to the indorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property: and whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a bonâ fide holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Rights under bills of lading to vest in consignee or indorsee.

I. Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have

transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

Not to affect right of stoppage in transitu or claims for freight.

II. Nothing herein contained shall prejudice or affect any right of stoppage in transitu, or any right to claim freight against the original shipper or owner, or any liability of the consignee or indorsee by reason or in consequence of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement.

Bill of lading in hands of consignee, &c., conclusive evidence of the shipment as against master, &c.

Proviso.

III. Every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board: Provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by shewing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.

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18 & 19 VICT. c. 119.

An Act to amend the Law relating to carriage of Passengers by Sea.
[14*th August*, 1855.]

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19 & 20 VICT. c. 97.

An Act to amend the Laws of England and Ireland affecting Trade and Commerce. [29*th July*, 1856.]

WHEREAS inconvenience is felt by persons engaged in trade by reason of the laws of England and Ireland being in some particulars different from those of Scotland in matters of common occurrence in the course of such trade, and with a view to remedy such inconvenience it is expedient to amend the laws of England and Ireland as hereinafter is mentioned; be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Persons acquiring title to goods before they have been seized or attached under a writ against the seller protected.

I. No writ of fieri facias or other writ of execution, and no writ of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person bonâ fide and for a valuable consideration before the actual seizure or attachment thereof by virtue of such writ: Provided such person had not, at the time when he acquired such title, notice that such writ, or any other writ by virtue of which the goods of such owner might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff, under-sheriff, or coroner.

Specific delivery of goods sold.

II. In all actions and suits in any of the superior courts of common law at Westminster or Dublin, or in any court of record in England, Wales or Ireland, for breach of contract to deliver specific goods for a price in money, on the application of the plaintiff, and by leave of the judge before whom the cause is tried, the jury shall, if they find the plaintiff entitled to recover, find by their verdict what are the goods in respect of the non-delivery of which the plaintiff is entitled to recover, and which remain undelivered; what (if

any) is the sum the plaintiff would have been liable to pay for the delivery thereof; what damages (if any) the plaintiff would have sustained if the goods should be delivered under execution, as hereinafter mentioned, and what damages if not so delivered; and thereupon, if judgment shall be given for the plaintiff, the court, or any judge thereof, at their or his discretion, on the application of the plaintiff, shall have power to order execution to issue for the delivery, on payment of such sum (if any) as shall have been found to be payable by the plaintiff as aforesaid, of the said goods, without giving the defendant the option of retaining the same upon paying the damages assessed; and such writ of execution may be for the delivery of such goods; and if such goods so ordered to be delivered, or any part thereof, cannot be found, and unless the court, or such judge or baron as aforesaid, shall otherwise order, the sheriff, or other officer of such court of record, shall distrain the defendant by all his lands and chattels, in the said sheriff's bailiwick, or within the jurisdiction of such other court of record, till the defendant deliver such goods, or, at the option of the plaintiff, cause to be made of the defendant's goods the assessed value or damages, or a due proportion thereof; provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs and interest in such action or suit.

Consideration for guarantee need not appear by writing.

III. No special promise to be made by any person after the passing of this Act to answer for the debt, default or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.

Guarantee to or for a firm to cease upon a change in the firm except in special cases.

IV. No promise to answer for the debt, default or miscarriage of another made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, default or miscarriage of a firm consisting of two or more persons, or of a single person trading under the name of a firm, shall be binding on the person making such promise in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of a firm, unless the intention of the parties that such promise shall continue to be binding notwithstanding such change shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise.

A surety who discharges the liability to be entitled to assignment of all securities held by the creditor.

V. Every person, who being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: Provided always, that no co-surety, co-contractor or co-debtor shall be entitled to recover from any other co-surety, co-contractor or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable.

VI. [Repealed by 45 & 46 Vict. c. 61, s. 96.]

VII. [Repealed by 45 & 46 Vict. c. 61, s. 96.]

With reference to the repairs of ships, every port within the United Kingdom, &c., a home port.

VIII. In relation to the rights and remedies of persons having claims for repairs done to, or supplies furnished to or for, ships, every port within the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney and Sark, and the islands adjacent to any of them, being part of the dominions of her Majesty, shall be deemed a home port.

Limitation of actions for "Merchants' Accounts."

IX. All actions of account, or for not accounting, and suits for such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits, or when such cause has already arisen, then within six years after the passing of this Act; and no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action or suit.

Absence beyond seas or imprisonment of creditor not a disability.

X. No person or persons who shall be entitled to any action or suit with respect to which the period of limitation within which the same shall be brought is fixed by the Act of the twenty-first year of the reign of King James the First, chapter sixteen, section three, or by the Act of the fourth year of the reign of Queen Anne, chapter sixteen, section seventeen, or by the Act of the fifty-third year of the reign of King George the Third, chapter one hundred and twenty-seven, section five, or by the Acts of the third and fourth years of the reign of King William the Fourth, chapter twenty-seven, sections forty, forty-one and forty-two, and chapter forty-two, section three, or by the Act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, section twenty, shall be entitled to any time within which to commence and sue such action or suit beyond the period so fixed for the same by the enactments aforesaid, by reason only of such person or some one or more of such persons, being at the time of such cause of action or suit accrued beyond the seas, or in the cases in which by virtue of any of the aforesaid enactments imprisonment is now a disability, by reason of such person or some one or more of such persons being imprisoned at the time of such cause of action or suit accrued.

Period of limitation to run as to joint debtors in the kingdom though some beyond seas.

XI. Where such cause of action or suit with respect to which the period of limitation is fixed by the enactments aforesaid, or any of them, lies against two or more joint debtors, the person or persons who shall be entitled to the same shall not be entitled to any time within which to commence and sue any such action or suit against any one or more of such joint debtors who shall not be beyond the seas at the time such cause of action or suit accrued, by reason only that some other one or more of such joint debtors was or were at the time such cause of action accrued beyond the seas, and such person or persons so entitled as aforesaid shall not be barred from commencing and suing any action or suit against the joint debtor or joint debtors who was or were beyond seas at the time the cause of action or suit accrued after his or their return from beyond seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not or were not beyond seas at the time aforesaid.

Judgment recovered against joint debtors no bar to proceeding against others beyond seas after their return.

Definition of "beyond seas," within 4 & 5 Anne, c. 16, and this Act.

XII. No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of her Majesty, shall be deemed to be beyond seas within the meaning of the Act of the fourth and fifth years of the reign of Queen Anne, chapter sixteen, or of this Act.

Provisions of 9 Geo. 4, c. 14, ss. 1 and 8, and 16 & 17 Vict. c. 113, ss. 24 and 27, extended to acknowledgments by agents.

XIII. In reference to the provisions of the Acts of the ninth year of the reign of King George the Fourth, chapter fourteen, sections one and eight, and the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, sections twenty-four and twenty-seven, an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorised to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself.

Part payment by one contractor, &c. not to prevent bar by certain statutes of limitations in favour of another contractor, &c.

XIV. In reference to the provisions of the Acts of the twenty-first year of the reign of King James the First, chapter sixteen, section three, and of the Act of the third and fourth years of the reign of King William the Fourth, chapter forty-two, section three, and of the Act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, section twenty, when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator, shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money, by any other or others of such co-contractors or co-debtors, executors or administrators.

Rules and regulations may be made and writs and proceedings framed for the purposes of this Act.

XV. In order to enable the superior courts of common law at Westminster and Dublin, and the judges thereof respectively, to make rules and regulations, and to frame writs and proceedings, for the purpose of giving effect to this Act, the two hundred and twenty-third and two hundred and twenty-fourth sections of "The Common Law Procedure Act, 1852," shall, so far as this Act is to take effect in England, and the two hundred and thirty-third and two hundred and fortieth sections of "The Common Law Procedure Amendment Act (Ireland), 1853," shall, so far as this Act is to take effect in Ireland, be incorporated with this Act, as if those provisions had been severally herein repeated and made to apply to this Act (*a*).

Short title.

XVI. In citing this Act it shall be sufficient to use the expression "The Mercantile Law Amendment Act, 1856."

Extent of Act.

XVII. Nothing in this Act shall extend to Scotland (*b*).

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20 & 21 VICT. c. 54.

An Act to make better Provision for the Punishment of Frauds committed by Trustees, Bankers, and other Persons intrusted with Property (*c*). [17*th August*, 1857.]

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24 VICT. c. 10.

An Act to extend the Jurisdiction and improve the Practice of the High Court of Admiralty. [17*th May*, 1861.]

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24 & 25 VICT. c. 96.

An Act to consolidate and amend the Statute Law of England and Ireland relating to Larceny and other similar Offences. [6*th August*, 1861.]

As to frauds by agents, bankers or factors:

Agent, banker, &c., embezzling money or selling securities, &c., intrusted to him;

or goods, &c., intrusted to him for safe custody.

75. Whosoever, having been intrusted, either solely, or jointly with any other person, as a banker, merchant, broker, attorney or other agent, with any money or security for the payment of money, with any direction in writing to apply, pay or deliver such money or security or any part thereof respectively, or the proceeds or any part of the proceeds of such security, for any purpose, or to any person specified in such direction, shall, in violation of good faith, and contrary to the terms of such direction, in anywise convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such money, security, or proceeds or any part thereof respectively; and whosoever, having been intrusted, either solely, or jointly with any other person, as a banker, merchant, broker, attorney or other agent, with any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of the United Kingdom, or any part thereof, or of any foreign state, or in any stock or fund of any body corporate, company or society, for safe custody or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, shall, in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been intrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of

(*a*) See 42 & 43 Vict. c. 78, s. 29.
(*b*) See 19 & 20 Vict. c. 60.
(*c*) Repealed by 24 & 25 Vict. c. 95, s. 1.

attorney shall relate, or any part thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; but nothing in this section contained relating to agents shall affect any trustee in or under any instrument whatsoever, or any mortgagee or any property, real or personal, in respect of any act done by such trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage; nor shall restrain any banker, merchant, broker, attorney or other agent from receiving any money which shall be or become actually due and payable upon or by virtue of any valuable security, according to the tenor and effect thereof, in such manner as he might have done if this Act had not been passed; nor for selling, transferring or otherwise disposing of any securities or effects in his possession upon which he shall have any lien, claim or demand entitling him by law so to do, unless such sale, transfer or other disposal shall extend to a greater number or part of such securities or effects than shall be requisite for satisfying such lien, claim or demand.

Punishment.

Not to affect trustees or mortgagees;

nor bankers, &c. receiving money due on securities;

or disposing of securities on which they have a lien.

76. Whosoever being a banker, merchant, broker, attorney or agent, and being intrusted, either solely, or jointly with any other person, with the property of any other person for safe custody, shall, with intent to defraud, sell, negotiate, transfer, pledge or in any manner convert or appropriate the same or any part thereof to or for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned.

Bankers, &c., fraudulently selling, &c., property intrusted to their care.

77. Whosoever, being intrusted, either solely, or jointly with any other person, with any power of attorney for the sale or transfer of any property, shall fraudulently sell or transfer or otherwise convert the same or any part thereof to his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, shall be guilty of a misdemeanor and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned.

Persons under powers of attorney fraudulently selling property.

78. Whosoever, being a factor or agent intrusted, either solely, or jointly with any other person, for the purpose of sale or otherwise, with the possession of any goods, or of any document of title to goods, shall, contrary to or without the authority of his principal in that behalf, for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, and in violation of good faith, make any consignment, deposit, transfer or delivery of any goods or document of title so intrusted to him as in this section before mentioned, as and by way of a pledge, lien or security for any money or valuable security borrowed or received by such factor or agent at or before the time of making such consignment, deposit, transfer or delivery, or intended to be thereafter borrowed or received, or shall, contrary to or without such authority, for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, and in violation of good faith, accept any advance of any money or valuable security on the faith of any contract or agreement to consign, deposit, transfer or deliver any such goods or document of title, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned; and every clerk or other person who shall knowingly and wilfully act and assist in making any such consignment, deposit, transfer or delivery, or in accepting or procuring such advance as aforesaid, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the same punishments: Provided, that no such factor or agent shall be liable to any prosecution for consigning, depositing, transferring or delivering any such goods or documents of title, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which at the time of such consignment, deposit, transfer or delivery was justly due and owing to such agent from his principal, together with the amount of any bill of exchange drawn by or on account of such principal, and accepted by such factor or agent.

Factors obtaining advances on the property of their principals.

Clerks wilfully assisting.

Cases excepted where the pledge does not exceed the amount of their lien.

Definitions of terms:
"intrusted:"
"pledge:"
"possessed:"
"advance:"
"contract or agreement:"
"advance."

79. Any factor or agent intrusted as aforesaid, and possessed of any such document of title, whether derived immediately from the owner of such goods or obtained by reason of such factor or agent having been intrusted with the possession of the goods, or of any other document of title thereto, shall be deemed to have been intrusted with the possession of the goods represented by such document of title; and every contract pledging or giving a lien upon such document of title as aforesaid shall be deemed to be a pledge of and lien upon the goods to which the same relates; and such factor or agent shall be deemed to be possessed of such goods or document, whether the same shall be in his actual custody, or shall be held by any other person subject to his control, or for him or on his behalf; and where any loan or advance shall be bonâ fide made to any factor or agent intrusted with and in possession of any such goods or document of title, on the faith of any contract or agreement in writing to consign, deposit, transfer or deliver such goods or document of title, and such goods or document of title shall actually be received by the person making such loan or advance, without notice that such factor or agent was not authorised to make such pledge or security, every such loan or advance shall be deemed to be a loan or advance on the security of such goods or document of title within the meaning of the last preceding section, though such goods or document of title shall not actually be received by the person making such loan or advance till the period subsequent thereto; and any contract or agreement, whether made direct with such factor or agent, or with any clerk or other person on his behalf, shall be deemed a contract or agreement with such factor or agent; and any payment made, whether by money or bill of exchange or other negotiable security, shall be deemed to be an advance within the meaning of the last preceding section; and a factor or agent in possession as aforesaid of such goods or document shall be taken, for the purposes of the last preceding section, to have been intrusted therewith by the owner thereof, unless the contrary be shown in evidence.

Possession to be evidence of intrusting.

Trustees, fraudulently disposing of property, guilty of a misdemeanor.

80. Whosoever, being a trustee of any property for the use or benefit, either wholly or partially, of some other person, or for any public or charitable purpose, shall, with intent to defraud, convert or appropriate the same or any part thereof to or for his own use or benefit, or the use or benefit of any person other than such person as aforesaid, or for any purpose other than such public or charitable purpose as aforesaid, or otherwise dispose of or destroy such property or any part thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned: Provided that no proceeding or prosecution for any offence included in this section shall be commenced without the sanction of her Majesty's attorney-general, or, in case that office be vacant, of her Majesty's solicitor-general: Provided, also, that where any civil proceedings shall have been taken against any person to whom the provisions of this section may apply, no person who shall have taken such civil proceeding shall commence any prosecution under this section without the sanction of the court or judge before whom such civil proceeding shall have been had or shall be pending.

No prosecution shall be commenced without the sanction of some judge or the attorney-general.

Directors, &c. of any body corporate or public company fraudulently appropriating property;

81. Whosoever, being a director, member or public officer of any body corporate or public company, shall fraudulently take or apply for his own use or benefit, or for any use or purposes other than the use or purposes of such body corporate or public company, any of the property of such body corporate or public company, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned.

or keeping fraudulent accounts;

82. Whosoever, being a director, public officer or manager of any body corporate or public company, shall as such receive or possess himself of any of the property of such body corporate or public company otherwise than in payment of a just debt or demand, and shall, with intent to defraud, omit to make or to cause or direct to be made a full and true entry thereof in the books and accounts of such body corporate or public company, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned.

or wilfully destroying books, &c.;

83. Whosoever, being a director, manager, public officer or member of any body corporate or public company, shall, with intent to defraud, destroy, alter, mutilate or falsify any book, paper, writing or valuable security belonging to the body corporate or public company, or make or concur in the

making of any false entry, or omit or concur in omitting any material particular, in any book of account or other document, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned.

or publishing fraudulent statements.

84. Whosoever, being a director, manager or public officer of any body corporate or public company, shall make, circulate or publish, or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned.

No person to be exempt from answering questions in any court, but no person making a disclosure in any compulsory proceeding to be liable to prosecution.

85. Nothing in any of the last ten preceding sections of this Act contained shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any court, or upon the hearing of any matter in bankruptcy or insolvency; and no person shall be liable to be convicted of any of the misdemeanors in any of the said sections mentioned by any evidence whatever in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit or proceeding which shall have been bonâ fide instituted by any party aggrieved, or if he shall have first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency.

No remedy at law or in equity shall be affected.

86. Nothing in any of the last eleven preceding sections of this Act contained, nor any proceeding, conviction or judgment to be had or taken thereon against any person under any of the said sections, shall prevent, lessen or impeach any remedy at law or in equity which any party aggrieved by any offence against any of the said sections might have had if this Act had not been passed; but no conviction of any such offender shall be received in evidence in any action at law or suit in equity against him; and nothing in the said sections contained shall affect or prejudice any agreement entered into or security given by any trustee, having for its object the restoration or repayment of any trust property misappropriated.

Convictions shall not be received in evidence in civil suits.

Certain misdemeanors not triable at sessions.

87. No misdemeanor against any of the last twelve preceding sections of this Act shall be prosecuted or tried at any court of general or quarter session of the peace.

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25 & 26 VICT. C. 63.

An Act to amend "The Merchant Shipping Act, 1854," "The Merchant Shipping Act Amendment Act, 1855," and "The Customs Consolidation Act, 1853." [29*th July*, 1862.]

17 & 18 Vict. c. 104. 18 & 19 Vict. c. 91. 16 & 17 Vict. c. 107.

WHEREAS it is expedient further to amend "The Merchant Shipping Act, 1854," "The Merchant Shipping Act Amendment Act, 1855," and "The Customs Consolidation Act, 1853:" Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited as "The Merchant Shipping Act Amendment Act, 1862," and shall be construed with and as part of "The Merchant Shipping Act, 1854," hereinafter termed the principal Act.

Enactments in Table (A) repealed.

2. The enactments described in table (A) in the schedule to this Act, shall be repealed as therein mentioned, except as to any liabilities incurred before such repeal.

Registry and Measurement of Tonnage (*Part II. of Merchant Shipping Act*, 1854).

Equities not excluded by Merchant Shipping Act.

3. It is hereby declared that the expression "beneficial interest," whenever used in the Second Part of the principal Act, includes interests arising under contract and other equitable interests; and the intention of the said Act is that, without prejudice to the provisions contained in the said Act for preventing notice of trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the said Act on registered owners and mortgagees, and without prejudice to the provisions contained in the said Act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein, in the same manner as equities may be enforced against them in respect of any other personal property (*a*).

Tonnage rates under local Acts may be levied on the registered tonnage.

4. Any body corporate or persons having power to levy tonnage rates on ships may, if they think fit, with the consent of the board of trade, levy such tonnage rates upon the registered tonnage of the ships as determined by the rules for the measurement of tonnage for the time being in force under the principal Act, notwithstanding that the local Act or Acts under which such rates are levied provides for levying the same upon some different system of tonnage measurement.

Certificates for Engineers (*Part III. of Merchant Shipping Act*, 1854).

Steam ships to carry certificated engineers.

5. On and after the first day of June, one thousand eight hundred and sixty-three, every steam ship which is required by the principal Act to have a master possessing a certificate from the board of trade shall also have an engineer or engineers possessing a certificate or certificates from the board of trade as follows; (that is to say,)

(1.) Engineers' certificates shall be of two grades, viz., "first-class engineers' certificates," and "second-class engineers' certificates:"

(2.) Every foreign-going steam ship of one hundred nominal horse power or upwards shall have as its first and second engineers two certificated engineers, the first possessing a "first-class engineers' certificate," and the second possessing a "second-class engineers' certificate," or a certificate of the higher grade:

(3.) Every foreign-going steam ship of less than one hundred nominal horse power shall have as its only or first engineer an engineer possessing a "second-class engineers' certificate," or a certificate of the higher grade:

(4.) Every sea-going home-trade passenger steam ship shall have as its only or first engineer an engineer possessing a "second-class engineers' certificate" or a certificate of the higher grade:

(5.) Every person who, having been engaged to serve in any of the above capacities in any such steam ship as aforesaid, goes to sea in that capacity without being at the time entitled to and possessed of such certificate as is required by this section, and every person who employs any person in any of the above capacities in such ship without ascertaining that he is at the time entitled to and possessed of such certificate as is required by this section, shall for each such offence incur a penalty not exceeding fifty pounds.

Examinations for engineers' certificates of competency.

6. The board of trade shall from time to time cause examinations to be held of persons who may be desirous of obtaining certificates of competency as engineers: for the purpose of such examinations the board of trade shall from time to time appoint and remove examiners, and award the remuneration to be paid to them; lay down rules as to the qualification of applicants, and as to the times and places of examination, and generally do all such acts as it thinks expedient in order to carry into effect the examination of such engineers as aforesaid.

Fees to be paid by applicants for examination.

7. All applicants for examination shall pay such fees, not exceeding the sums specified in the table marked (B) in the schedule hereto, as the board of

(*a*) *The Innisfallen*, L. R. 1 A. & E. 72; *The Cathcart*, L. R. 1 A. & E. 314.

trade directs (*b*); and such fees shall be paid to such persons as the said board appoints for that purpose, and shall be carried to the account of the mercantile marine fund.

Certificates of competency to be granted to those who pass.

8. The board of trade shall deliver to every applicant who is duly reported to have passed the examination satisfactorily, and to have given satisfactory evidence of his sobriety, experience and ability, a certificate of competency as first-class engineer or as second-class engineer, as the case may be.

Engineers' certificates of service to be delivered on proof of certain service.

9. Certificates of service for engineers, differing in form from certificates of competency, shall be granted as follows: (that is to say,)

(1.) Every person who before the first day of April, one thousand eight hundred and sixty-two, has served as first engineer in any foreign-going steam-ship of one hundred nominal horse-power or upwards, or who has attained or attains the rank of engineer in the service of her Majesty or of the East India Company, shall be entitled to a "first-class engineers' certificate" of service:

(2.) Every person who before the first day of April, one thousand eight hundred and sixty-two, has served as second engineer in any foreign-going steam-ship of one hundred nominal horse power or upwards, or as first or only engineer in any other steam-ship, or who has attained or attains the rank of first-class assistant engineer in the service of her Majesty, shall be entitled to a "second-class engineers' certificate" of service:

Each of such certificates of service shall contain particulars of the name, place and time of birth, and the length and nature of the previous service of the person to whom the same is delivered; and the board of trade shall deliver such certificates of service to the various persons so respectively entitled thereto, upon their proving themselves to have attained such rank or to have served as aforesaid, and upon their giving a full and satisfactory account of the particulars aforesaid.

Certain provisions of Merchant Shipping Act to apply to engineers' certificates.

10. The provisions of the principal Act, with respect to the certificates of competency or service of masters and mates, contained in the 138th, 139th, 140th, 161st and 162nd sections of the said Act, shall apply to certificates of competency or service granted under this Act in the same manner as if certificates of competency and service to be granted to engineers under this Act were specially mentioned and included in the said section.

Power of board of trade and local marine board to investigate conduct of certificated engineers.

11. The power by the 241st section of the principal Act given to the board of trade (*c*), or to any local marine board of instituting investigations into the conduct of any master or mate whom it has reason to believe to be from incompetency or misconduct unfit to discharge his duties, shall extend to any certificated engineer whom the board of trade or any local marine board has reason to believe to be from incompetency or misconduct unfit to discharge his duties in the same manner as if in the said section the words "certificated engineer" had been inserted after "master" wherever "master" occurs in such section.

Declaration of engineer surveyor to contain statement concerning engineers' certificate.

12. The declaration required to be given by the engineer surveyor under section 309 of the principal Act shall, in the case of a ship by this Act required to have a certificated engineer, contain, in addition to the statements in the said section mentioned, a statement that the certificate or certificates of the engineer or engineers of such ship is or are such and in such condition as is required by this Act.

Masters and Seamen (Part III. of Merchant Shipping Act, 1854).

Third Part of Act to apply to fishing boats, lighthouse vessels and pleasure yachts, with certain exceptions.

13. The following vessels; (that is to say,)

[(1.) Registered sea-going ships exclusively employed in fishing on the coasts of the United Kingdom (*d*):]

(2.) Sea-going ships belonging to any of the three general lighthouse boards:

(3.) Sea-going ships being pleasure yachts;

Shall be subject to the whole of the Third Part of the principal Act; except sections 136, 143, 145, 147, 149, 150, 151, 152, 153, 154, 155, 157, 158, 161, 162, 166, 170, 171, 231, 256, 279, 280, 281, 282, 283, 284, 285, 286 and 287.

(*b*) See s. 4 of 43 & 44 Vict. c. 22.
(*c*) See 39 & 40 Vict. c. 80, s. 29, *infra*.
(*d*) Repealed by 46 & 47 Vict. c. 41, s. 55.

Local marine board may determine number of quorum.

14. Whereas doubts have been entertained whether local marine boards have the power of declaring a quorum: it is hereby declared, that the power by the 119th section of the principal Act given to every local marine board of regulating the mode in which its meetings are to be held and its business conducted includes the power of determining a quorum; nevertheless, after the passing of this Act such quorum shall never consist of less than three members.

Titles of shipping masters.

15. The offices termed shipping offices in the principal Act shall be termed mercantile marine offices, and the officers termed shipping masters and deputy shipping masters in the principal Act shall be termed superintendents and deputy superintendents of such offices; but nothing in this section contained shall invalidate or affect any act which may be done at any such office under the title of a shipping office, or any act which may be done by, with or to any of the said officers under the title of shipping master or deputy shipping master.

Punishment for embezzlement in shipping offices.

16. Any person appointed to any office or service by or under any local marine board shall be deemed to be a clerk or servant within the meaning of the sixty-eighth section of the Act of the twenty-fifth year of the reign of her present Majesty, chapter ninety-six:

If any such person fraudulently applies or disposes of any chattel, money or valuable security received by him whilst employed in such office or service for or on account of any such local marine board, or for or on account of any other public board or department, to his own use or any use or purpose other than that for which the same was paid, entrusted to or received by him, or fraudulently withholds, retains or keeps back the same or any part thereof contrary to any lawful directions or instructions which he is required to obey in relation to such office or service, he shall be deemed guilty of embezzlement within the meaning of the said section:

Any such person shall, on conviction of such offence as aforesaid, be liable to the same pains and penalties as are thereby imposed upon any clerk or servant for embezzlement:

In any indictment against such person for such offence, it shall be sufficient to charge any such chattel, money, or valuable security as the property either of the board by which he was appointed, or of the board or department for or on account of which he may have received the same; and no greater particularity in the description of the property shall be required in such indictment in order to sustain the same, or in proof of the offence alleged, than is required in respect of an indictment or the subject-matter thereof by the seventy-first section of the said last-mentioned Act.

Examinations of masters and mates at ports where there are no local marine boards.

17. Whereas it is expedient to make provision in certain cases for holding examinations of applicants for certificates of competency at places where there are no local marine boards: be it enacted, that the board of trade, if satisfied that serious inconvenience exists at any port in consequence of the distance which applicants for certificates have to travel in order to be examined, may with the concurrence of any local marine board, send the examiner or examiners of that local marine board to the port where such inconvenience exists: and thereupon the said examiner or examiners shall proceed to such port, and shall there examine the applicants in the presence of such person or persons (if any) as the board of trade may appoint for the purpose; and such examinations shall be conducted in the same manner and shall have the same effect as other examinations under the said Act.

Construction of sect. 182 of principal Act. Stipulations concerning salvage.

18. It is hereby declared, that the 182nd section of the principal Act does not apply to the case of any stipulation made by the seamen belonging to any ship, which according to the terms of the agreement is to be employed on salvage service, with respect to the remuneration to be paid to them for salvage services to be rendered by such ship to any other ship or ships (*e*).

Payment of wages to seamen abroad under sect. 209 of principal Act.

19. The payment of seamen's wages required by the 209th section of the principal Act shall, whenever it is practicable so to do, be made in money and not by bill; and in cases where payment is made by bill drawn by the master, the owner of the ship shall be liable to pay the amount for which the same is drawn to the holder or indorsee thereof; and it shall not be necessary in any proceeding against the owner upon such bill to prove that the master had authority to draw the same; and any bill purporting to be drawn in pursuance of the said section, and to be indorsed as therein

(*e*) *The Ganges*, L. R. 2 A. & E. 370.

required, if produced out of the custody of the board of trade or of the registrar-general of seamen, or of any superintendent of any mercantile marine office, shall be received in evidence; and any indorsement on any such bill purporting to be made in pursuance of the said section, and to be signed by one of the functionaries therein mentioned, shall also be received in evidence, and shall be deemed to be primâ facie evidence of the facts stated in such indorsement.

Wages and effects of deceased seamen.

20. The 197th section of the principal Act shall extend to seamen or apprentices who within the six months immediately preceding their death have belonged to a British ship; and such section shall be construed as if there were inserted in the first line thereof after the words "such seamen or apprentice as last aforesaid" the words "or if any seaman or apprentice who has within the six months immediately preceding his death belonged to a British ship."

Recovery of wages, &c., of seamen lost with their ship.

21. The wages of seamen or apprentices who are lost with the ship to which they belong shall be dealt with as follows; (that is to say,)

(1.) The board of trade may recover the same from the owner of the ship in the same manner in which seamen's wages are recoverable:

(2.) In any proceedings for the recovery of such wages, if it is shown by some official return produced out of the custody of the registrar-general of seamen or by other evidence that the ship has twelve months or upwards before the institution of the proceedings left a port of departure, and if it is not shown that she has been heard of within twelve months after such departure, she shall be deemed to have been lost with all hands on board, either immediately after the time she was last heard of or at such later time as the court hearing the case may think probable:

(3.) The production out of the custody of the registrar-general of seamen or of the board of trade of any duplicate agreement or list of the crew made out at the time of the last departure of the ship from the United Kingdom, or of a certificate purporting to be a certificate from a consular or other public officer at any port abroad, stating that certain seamen or apprentices were shipped in the ship from the said port, shall, in the absence of proof to the contrary, be sufficient proof that the seamen or apprentices therein named were on board at the time of the loss:

(4.) The board of trade shall deal with such wages in the manner in which they deal with the wages of other deceased seamen and apprentices under the principal Act.

Relief of distressed seamen to be regulated by board of trade.

22. Whereas under the 211th and 212th sections of the principal Act, and the 16th section of "The Merchant Shipping Act Amendment Act, 1855," provision is made for relieving and sending home seamen found in distress abroad: and whereas doubts are entertained whether power exists under the said sections of making regulations and imposing conditions which are necessary for the prevention of desertion and misconduct and the undue expenditure of public money: be it enacted, and it is hereby declared, that the claims of seamen to be relieved or sent home in pursuance of the said sections or any of them, shall be subject to such regulations and dependent on such conditions as the board of trade may from time to time make or impose; and no seamen shall have any right to demand to be relieved or sent home except in the cases and to the extent provided for by such regulations and conditions.

Power of cancelling certificate to rest with the court which hears the case.

23. The following rules shall be observed with respect to the cancellation and suspension of certificates; (that is to say):

(1.) The power of cancelling or suspending the certificate of a master or mate by the 242nd section of the principal Act conferred on the board of trade shall (except in the case provided for by the fourth paragraph of the said section) vest in and be exercised by the local marine board, magistrates, naval court, admiralty court, or other court or tribunal by which the case is investigated or tried, and shall not in future vest in or be exercised by the board of trade:

(2.) Such power shall extend to cancelling or suspending the certificates of engineers in the same manner as if "certificated engineer" or "certificated engineers" were inserted throughout such section after "master" or "masters:"

(3.) Every such board, court or tribunal shall at the conclusion of the

case, or as soon afterwards as possible, state in open court the decision to which they may have come with respect to cancelling or suspending certificates, and shall in all cases send a full report upon the case with the evidence to the board of trade, and shall also, if they determine to cancel or suspend any certificate, forward such certificate to the board of trade with their report:

(4.) It shall be lawful for the board of trade, if they think the justice of the case required it, to re-issue and return any certificate which has been cancelled or suspended, or shorten the time for which it is suspended, or grant a new certificate of the same or any lower grade in place of any certificate which has been cancelled or suspended:

[(5.) The 434th and 437th sections of the principal Act shall be read as if for the word "nautical" were substituted the words "nautical or engineering," and as if for the word "person" and "assessor" respectively were substituted the words "person or persons" and "assessor or assessors" respectively (*f*):]

(6.) No certificate shall be cancelled or suspended under this section unless a copy of the report or a statement of the case upon which the investigation is ordered has been furnished to the owner of the certificate before the commencement of the investigation, nor in the case of investigations conducted by justices or a stipendiary magistrate, unless one assessor at least expresses his concurrence in the report.

Certificate to be delivered up.

24. Every master or mate or engineer whose certificate is or is to be suspended or cancelled in pursuance of this Act shall, upon demand of the board, court or tribunal by which the case is investigated or tried, deliver his certificate to them, or, if it is not demanded by such board, court or tribunal, shall, upon demand, deliver it to the board of trade, or as it directs, and in default shall for each offence incur a penalty not exceeding fifty pounds.

25—38. [*Safety* (*Part IV. of Merchant Shipping Act*, 1854).]

39—42. [*Pilotage* (*Part V. of Merchant Shipping Act*, 1854).]

43—48. [*Lighthouses* (*Part VI. of Merchant Shipping Act*, 1854).]

Wreck and Salvage (*Part VIII. of Merchant Shipping Act*, 1854).

Extension and amendment of summary jurisdiction in small salvage cases.

49. The provisions contained in the Eighth Part of the principal Act for giving summary jurisdiction to two justices in salvage cases, and for preventing unnecessary appeals and litigation in such cases, shall be amended as follows: (that is to say,)

(1.) Such provision shall extend to all cases in which the value of the property saved does not exceed one thousand pounds, as well as to the cases provided for by the principal Act:

(2.) Such provisions shall be held to apply whether the salvage service has been rendered within the limits of the United Kingdom or not:

(3.) It shall be lawful for one of her Majesty's principal secretaries of state, or in Ireland for the lord lieutenant or other chief governor or governors to appoint out of the justices for any borough or county a rota of justices by whom jurisdiction in salvage cases shall be exercised:

(4.) When no such rota is appointed, it shall be lawful for the salvors, by writing addressed to the justice's clerk, to name one justice, and for the owner of the property saved in like manner to name the other:

(5.) If either party fails to name a justice within a reasonable time, the case may be tried by two or more justices at petty sessions:

(6.) It shall be competent for any stipendiary magistrate, and also in England for any county court judge, in Scotland for the sheriff or sheriff-substitute of any county, and in Ireland for the recorder of any borough in which there is a recorder, or for the chairmen of quarter sessions in any county, to exercise the same jurisdiction in salvage cases as is given to two justices:

(*f*) Repealed by Statute Law Revision Act, 1878. See 39 & 40 Vict. c. 80, s. 45, *infra*.

(7.) It shall be lawful for one of her Majesty's principal secretaries of state to determine a scale of costs to be awarded in salvage cases by any such justices or court as aforesaid (*g*):

(8.) All the provisions of the principal Act relating to summary proceedings in salvage cases, and to the prevention of unnecessary appeals in such cases, shall, except so far as the same are altered by this Act, extend and apply to all such proceedings, whether under the principal Act or this Act, or both of such Acts.

Receiver may appoint a valuer in salvage cases.

50. Whenever any salvage question arises the receiver of wreck for the district may, upon application from either of the parties, appoint a valuer to value the property in respect of which the salvage claim is made, and shall, when the valuation has been returned to him, give a copy of the valuation to both parties; and any copy of such valuation, purporting to be signed by the valuer and to be attested by the receiver, shall be received in evidence in any subsequent proceeding; and there shall be paid in respect of such valuation, by the party applying for the same, such fee as the board of trade may direct.

Jurisdiction of court of session in salvage cases.

51. The words "court of session" in the four hundred and sixty-eighth section of the principal Act shall be deemed to mean and include either division of the court of session or the lord ordinary officiating on the bills during vacation.

Delivery of wreck by receiver not to prejudice title.

52. Upon delivery of wreck or of the proceeds of wreck by any receiver to any person in pursuance of the provisions of the Eighth Part of the principal Act, such receiver shall be discharged from all liability in respect thereof, but such delivery shall not be deemed to prejudice or affect any question concerning the right or title to the said wreck which may be raised by third parties, nor shall any such delivery prejudice or affect any question concerning the title to the soil on which the wreck may have been found.

Crown rights to wreck.

53. Whereas by the principal Act it is provided that the proceeds of wreck, if the same is not claimed by the owner within a year, and if no person other than her Majesty, her heirs and successors, is proved to be entitled thereto, shall, subject to certain deductions, be paid into the receipt of her Majesty's exchequer in such manner as the commissioners of the treasury may direct, and that the same shall be carried to and form part of the consolidated fund of the United Kingdom (*h*):

And whereas doubts have been entertained whether the said last-recited provision is consistent with the arrangements concerning the hereditary revenues of the crown effected by the Act of the first year of her present Majesty, chapter two: And whereas doubts have also been entertained whether due provision is made by the said Act for paying to the revenues of the duchies of Lancaster and Cornwall respectively such of the said proceeds as may belong to those duchies: 1 Vict. c. 2.

It is hereby declared, that such of the said proceeds of wreck as belong to her Majesty in right of her crown shall, during the life of her present Majesty (whom God long preserve), be carried to and form part of the consolidated fund of the United Kingdom, and shall after the decease of her present Majesty (whom God long preserve) be payable and paid to her Majesty's heirs and successors:

And it is hereby further declared, that such of the said proceeds of wreck as belong to her Majesty in right of her duchy of Lancaster shall be paid to the receiver-general of the said duchy, or his sufficient deputy or deputies, as part of the revenues of the said duchy, and be dealt with accordingly:

And it is hereby further declared and enacted, that the provision in the principal Act contained regarding the sale of unclaimed wreck to which no owner establishes his claim within the period of one year, and to which no admiral, vice-admiral, lord of any manor, or person other than her Majesty, her heirs and successors, is proved to be entitled, is intended and shall be construed to apply to wreck of the sea belonging to her Majesty, her heirs and successors, in respect of the duchy of Cornwall, or to the Duke of Cornwall for the time being in respect of his duchy of Cornwall; but that the proceeds of such wreck shall, subject to such deductions as are in the same Act mentioned, form part of the revenues of the duchy of Cornwall, and be dealt with accordingly.

(*g*) See Maude & Pollock's Merchant Shipping, 4th ed., 2, ccccxxxvi.
(*h*) See 45 & 46 Vict. c. 55, s. 4.

Liability of Shipowners (Part IX. of Merchant Shipping Act, 1854).

Shipowners' liability limited.

54. The owners of any ship, whether British or foreign, shall not, in cases where all or any of the following events occur without their actual fault or privity; (that is to say,)

(1.) Where any loss of life or personal injury is caused to any person being carried in such ship:

(2.) Where any damage or loss is caused to any goods, merchandise or other things whatsoever on board any such ship:

(3.) Where any loss of life or personal injury is by reason of the improper navigation of such ship as aforesaid caused to any person carried in any other ship or boat:

(4.) Where any loss or damage is by reason of the improper navigation of such ship as aforesaid caused to any other ship or boat, or to any goods, merchandise or other things whatsoever on board any other ship or boat:

be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise or other things, to an aggregate amount exceeding fifteen pounds for each ton of their ship's tonnage; nor in respect of loss or damage to ships, goods, merchandise or other things, whether there be in addition loss of life or personal injury or not to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage; such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steam ships the gross tonnage without deduction on account of engine-room:

In the case of any foreign ship which has been or can be measured according to British law, the tonnage as ascertained by such measurement shall, for the purposes of this section, be deemed to be the tonnage of such ship:

In the case of any foreign ship which has not been and cannot be measured under British law, the surveyor-general of tonnage in the United Kingdom, and the chief measuring officer in any British possession abroad, shall, on receiving from or by direction of the court hearing the case such evidence concerning the dimensions of the ship as it may be found practicable to furnish, give a certificate under his hand stating what would in his opinion have been the tonnage of such ship if she had been duly measured according to British law, and the tonnage so stated in such certificate shall, for the purposes of this section, be deemed to be the tonnage of such ship.

55. Insurances effected against any or all of the events enumerated in the section last preceding, and occurring without such actual fault or privity as therein mentioned, shall not be invalid by reason of the nature of the risk (*i*).

Limitation of invalidity of insurances.

Proof of passengers on board lost ship.

56. In any proceeding under the 506th section of the principal Act or any Act amending the same against the owner of any ship or share therein in respect of loss of life, the master's list or the duplicate list of passengers delivered to the proper officer of customs under the sixteenth section of "The Passengers Act, 1855," shall, in the absence of proof to the contrary, be sufficient proof that the persons in respect of whose death any such prosecution or proceeding is instituted were passengers on board such ship at the time of their deaths.

Arrangements concerning Lights, Sailing Rules, Salvage and Measurement of Tonnage in the case of Foreign Ships.

Foreign ships in British jurisdiction to be subject to regulations in Table (C) in schedule.

57. Whenever foreign ships are within British jurisdiction, the regulations for preventing collision contained in table (C) in the schedule to this Act, or such other regulations for preventing collision as are for the time being in force under this Act, and all provisions of this Act relating to such regulations, or otherwise relating to collisions, shall apply to such foreign ships; and in any cases arising in any British court of justice concerning matters happening within British jurisdiction, foreign ships shall, so far as regards such regulations and provisions be treated as if they were British ships.

Regulations, when adopted by a foreign

58. Whenever it is made to appear to her Majesty that the government of any foreign country is willing that the regulations for preventing collision

(*i*) See 30 Vict. c. 23, s. 7.

contained in table (C) in the schedule to this Act (*k*), or such other regulations for preventing collision as are for the time being in force under this Act, or any of the said regulations, or any provisions of this Act relating to collisions, should apply to the ships of such country when beyond the limits of British jurisdiction, her Majesty may, by order in council, direct that such regulations, and all provisions of this Act which relate to such regulations, and all such other provisions as aforesaid, shall apply to the ships of the said foreign country, whether within British jurisdiction or not.

country, may be applied to its ships on the high seas.

59. Whenever it is made to appear to her Majesty that the government of any foreign country is willing that salvage shall be awarded by British courts for services rendered in saving life from any ship belonging to such country when such ship is beyond the limits of British jurisdiction, her Majesty may, by order in council, direct that the provisions of the principal Act and of this Act, with respect to salvage for services rendered in saving life from British ships, shall in all British courts be held to apply to services rendered in saving life from the ships of such foreign country, whether such services are rendered within British jurisdiction or not.

Provisions concerning salvage of life may, with the consent of any foreign country, be applied to its ships on the high seas.

60. Whenever it is made to appear to her Majesty that the rules concerning the measurement of tonnage of merchant ships for the time being in force under the principal Act have been adopted by the government of any foreign country, and are in force in that country, it shall be lawful for her Majesty by order in council to direct that the ships of such foreign country shall be deemed to be of the tonnage denoted in their certificates of registry or other national papers; and thereupon it shall no longer be necessary for such ships to be remeasured in any port or place in her Majesty's dominions, but such ships shall be deemed to be of the tonnage denoted in their certificates of registry or other papers, in the same manner, to the same extent and for the same purposes in, to and for which the tonnage denoted in the certificates of registry of British ships is deemed to be the tonnage of such ships.

Ships of foreign countries adopting the rule for measurement of tonnage need not be remeasured in this country

61. Whenever an order in council has been issued under this Act, applying any provision of this Act or any regulation made by or in pursuance of this Act to the ships of any foreign country, such ships shall in all cases arising in any British court be deemed to be subject to such provision or regulation, and shall for the purpose of such provision or regulation be treated as if they were British ships.

Effect of orde in council.

62. In issuing any order in council under this Act her Majesty may limit the time during which it is to remain in operation, and may make the same, subject to such conditions and qualifications, if any, as may be deemed expedient, and thereupon the operation of the said order shall be limited and modified accordingly.

Orders in council may be limited as to time, and qualified.

63. Her Majesty may, by order in council, from time to time revoke or alter any order previously made under this Act (*l*).

Orders in council may be revoked and altered.

64. Every order in council to be made under this Act shall be published in the London Gazette as soon as may be after the making thereof; and the production of a copy of the London Gazette containing such order shall be received in evidence, and shall be proof that the order therein published has been duly made and issued; and it shall not be necessary to plead such order specially.

Orders in council to be published in "London Gazette."

Legal Procedure.

65. Nothing in the third section of the Act passed in the twentieth and twenty-first years of the reign of her present Majesty, chapter forty-three, except so much thereof as provides for the payment of any fees that may be due to the clerk of the justices, shall be deemed to apply to extend to any proceeding under the direction of the board of trade, or under or by virtue of the provisions of the principal Act or this Act, or any Act amending the same.

20 & 21 Vict. c. 43, s. 3, not to apply to proceedings under board of trade or this Act, &c.

Delivery of Goods and Lien for Freight.

66. The following terms used in the sections of this Act hereinafter con-

Interpretation of terms.

(*k*) Superseded by Order in Council, 14th August, 1879. Maude & Pollock, pp. 2, 173.

(*l*) 39 & 40 Vict. c. 80, s. 38, *infra*.

tained, shall have the respective meanings hereby assigned to them, if not inconsistent with the context or subject-matter; (that is to say,)

"Report:" The word "report" shall mean the report required by the customs laws to be made by the master of any importing ship:

"Entry:" The word "entry" shall mean the entry required by the customs laws to be made for the landing or discharge of goods from an importing ship:

"Goods:" The word "goods" shall include every description of wares and merchandise:

"Wharf:" The word "wharf" shall include all wharves, quays, docks and premises in or upon which any goods when landed from ships may be lawfully placed:

"Warehouse:" The word "warehouse" shall include all warehouses, buildings and premises in which goods when landed from ships may be lawfully placed:

"Wharf owner:" The expression "wharf owner" shall mean the occupier of any wharf, as hereinbefore defined:

"Warehouse owner:" The expression "warehouse owner" shall mean the occupier of any warehouse as hereinbefore defined:

"Shipowner:" The word "shipowner" shall include the master of the ship and every other person authorised to act as agent for the owner, or entitled to receive the freight, demurrage, or other charges payable in respect of such ship:

"Owner of goods." The expression "owner of goods" shall include every person who is for the time being entitled, either as owner or agent for the owner, to the possession of the goods, subject in the case of a lien, if any, to such lien:

Power to shipowner to enter and land goods in default of entry and landing by owner of goods.

67. Where the owner of any goods imported in any ships from foreign parts into the United Kingdom fails to make entry thereof, or having made entry thereof to land the same or take delivery thereof and to proceed therewith with all convenient speed, by the times severally hereinafter mentioned, the shipowner may make entry of and land or unship the said goods at the times, in the manner, and subject to the conditions following; (that is to say,)

(1.) If a time for the delivery of the goods is expressed in the charter party, bill of lading, or agreement, then at any time after the time so expressed:

(2.) If no time for the delivery of the goods is expressed in the charter party, bill of lading, or agreement, then at any time after the expiration of seventy-two hours, exclusive of a Sunday or holiday, after the report of the ship:

(3.) If any wharf or warehouse is named in the charter party, bill of lading, or agreement, as the wharf or warehouse where the goods are to be placed, and if they can be conveniently there received, the shipowner in landing them by virtue of this enactment shall cause them to be placed on such wharf or in such warehouse:

(4.) In other cases the shipowner in landing goods by virtue of this enactment shall place them in or on some wharf or warehouse on or in which goods of a like nature are usually placed; such wharf or warehouse being, if the goods are dutiable, a wharf or warehouse duly approved by the commissioners of customs for the landing of dutiable goods:

(5.) If at any time before the goods are landed or unshipped the owner of the goods is ready and offers to land or take delivery of the same, he shall be allowed so to do, and his entry shall in such case be preferred to any entry which may have been made by the shipowner:

(6.) If any goods are, for the purpose of convenience in assorting the same, landed at the wharf where the ship is discharged, and the owner of the goods at the time of such landing has made entry and is ready and offers to take delivery thereof, and to convey the same to some other wharf or warehouse, such goods shall be assorted at landing, and shall if demanded, be delivered to the owner thereof within twenty-four hours after assortment; and the expense of and consequent on such landing and assortment shall be borne by the shipowner:

(7.) If at any time before the goods are landed or unshipped the owner thereof has made entry for the landing and warehousing thereof at any particular wharf or warehouse other than that at which the ship

is discharging, and has offered and been ready to take delivery thereof, and the shipowner has failed to make such delivery, and has also failed at the time of such offer to give the owner of the goods correct information of the time at which such goods can be delivered, then the shipowner shall, before landing or unshipping such goods under the power hereby given to him, give to the owner of the goods or of such wharf or warehouse as last aforesaid twenty-four hours' notice in writing of his readiness to deliver the goods, and shall, if he lands or unships the same without such notice, do so at his own risk and expense.

If, when goods are landed, the shipowner give notice for that purpose, the lien for freight is to continue.

68. If, at the time when any goods are landed from any ship, and placed in the custody of any person as a wharf or warehouse owner, the shipowner gives to the wharf or warehouse owner notice in writing that the goods are to remain subject to a lien for freight or other charges payable to the shipowner to an amount to be mentioned in such notice, the goods so landed shall, in the hands of the wharf or warehouse owner, continue liable to the same lien, if any, for such charges as they were subject to before the landing thereof; and the wharf or warehouse owner receiving such goods shall retain them until the lien is discharged as hereinafter mentioned, and shall, if he fail so to do, make good to the shipowner any loss thereby occasioned to him.

Lien to be discharged on proof of payment.

69. Upon the production to the wharf or warehouse owner of a receipt for the amount claimed as due, and delivery to the wharf or warehouse owner of a copy thereof, or of a release of freight from the shipowner, the said lien shall be discharged.

Lien to be discharged on deposit with warehouse owner.

70. The owner of the goods may deposit with the wharf or warehouse owner a sum of money equal in amount to the sum so claimed as aforesaid by the shipowner, and thereupon the lien shall be discharged, but without prejudice to any other remedy which the shipowner may have for the recovery of the freight.

Warehouse owner may at the end of fifteen days, if no notice is given, pay deposit to shipowner.

71. If such deposit as aforesaid is made with the wharf or warehouse owner, and the person making the same does not within fifteen days after making it give to the wharf or warehouse owner notice in writing to retain it, stating in such notice the sum, if any, which he admits to be payable to the shipowner, or, as the case may be, that he does not admit any sum to be so payable, the wharf or warehouse owner may, at the expiration of such fifteen days, pay the sum so deposited over to the shipowner, and shall by such payment be discharged from all liability in respect thereof.

Course to be taken if notice to retain is given.

72. If such deposit as aforesaid is made with the wharf or warehouse owner, and the person making the same does within fifteen days after making it give to the wharf or warehouse owner such notice in writing as aforesaid, the wharf or warehouse owner shall immediately apprise the shipowner of such notice, and shall pay or tender to him out of the sum deposited the sum, if any, admitted by such notice to be payable, and shall retain the remainder or balance, or, if no sum is admitted to be payable, the whole of the sum deposited for thirty days from the date of the said notice; and at the expiration of such thirty days, unless legal proceedings have in the meantime been instituted by the shipowner against the owner of the goods to recover the said balance or sum or otherwise for the settlement of any disputes which may have arisen between them concerning such freight or other charges as aforesaid, and notice in writing of such proceedings has been served on him, the wharf or warehouse owner shall pay the said balance or sum over to the owner of the goods, and shall by such payment be discharged from all liability in respect thereof.

After ninety days warehouse owner may sell goods by public auction.

73. If the lien is not discharged, and no deposit is made, as hereinbefore mentioned, the wharf or warehouse owner may, and, if required by the shipowner, shall, at the expiration of ninety days from the time when the goods were placed in his custody, or if the goods are of a perishable nature, at such earlier period as he in his discretion thinks fit, sell by public auction, either for home use or exportation, the said goods, or so much thereof as may be necessary to satisfy the charges hereinafter mentioned.

Notice of sale to be given.

74. Before making such sale the wharf or warehouse owner shall give notice thereof by advertisment in two newspapers circulating in the neighbourhood, or in one daily newspaper published in London and in one local newspaper, and also, if the address of the owner of the goods has been stated on the manifest of the cargo, or on any of the documents which have come into the possession of the wharf or warehouse owner, or is otherwise known

to him, give notice of the sale to the owner of the goods by letter sent by the post; but the title of a bonâ fide purchaser of such goods shall not be invalidated by reason of the omission to send notice as hereinbefore mentioned, nor shall any such purchaser be bound to enquire whether such notice has been sent.

Moneys arising from sale, how to be applied.

75. In every case of any such sale as aforesaid the wharf or warehouse owner shall apply the moneys received from the sale as follows, and in the following order:

(1.) If the goods are sold for home use in payment of any customs or excise duties owing in respect thereof:

(2.) In payment of the expenses of the sale:

(3.) In the absence of any agreement between the wharf or warehouse owner and the shipowner concerning the priority of their respective charges, in payment of the rent, rates and other charges due to the wharf or warehouse owner in respect of the said goods:

(4.) In payment of the amount claimed by the shipowner as due for freight or other charges in respect of the said goods:

(5.) But in case of any agreement between the wharf or warehouse owner and the shipowner concerning the priority of their respective charges then such charges shall have priority according to the terms of such agreement:

and the surplus, if any, shall be paid to the owner of the goods.

Warehouse owner's rent and expenses.

76. Whenever goods are placed in the custody of a wharf or warehouse owner under the authority of this Act, the said wharf or warehouse owner shall be entitled to rent in respect of the same, and shall also have power from time to time at the expense of the owner of the goods, to do all such reasonable acts as in the judgment of the said wharf or warehouse owner are necessary for the proper custody and preservation of the said goods, and shall have a lien on the said goods for the said rent and expenses.

Warehouse owner's protection.

77. Nothing in this Act contained shall compel any wharf or warehouse owner to take charge of any goods which he would not be liable to take charge of if this Act had not passed; nor shall he be bound to see to the validity of any lien claimed by any shipowner under this Act.

Saving powers under local Acts.

78. Nothing in this Act contained shall take away or abridge any powers given by any local Act to any harbour trust, body corporate or persons whereby they are enabled to expedite the discharge of ships or the landing or delivery of goods; nor shall anything in this Act contained take away or diminish any rights or remedies given to any shipowner or wharf or warehouse owner by any local Act.

The SCHEDULE referred to in this Act.

Table (A). See Sect. 2 (*m*).

Table (B). See Sect. 6 (*n*).

Fees to be charged on Examination of Engineers.

For a first-class engineer's certificate . . .	£2	0	0
For a second-class engineer's certificate . .	1	0	0

(*m*) Repealed by Statute Law Revision Act, 1875.

(*n*) For table of fees payable at Mercantile Marine Offices on examination for certificate, see Maude & Pollock, 4th ed. p. cccxciii.

25 & 26 VICT. c. 89.

An Act for the Incorporation, Regulation, and Winding-up of Trading Companies and other Associations (o). [*7th August*, 1862.]

WHEREAS it is expedient that the laws relating to the incorporation, regulation, and winding-up of trading companies and other associations should be consolidated and amended: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

Preliminary.

Short title.

1. This Act may be cited for all purposes as "The Companies Act, 1862."

Commencement of Act.

2. This Act, with the exception of such temporary enactment as is hereinafter declared to come into operation immediately, shall not come into operation until the second day of November, one thousand eight hundred and sixty-two, and the time at which it so comes into operation is hereinafter referred to as the commencement of this Act.

Definition of insurance company.

3. For the purposes of this Act a company that carries on the business of insurance in common with any other business or businesses shall be deemed to be an insurance company (*p*).

Prohibition of partnerships exceeding certain number.

4. No company, association, or partnership consisting of more than ten persons shall be formed, after the commencement of this Act, for the purpose of carrying on the business of banking, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent; and no company, association, or partnership consisting of more than twenty persons shall be formed after the commencement of this Act, for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the Stannaries.

Division of Act.

5. This Act is divided into nine parts, relating to the following subject-matters:

The first part,—to the constitution and incorporation of companies and associations under this Act:
The second part,—to the distribution of the capital and liability of members of companies and associations under this Act:
The third part,—to the management and administration of companies and associations under this Act:
The fourth part,—to the winding-up of companies and associations under this Act:
The fifth part,—to the registration office:
The sixth part,—to application of this Act to companies registered under the Joint Stock Companies Act:
The seventh part,—to companies authorized to register under this Act:
The eighth part,—to application of this Act to unregistered companies:
The ninth part,—to repeal of Acts, and temporary provisions.

PART I.

CONSTITUTION AND INCORPORATION OF COMPANIES AND ASSOCIATIONS UNDER THIS ACT.

Memorandum of Association.

Memorandum of Association.

Mode of forming company.

6. Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association (*q*), and otherwise complying with the requisitions of this Act in respect to registration, form an incorporated company, with or without limited liability.

(*o*) See 30 Vict. c. 29, and 30 & 31 Vict. c. 131, *infra*.

(*p*) See sect. 44.

(*q*) See Schedule II.

I. *Memorandum of Association.*

Mode of limiting liability of members.

7. The liability of the members of a company formed under this Act may, according to the memorandum of association, be limited either to the amount, if any, unpaid on the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound up (*r*).

Memorandum of association of a company limited by shares.

8. Where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares, the memorandum of association shall contain the following things; (that is to say,)

(1.) The name of the proposed company, with the addition of the word "limited" as the last word in such name (*s*):

(2.) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situate:

(3.) The objects for which the proposed company is to be established:

(4.) A declaration that the liability of the members is limited:

(5.) The amount of capital with which the company proposes to be registered divided into shares of a certain fixed amount:

Subject to the following regulations:

(1.) That no subscriber shall take less than one share:

(2.) That each subscriber of the memorandum of association shall write opposite to his name the number of shares he takes.

Memorandum of association of a company limited by guarantee.

9. Where a company is formed on the principle of having the liability of its members limited to such amount as the members respectively undertake to contribute to the assets of the company in the event of the same being wound up, hereinafter referred to as a company limited by guarantee, the memorandum of association shall contain the following things; (that is to say,)

(1.) The name of the proposed company, with the addition of the word "limited" as the last word in such name:

(2.) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situate:

(3.) The objects for which the proposed company is to be established:

(4.) A declaration that each member undertakes to contribute to the assets of the company, in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and of the costs, charges, and expenses of winding-up the company, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding a specified amount.

Memorandum of association of an unlimited company.

10. Where a company is formed on the principle of having no limit placed on the liability of its members, hereinafter referred to as an unlimited company, the memorandum of association shall contain the following things; (that is to say),

(1.) The name of the proposed company:

(2.) The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is proposed to be situate:

(3.) The objects for which the proposed company is to be established.

Stamp, signature, and effect of memorandum of association.

11. The memorandum of association shall bear the same stamp as if it were a deed, and shall be signed by each subscriber in the presence of, and be attested by, one witness at the least, and that attestation shall be a sufficient attestation in Scotland as well as in England and Ireland: it shall, when registered, bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in the memorandum contained, on the part of himself, his heirs, executors, and administrators, a covenant to observe all the conditions of such memorandum, subject to the provisions of this Act.

(*r*) By sect. 4 of 30 & 31 Vict. c. 131, *infra*, companies may have directors with unlimited liability.

(*s*) See sect. 23 of 30 & 31 Vict. c. 131, *infra*.

I. *Memorandum of Association.*

Power of certain companies to alter memorandum of association.

12. Any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorized to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned, as to increase its capital, by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock, but, save as aforesaid, and save as is hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association (*t*).

Power of companies to change name.

13. Any company under this Act, with the sanction of a special resolution of the company passed in manner hereinafter mentioned, and with the approval of the Board of Trade, testified in writing under the hand of one of its secretaries or assistant secretaries, may change its name, and upon such change being made the registrar shall enter the new name on the register in the place of the former name, and shall issue a certificate of incorporation altered to meet the circumstances of the case; but no such alteration of name shall affect any rights or obligations of the company, or render defective any legal proceedings instituted or to be instituted by or against the company, and any legal proceedings may be continued or commenced against the company by its new name that might have been continued or commenced against the company by its former name.

Articles of Association.

Articles of Association.

Regulations to be prescribed by articles of association.

14. The memorandum of association may, in the case of a company limited by shares, and shall, in the case of a company limited by guarantee or unlimited, be accompanied, when registered, by articles of association signed by the subscribers to the memorandum of association, and prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient: the articles shall be expressed in separate paragraphs, numbered arithmetically: they may adopt all or any of the provisions contained in the Table marked A in the first schedule hereto; they shall, in the case of a company, whether limited by guarantee or unlimited, that has a capital divided into shares, state the amount of capital with which the company proposes to be registered; and in the case of a company, whether limited by guarantee or unlimited, that has not a capital divided into shares, state the number of members with which the company proposes to be registered, for the purpose of enabling the registrar to determine the fees payable on registration: in a company limited by guarantee or unlimited, and having a capital divided into shares, each subscriber shall take one share at the least, and shall write opposite to his name in the memorandum of association the number of shares he takes.

Application of Table A.

15. In the case of a company limited by shares, if the memorandum of association is not accompanied by articles of association, or in so far as the articles do not exclude or modify the regulations contained in the Table marked A in the first schedule hereto, the last-mentioned regulations shall, so far as the same are applicable, be deemed to be the regulations of the company, in the same manner and to the same extent as if they had been inserted in articles of association, and the articles had been duly registered.

Stamp, signature, and effect of articles of association.

16. The articles of association shall be printed, they shall bear the same stamp as if they were contained in a deed, and shall be signed by each subscriber in the presence of, and be attested by, one witness at the least, and such attestation shall be a sufficient attestation in Scotland as well as in England and Ireland; when registered, they shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles, subject to the provisions of this Act; and all moneys payable by any member of the company, in pursuance of the conditions and regulations of the company, or any of such conditions or regulations, shall be deemed to be a debt due from such member to the company, and in England and Ireland to be in the nature of a specialty debt.

(*t*) See 30 & 31 Vict. c. 131, ss. 8—20; 40 & 41 Vict. c. 26, s. 4; 43 Vict. c. 19, s. 4, *infra*.

I. *General Provisions.*

General Provisions.

Registration of memorandum of association and articles of association, with fees as in Table B.

17. The memorandum of association and the articles of association, if any, shall be delivered to the registrar of joint stock companies hereinafter mentioned (*u*), who shall retain and register the same: there shall be paid to the registrar by a company having a capital divided into shares, in respect of the several matters mentioned in the table marked B in the first schedule hereto, the several fees therein specified, or such smaller fees as the Board of Trade may from time to time direct (*x*); and by a company not having a capital divided into shares, in respect of the several matters mentioned in the table marked C in the first schedule hereto, the several fees therein specified, or such smaller fees as the Board of Trade may from time to time direct: all fees paid to the said registrar in pursuance of this Act shall be paid into the receipt of her Majesty's Exchequer, and be carried to the account of the Consolidated Fund of the United Kingdom of Great Britain and Ireland.

Effect of registration.

18. Upon the registration of the memorandum of association, and of the articles of association in cases where articles of association are required by this Act or by the desire of the parties to be registered, the registrar shall certify, under his hand, that the company is incorporated, and in the case of a limited company that the company is limited: the subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate by the name contained in the memorandum of association, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands, but with such liability on the part of the members to contribute to the assets of the company in the event of the same being wound up as hereinafter mentioned (*y*): a certificate of the incorporation of any company given by the registrar, shall be conclusive evidence that all the requisitions of this Act in respect of registration have been complied with.

Copies of memorandum and articles to be given to members.

19. A copy of the memorandum of association, having annexed thereto the articles of association, if any, shall be forwarded to every member, at his request, on payment of the sum of one shilling, or such less sum as may be prescribed by the company for each copy; and if any company makes default in forwarding a copy of the memorandum of association and articles of association, if any, to a member, in pursuance of this section, the company so making default shall, for each offence, incur a penalty not exceeding one pound.

Prohibition against identity of names in companies.

20. No company shall be registered under a name identical with that by which a subsisting company is already registered, or so nearly resembling the same as to be calculated to deceive, except in a case where such subsisting company is in the course of being dissolved, and testifies its consent in such manner as the registrar requires; and if any company, through inadvertence or otherwise, is, without such consent as aforesaid, registered by a name identical with that by which a subsisting company is registered, or so nearly resembling the same as to be calculated to deceive, such first-mentioned company may, with the sanction of the registrar, change its name, and upon such change being made, the registrar shall enter the new name on the register in the place of the former name, and shall issue a certificate of incorporation, altered to meet the circumstances of the case; but no such alteration of name shall affect any rights or obligations of the company, or render defective any legal proceedings instituted, or to be instituted, by or against the company, and any legal proceedings may be continued or commenced against the company by its new name that might have been continued or commenced against the company by its former name.

Prohibition against certain companies holding land.

21. No company formed for the purpose of promoting art, science, religion, charity, or any other like object, not involving the acquisition of gain by the company or by the individual members thereof, shall, without the sanction of the Board of Trade, hold more than two acres of land; but the Board of Trade may, by licence (*z*) under the hand of one of their principal secretaries or assistant secretaries, empower any such company to hold lands in such quantity and subject to such conditions as they think fit.

(*u*) Sect. 174.
(*x*) Sect. 71; Schedule I., Table (B).
(*y*) Sect. 38.
(*z*) Sched. II., Form F.

PART II.

DISTRIBUTION OF CAPITAL AND LIABILITY OF MEMBERS OF COMPANIES AND ASSOCIATIONS UNDER THIS ACT.

Distribution of Capital.

Nature of interest in company.

22. The shares or other interest of any member in a company under this Act shall be personal estate, capable of being transferred in manner provided by the regulations of the company, and shall not be of the nature of real estate, and each share shall, in the case of a company having a capital divided into shares be distinguished by its appropriate number.

Definition of "member."

23. The subscribers of the memorandum of association of any company under this act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members hereinafter mentioned; and every other person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company (*a*).

Transfer by personal representative.

24. Any transfer of the share or other interest of a deceased member of a company under this Act, made by his personal representative, shall, notwithstanding such personal representative may not himself be a member, be of the same validity as if he had been a member at the time of the execution of the instrument of transfer.

Register of members.

25. Every company under this Act shall cause to be kept in one or more books a register of its members (*b*), and there shall be entered therein the following particulars:—

(1.) The names and addresses, and the occupations, if any, of the members of the company, with the addition, in the case of a company having a capital divided into shares, of a statement of the shares held by each member, distinguishing each share by its number; and of the amount paid or agreed to be considered as paid on the shares of each member:

(2.) The date at which the name of any person was entered in the register as a member:

(3.) The date at which any person ceased to be a member:

And any company acting in contravention of this section shall incur a penalty not exceeding five pounds for every day during which its default in complying with the provisions of this section continues, and every director or manager of the company who shall knowingly and wilfully authorize or permit such contravention shall incur the like penalty.

Annual list of members.

26. Every company under this Act, and having a capital divided into shares (*c*), shall make, once at least in every year, a list of all persons who, on the fourteenth day succeeding the day on which the ordinary general meeting, or if there is more than one ordinary meeting in each year, the first of such ordinary general meetings is held, are members of the company; and such list shall state the names, addresses, and occupations of all the members therein mentioned, and the number of shares held by each of them, and shall contain a summary specifying the following particulars:—

(1.) The amount of the capital of the company, and the number of shares into which it is divided:

(2.) The number of shares taken from the commencement of the company up to the date of the summary:

(3.) The amount of calls made on each share:

(4.) The total amount of calls received:

(5.) The total amount of calls unpaid:

(6.) The total amount of shares forfeited:

(7.) The names, addresses, and occupations of the persons who have ceased to be members since the last list was made, and the number of shares held by each of them.

The above list and summary shall be contained in a separate part of the register, and shall be completed within seven days after such fourteenth day

(*a*) Sect. 37.

(*b*) Compare sect. 31 of 30 & 31 Vict. c. 131, *infra*.

(*c*) See sect. 12 of this Act.

II. *Distribution of Capital.*

as is mentioned in this section, and a copy shall forthwith be forwarded to the registrar of joint stock companies (*d*).

Penalty on company, &c., not keeping a proper register.

27. If any company under this Act, and having a capital divided into shares, makes default in complying with the provisions of this Act with respect to forwarding such list of members or summary as is hereinbefore mentioned to the registrar, such company shall incur a penalty not exceeding five pounds for every day during which such default continues, and every director and manager of the company who shall knowingly and wilfully authorize or permit such default shall incur the like penalty.

Company to give notice of consolidation or of conversion of capital into stock.

28. Every company under this Act, and having a capital divided into shares that has consolidated and divided its capital into shares of larger amount than its existing shares, or converted any portion of its capital into stock, shall give notice to the registrar of joint stock companies of such consolidation, division, or conversion, specifying the shares so consolidated, divided, or converted.

Effect of conversion of shares into stock.

29. Where any company under this Act, and having a capital divided into shares, has converted any portion of its capital into stock, and given notice of such conversion to the registrar, all the provisions of this Act which are applicable to shares only shall cease as to so much of the capital as is converted into stock; and the register of members hereby required to be kept by the company, and the list of members to be forwarded to the registrar, shall show the amount of stock held by each member in the list instead of the amount of shares and the particulars relating to shares hereinbefore required.

Entry of trusts on register.

30. No notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the registrar, in the case of companies under this Act, and registered in England or Ireland.

Certificate of shares or stock.

31. A certificate, under the common seal of the company, specifying any share or shares or stock held by any member of a company, shall be *primâ facie* evidence of the title of the member to the share or shares or stock therein specified.

Inspection of register.

32. The register of members, commencing from the date of the registration of the company, shall be kept at the registered office of the company hereinafter mentioned (*e*); except when closed, as hereinafter mentioned (*f*), it shall during business hours, but subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day be appointed for inspection, be open to the inspection of any member gratis, and to the inspection of any other person on the payment of one shilling, or such less sum as the company may prescribe, for each inspection; and every such member or other person may require a copy of such register, or of any part thereof, or of such list or summary of members as is hereinbefore mentioned, on payment of sixpence for every hundred words required to be copied; if such inspection or copy is refused, the company shall incur for each refusal a penalty not exceeding two pounds, and a further penalty not exceeding two pounds for every day during which such refusal continues, and every director and manager of the company who shall knowingly authorize or permit such refusal shall incur the like penalty; and in addition to the above penalty, as respects companies registered in England and Ireland, any judge sitting in chambers, or the vice-warden of the stannaries, in the case of companies subject to his jurisdiction, may by order compel an immediate inspection of the register.

Power to close register.

33. Any company under this Act may, upon giving notice by advertisement in some newspaper circulating in the district in which the registered office of the company is situated, close the register of members for any time or times not exceeding in the whole thirty days in each year.

Notice of increase of capital and of members to be given to registrar.

34. Where a company has a capital divided into shares, whether such shares may or may not have been converted into stock, notice of any increase in such capital beyond the registered capital, and where a company has not a capital divided into shares, notice of any increase in the number of members beyond the registered number, shall be given to the registrar in the case of an increase of capital, within fifteen days from the date of the passing of the resolution by which such increase has been authorized; and in the case of an increase of members, within fifteen days from the time at which

(*d*) See 43 Vict. c. 19, s. 6, *infra*.
(*e*) Sect. 39.
(*f*) Sect. 33.

such increase of members has been resolved on or has taken place, and the registrar shall forthwith record the amount of such increase of capital or members: if such notice is not given within the period aforesaid, the company in default shall incur a penalty not exceeding five pounds for every day during which such neglect to give notice continues, and every director and manager of the company who shall knowingly and wilfully authorize or permit such default shall incur the like penalty.

II. *Distribution of Capital.*

Remedy for improper entry or omission of entry in register.

35. If the name of any person is, without sufficient cause, entered in or emitted from the register of members of any company under this Act, or if default is made, or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may, as respects companies registered in England or Ireland, by motion in any of her Majesty's superior courts of law or equity, or by application to a judge sitting in chambers, or to the vice-warden of the stannaries in the case of companies subject to his jurisdiction, and as respects companies registered in Scotland by summary petition to the court of session, or in such other manner as the said courts may direct, apply for an order of the court that the register may be rectified; and the court may either refuse such application, with or without cost, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party aggrieved may have sustained: the court may, in any proceeding under this section, decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or emitted from the register, whether such question arises between two or more members or alleged members, or between any members or alleged members and the company, and generally the court may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register; provided that the court [if a court of common law, may direct an issue to be tried, in which any question of law may be raised, and a writ of error or appeal, in the manner directed by "The Common Law Procedure Act, 1854," shall lie] (*g*).

Notice to registrar of rectification of registrar.

36. Whenever any order has been made rectifying the register, in the case of a company hereby required to send a list of its members to the registrar, the court shall, by its order, direct that due notice of such rectification be given to the registrar.

Register to be evidence.

37. The register of members shall be *primâ facie* evidence of any matters by this Act directed or authorized to be inserted therein (*h*).

Liability of Members.

Liability of Members.

Liability of present and past members of company.

38. In the event of a company formed under this Act being wound up, every present and past member (*i*) of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with the qualifications following; (that is to say) (*k*),

(1.) No past member shall be liable to contribute to the assets of the company if he has ceased to be a member for a period of one year or upwards prior to the commencement (*l*) of the winding-up:

(2.) No past member shall be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member:

(3.) No past member shall be liable to contribute to the assets of the company unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act:

(4.) In the case of a company limited by shares, no contribution shall be

(*g*) Words within brackets repealed by 44 & 45 Vict. c. 59.

(*h*) See sect. 25.

(*i*) Sect. 23. As to shares standing in the name of a married woman, see 45 & 46 Vict. c. 75, ss. 6—9.

(*k*) Sect. 109.

(*l*) Sects. 84, 130.

II. *Liability of Members.*

required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member:

(5.) In the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount of the undertaking entered into on his behalf by the memorandum of association (*m*):

(6.) Nothing in this Act contained shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members upon any such policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of such policy or contract:

(7.) No sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account, for the purposes of the final adjustment of the rights of the contributories amongst themselves (*n*).

PART III.

Management and Administration of Companies and Associations under this Act.

Provisions for Protection of Creditors.

Provisions for Protection of Creditors.

Registered office of company.

39. Every company under this Act shall have a registered office to which all communications and notices may be addressed (*o*). If any company under this Act carries on business without having such an office, it shall incur a penalty not exceeding five pounds for every day during which business is so carried on.

Notice of situation of registered office.

40. Notice of the situation of such registered office, and of any change therein, shall be given to the registrar, and recorded by him: until such notice is given the company shall not be deemed to have complied with the provisions of this Act with respect to having a registered office.

Publication of name by a limited company.

41. Every limited company under this Act, whether limited by shares or by guarantee, shall paint or affix, and shall keep painted or affixed, its name on the outside of every office or place in which the business of the company is carried on, in a conspicuous position, in letters easily legible, and shall have its name engraven in legible characters on its seal, and shall have its name mentioned in legible characters in all notices, advertisements, and other official publications of such company, and in all bills of exchange, promissory notes, indorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of such company, and in all bills of parcels, invoices, receipts, and letters of credit of the company.

Penalties on non-publication of name.

42. If any limited company under this Act does not paint or affix, and keep painted or affixed, its name in manner directed by this Act, it shall be liable to a penalty not exceeding five pounds for not so painting or affixing its name, and for every day during which such name is not so kept painted or affixed, and every director and manager of the company who shall knowingly and wilfully authorize or permit such default shall be liable to the like penalty; and if any director, manager, or officer of such company, or any person on its behalf, uses or authorizes the use of any seal purporting to be a seal of the company whereon its name is not so engraven as aforesaid, or issues or authorizes the issue of any notice, advertisement, or other official publication of such company, or signs or authorizes to be signed on behalf of such company any bill of exchange, promissory note, indorsement, cheque, order for money or goods, or issues or authorizes to be issued any bill of parcels, invoice, receipt, or letter of credit of the company, wherein its

(*m*) Sect. 9 (4). (*n*) Sect. 101. (*o*) Sect. 62.

name is not mentioned in manner aforesaid, he shall be liable to a penalty of fifty pounds, and shall further be personally liable to the holder of any such bill of exchange, promissory note, cheque, or order for money or goods, for the amount thereof, unless the same is duly paid by the company.

III. *Provisions for Protection of Creditors.*

Register of mortgages.

43. Every limited company under this Act shall keep a register of all mortgages and charges specifically affecting property of the company, and shall enter in such register in respect of each mortgage or charge a short description of the property mortgaged or charged, the amount of charge created, and the names of the mortgagees or persons entitled to such charge: if any property of the company is mortgaged or charged without such entry as aforesaid being made, every director, manager, or other officer of the company who knowingly and wilfully authorizes or permits the omission of such entry, shall incur a penalty not exceeding fifty pounds: the register of mortgages required by this section shall be open to inspection by any creditor or member of the company at all reasonable times; and if such inspection is refused, any officer of the company refusing the same, and every director and manager of the company authorizing or knowingly and wilfully permitting such refusal, shall incur a penalty not exceeding five pounds, and a further penalty not exceeding two pounds for every day during which such refusal continues; and in addition to the above penalty, as respects companies registered in England and Ireland, any judge sitting in chambers, or the Vice-Warden of the Stannaries, in the case of companies subject to his jurisdiction (*p*), may by order compel an immediate inspection of the register.

Certain companies to publish statement entered in Schedule.

44. Every limited banking company, and every insurance company, and deposit, provident, or benefit society under this Act shall, before it commences business, and also on the first Monday in February and the first Monday in August in every year during which it carries on business, make a statement in the Form marked D. in the first schedule hereto, or as near thereto as circumstances will admit, and a copy of such statement shall be put up in a conspicuous place in the registered office of the company, and in every branch office or place where the business of the company is carried on, and if default is made in compliance with the provisions of this section, the company shall be liable to a penalty not exceeding five pounds for every day during which such default continues, and every director and manager of the company who shall knowingly and wilfully authorize or permit such default shall incur the like penalty.

Every member and every creditor of any company mentioned in this section shall be entitled to a copy of the above-mentioned statement on payment of a sum not exceeding sixpence.

List of directors to be sent to registrar.

45. Every company under this Act, and not having a capital divided into shares, shall keep at its registered office a register containing the names and addresses and the occupations of its directors or managers, and shall send to the Registrar of Joint Stock Companies a copy of such register, and shall from time to time notify to the registrar any change that takes place in such directors or managers.

Penalty on company not keeping register of directors.

46. If any company under this Act, and not having a capital divided into shares, makes default in keeping a register of its directors or managers, or in sending a copy of such register to the registrar in compliance with the foregoing rules, or in notifying to the registrar any change that takes place in such directors or managers, such delinquent company shall incur a penalty not exceeding five pounds for every day during which such default continues, and every director and manager of the company who shall knowingly and wilfully authorize or permit such default shall incur the like penalty.

Promissory notes and bills of exchange.

47. A promissory note or bill of exchange shall be deemed to have been made, accepted, or indorsed on behalf of any company under this Act, if made, accepted, or indorsed in the name of the company by any person acting under the authority of the company, or if made, accepted or indorsed by or on behalf or on account of the company, by any person acting under the authority of the company (*q*).

Prohibition against carrying on business with less than seven members.

48. If any company under this Act carries on business when the number of its members is less than seven (*r*), for a period of six months after the number has been so reduced, every person who is a member of such company during the time that it so carries on business after such period of six

(*p*) Sect. 35. (*q*) Sect. 95 (3). (*r*) Sect. 6.

III. *Provisions for Protection of Creditors.*

months, and is cognisant of the fact that it is so carrying on business with fewer than seven members, shall be severally liable for the payment of the whole debts of the company contracted during such time, and may be sued for the same, without the joinder in the action or suit of any other member.

Provisions for Protection of Members.

Provisions for Protection of Members.

General meeting of company.

49. A general meeting of every company under this Act shall be held once at the least in every year (*r*).

Power to alter regulations by special resolution.

50. Subject to the provisions of this Act, and to the conditions contained in the memorandum of association (*s*), any company formed under this Act may, in general meeting, from time to time, by passing a special resolution in manner hereinafter mentioned, alter all or any of the regulations of the company contained in the articles of association or in the Table marked A in the first schedule, where such table is applicable to the company, or make new regulations to the exclusion of or in addition to all or any of the regulations of the company; and any regulations so made by special resolution shall be deemed to be regulations of the company of the same validity as if they had been originally contained in the articles of association, and shall be subject in like manner to be altered or modified by any subsequent special resolution.

Definition of special resolution.

51. A resolution passed by a company under this Act shall be deemed to be special whenever a resolution has been passed by a majority of not less than three-fourths of such members of the company for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy (in cases where by the regulations of the company proxies are allowed), at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy, at a subsequent general meeting, of which notice has been duly given, and held at an interval of not less than fourteen days, nor more than one month from the date of the meeting at which such resolution was first passed; at any meeting mentioned in this section, unless a poll is demanded by at least five members, a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against the same: notice of any meeting shall, for the purposes of this section, be deemed to be duly given and the meeting to be duly held, whenever such notice is given and meeting held in manner prescribed by the regulations of the company: in computing the majority under this section, when a poll is demanded, reference shall be had to the number of votes to which each member is entitled by the regulations of the company.

Provision where no regulations as to meetings.

52. In default of any regulations as to voting every member shall have one vote (*t*), and in default of any regulations as to summoning general meetings a meeting shall be held to be duly summoned of which seven days' notice in writing has been served on every member in manner in which notices are required to be served by the table marked A in the first schedule hereto, and in default of any regulations as to the persons to summon meetings five members shall be competent to summon the same, and in default of any regulations as to who is to be chairman of such meeting, it shall be competent for any person elected by the members present to preside.

Registry of special resolutions.

53. A copy of any special resolution that is passed by any company under this Act, shall be printed and forwarded to the registrar of joint stock companies, and be recorded by him: if such copy is not so forwarded within fifteen days from the date of the confirmation of the resolution, the company shall incur a penalty not exceeding two pounds for every day after the expiration of such fifteen days during which such copy is omitted to be forwarded, and every director and manager of the company who shall knowingly and wilfully authorize or permit such default shall incur the like penalty.

(*r*) See First Schedule, Table A. (29), and sect. 39 of 30 & 31 Vict. c. 131, *infra*.

(*s*) Sect. 6.

(*t*) Sched. I. Table A. (44).

III. *Provisions for Protection of Members.*

Copies of special resolutions.

54. Where articles of association have been registered, a copy of every special resolution for the time being in force shall be annexed to or embodied in every copy of the articles of association that may be issued after the passing of such resolution; where no articles of association have been registered, a copy of any special resolution shall be forwarded in print to any member requesting the same on payment of one shilling or such less sum as the company may direct; and if any company makes default in complying with the provisions of this section it shall incur a penalty not exceeding one pound for each copy in respect of which such default is made; and every director and manager of the company who shall knowingly and wilfully authorize or permit such default shall incur the like penalty.

Execution of deeds abroad.

55. Any company under this Act may, by instrument in writing under its common seal, empower any person, either generally or in respect of any specified matter, as its attorney, to execute deeds on its behalf in any place not situate in the United Kingdom (*u*); and every deed signed by such attorney, on behalf of the company, and under his seal, shall be binding on the company, and have the same effect as if it were under the common seal of the company.

Examination of affairs of company by inspectors.

56. The board of trade may appoint one or more competent inspectors to examine into the affairs of any company under this Act, and to report thereon, in such manner as the board may direct, upon the applications following; (that is to say,)

(1.) In the case of a banking company that has a capital divided into shares, upon the application of members holding not less than one-third part of the whole shares of the company for the time being issued:

(2.) In the case of any other company that has a capital divided into shares, upon the application of members holding not less than one-fifth part of the whole shares of the company for the time being issued:

(3.) In the case of any company not having a capital divided into shares, upon the application of members being in number not less than one-fifth of the whole number of persons for the time being entered on the register of the company as members.

Application for inspection to be supported by evidence.

57. The application shall be supported by such evidence as the board of trade may require for the purpose of showing that the applicants have good reason for requiring such investigation to be made, and that they are not actuated by malicious motives in instituting the same; the board of trade may also require the applicants to give security for payment of the costs of the inquiry before appointing any inspector or inspectors.

Inspection of books.

58. It shall be the duty of all officers and agents of the company to produce for the examination of the inspectors all books and documents in their custody or power: any inspector may examine upon oath the officers and agents of the company in relation to its business, and may administer such oath accordingly: if any officer or agent refuses to produce any book or document hereby directed to be produced, or to answer any question relating to the affairs of the company, he shall incur a penalty not exceeding five pounds in respect of each offence (*x*).

Result of examination, how dealt with.

59. Upon the conclusion of the examination the inspectors shall report their opinion to the board of trade; such report shall be written or printed, as the board of trade directs; a copy shall be forwarded by the board of trade to the registered office of the company, and a further copy shall, at the request of the members upon whose application the inspection was made, be delivered to them or to any one or more of them: all expenses of and incidental to any such examination as aforesaid shall be defrayed by the members upon whose applications the inspectors were appointed, unless the board of trade shall direct the same to be paid out of the assets of the company, which it is hereby authorized to do.

Power of company to appoint inspectors.

60. Any company under this Act may by special resolution appoint inspectors for the purpose of examining into the affairs of the company: the inspectors so appointed shall have the same powers and perform the

(*u*) See 27 Vict. c. 19, "An Act to enable Joint Stock Companies carrying on Business in Foreign Countries to have Official Seals to be used for such Countries."

(*x*) Schedule I., Table A. (78).

III. *Provisions for Protection of Members.*

same duties as inspectors appointed by the board of trade, with this exception, that, instead of making their report to the board of trade, they shall make the same in such manner and to such persons as the company in general meeting directs; and the officers and agents of the company shall incur the same penalties, in case of any refusal to produce any book or document hereby required to be produced to such inspectors, or to answer any question, as they would have incurred if such inspector had been appointed by the board of trade.

Report of inspectors to be evidence.

61. A copy of the report of any inspectors appointed under this Act, authenticated by the seal of the company into whose affairs they have made inspection, shall be admissible in any legal proceeding, as evidence of the opinion of the inspectors in relation to any matter contained in such report.

Notices.

Notices.

Service of notices on company.

62. Any summons, notice, order, or other document required to be served upon the company may be served by leaving the same, or sending it through the post in a prepaid letter addressed to the company, at their registered office (*y*).

Rules as to notices by letter.

63. Any document to be served by post on the company shall be posted in such time as to admit of its being delivered in the due course of delivery within the period (if any) prescribed for the service thereof; and in proving service of such document it shall be sufficient to prove that such document was properly directed, and that it was put as a prepaid letter into the post office.

Authentication of notices of company.

64. Any summons, notice, order or proceeding requiring authentication by the company, may be signed by any director, secretary, or other authorized officer of the company, and need not be under the common seal of the company, and the same may be in writing or in print, or partly in writing and partly in print.

Legal Proceedings.

Legal Proceedings.

Recovery of penalties.

65. All offences under this Act made punishable by any penalty may be prosecuted summarily before two or more justices, as to England, in manner directed by an Act passed in the session holden in the eleventh and twelfth years of the reign of her Majesty Queen Victoria, chapter forty-three, intituled "An Act to facilitate the Performance of the Duties of Justices of the Peace out of Sessions within England and Wales with respect to Summary Convictions and Orders," or any Act amending the same; and as to Scotland, before two or more justices or the sheriff of the county, in manner directed by the Act passed in the session of Parliament holden in the seventeenth and eighteenth years of the reign of Her Majesty Queen Victoria, chapter one hundred and four, intituled "An Act to amend and consolidate the Acts relating to Merchant Shipping," or any Act amending the same, as regards offences in Scotland against that Act, not being offences by that Act described as felonies or misdemeanors; and as to Ireland, in manner directed by the Act passed in the session holden in the fourteenth and fifteenth years of the reign of her Majesty Queen Victoria, chapter ninety-three, intituled "An Act to consolidate and amend the Acts regulating the Proceedings of Petty Sessions and the Duties of Justices of the Peace out of Quarter Sessions in Ireland," or any Act amending the same.

Application of penalties.

66. The justices or sheriff imposing any penalty under this Act may direct the whole or any part thereof to be applied in or towards payment of the costs of the proceedings, or in or towards the rewarding the person upon whose information or at whose suit such penalty has been recovered; and subject to such direction, all penalties shall be paid into the receipt of her Majesty's Exchequer in such manner as the Treasury may direct, and shall be carried to and form part of the consolidated fund of the United Kingdom.

Evidence of proceedings at meetings.

67. Every company under this Act shall cause minutes of all resolutions and proceedings of general meetings of the company, and of the directors or managers of the company in cases where there are directors or managers, to be duly entered in books to be from time to time provided for the purpose, and any such minute as aforesaid, if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had, or

(*y*) Sect. 39.

by the chairman of the next succeeding meeting, shall be received as evidence in all legal proceedings (*z*); and until the contrary is proved, every general meeting of the company or meeting of directors or managers in respect of the proceedings of which minutes have been so made shall be deemed to have been duly held and convened, and all resolutions passed thereat or proceedings had to have been duly passed and had, and all appointments of directors, managers or liquidators shall be deemed to be valid, and all acts done by such directors, managers or liquidators shall be valid, notwithstanding any defect that may afterwards be discovered in their appointments or qualifications.

III. *Legal Proceedings.*

Jurisdiction of vice-warden of stannaries.

68. In the case of companies under this Act, and engaged in working mines within and subject to the jurisdiction of the stannaries, the court of the vice-warden of the stannaries shall have and exercise the like jurisdiction and powers, as well on the common law as the equity side thereof, which it now possesses by custom, usages or statute in the case of unincorporated companies, but only so far as such jurisdiction or powers are consistent with the provisions of this Act and with the constitution of companies as prescribed or required by this Act; and for the purpose of giving fuller effect to such jurisdiction in all actions, suits or legal proceedings instituted in the said court in causes or matters whereof the court has cognizance, all process issuing out of the same, and all orders, rules, demands, notices, warrants and summons required or authorized by the practice of the court to be served on any company, whether registered or not registered, or any member or contributory thereof, or any officer, agent, director, manager or servant thereof, may be served in any part of England without any special order of the vice-warden for that purpose, or by such special order may be served in any part of the United Kingdom of Great Britain and Ireland, or in the adjacent islands, parcel of the dominions of the crown, on such terms and conditions as the court shall think fit; and all decrees, orders and judgments of the said court made or pronounced in such causes or matters may be enforced in the same manner in which degrees, orders and judgments of the court may now by law be enforced, whether within or beyond the local limits of the stannaries; and the seal of the said court, and the signature of the registrar thereof, shall be judicially noticed by all other courts and judges in England, and shall require no other proof than the production thereof; the registrar of the said court, or the assistant registrar, in making sales under any decrees or order of the court shall be entitled to the same privilege of selling by auction or competition without a licence, and without being liable to duty, as a judge of the court of chancery is entitled to in pursuance of the Acts in that behalf.

Provision as to costs in actions brought by certain limited companies.

69. Where a limited company is plaintiff or pursuer in any action, suit, or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given.

Declaration in action against members.

70. In any action or suit brought by the company against any member to recover any call or other moneys due from such member in his character of member, it shall not be necessary to set forth the special matter, but it shall be sufficient to allege that the defendant is a member of the company, and is indebted to the company in respect of a call made or other moneys due whereby an action or suit hath accrued to the company.

Alteration of Forms.

Alteration of Forms.

Board of Trade may alter forms in Schedule.

71. The forms set forth in the second schedule hereto, or forms as near thereto as circumstances admit, shall be used in all matters to which such forms refer; the board of trade may from time to time make such alterations in the tables and forms contained in the first schedule hereto, so that it does not increase the amount of fees payable to the registrar in the said schedule mentioned, and in the forms in the second schedule, or make such additions to the last-mentioned forms as it deems requisite: any such table or form, when altered, shall be published in the London Gazette, and upon such publication being made such table or form shall have the same force as if it

(*z*) Sect. 154.

III. *Alteration of Forms.*

were included in the schedule to this Act, but no alteration made by the board of trade in the table marked A. contained in the first schedule shall affect any company registered prior to the date of such alteration, or repeal, as respects such company, any portion of such table.

Arbitrations.

Arbitrations.

Power for companies to refer matters to arbitration.

72. Any company under this Act may from time to time, by writing under its common seal, agree to refer and may refer to arbitration, in accordance with "The Railway Companies Arbitration Act, 1859," any existing or future difference, question, or other matter whatsoever in dispute between itself and any other company or person, and the companies parties to the arbitration may delegate to the person or persons to whom the reference is made power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves, or by the directors or other managing body of such companies.

Provisions of 22 & 23 Vict. c. 59, to apply.

73. All the provisions of "The Railway Companies Arbitrations Act, 1859," shall be deemed to apply to arbitrations between companies and persons in pursuance of this Act; and in the construction of such provisions "the companies" shall be deemed to include companies authorized by this Act to refer disputes to arbitration.

PART IV.

WINDING UP OF COMPANIES AND ASSOCIATIONS UNDER THIS ACT.

Preliminary.

Preliminary.

Meaning of contributory.

74. The term "contributory" shall mean every person liable to contribute to the assets of a company under this Act, in the event of the same being wound up (*a*): it shall also, in all proceedings for determining the persons who are to be deemed contributories, and in all proceedings prior to the final determination of such persons, include any person alleged to be a contributory.

Nature of liability of contributory.

75. The liability of any person to contribute to the assets of a company under this Act in the event of the same being wound up, shall be deemed to create a debt (in England and Ireland of the nature of a specialty) accruing due from such person at the time when his liability commenced (*b*), but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability; and it shall be lawful in the case of the bankruptcy of any contributory to prove against his estate the estimated value of his liability to future calls, as well as calls already made.

Contributories in case of death.

76. If any contributory dies either before or after he has been placed on the list of contributories hereinafter mentioned, his personal representatives, heirs, and devisees shall be liable in a due course of administration to contribute to the assets of the company in discharge of the liability of such deceased contributory, and such personal representative, heirs, and devisees shall be deemed to be contributories accordingly.

Contributories in case of bankruptcy.

77. If any contributory becomes bankrupt, either before or after he has been placed on the list of contributories, his assignees shall be deemed to represent such bankrupt for all the purposes of the winding-up, and shall be deemed to be contributories accordingly, and may be called upon to admit to proof against the estate of such bankrupt, or otherwise to allow to be paid out of his assets in due course of law, any moneys due from such bankrupt in respect of his liability to contribute to the assets of the company being wound up; and for the purposes of this section any person who may have taken the benefit of any Act for the relief of insolvent debtors before the eleventh day of October one thousand eight hundred and sixty-one shall be deemed to have become bankrupt.

Contributories in case of marriage.

78. If any female contributory marries, either before or after she has been placed on the list of contributories, her husband shall during the continuance

(*a*) Sect. 38. As to shares standing in the name of a married woman, see 45 & 46 Vict. c. 75, ss. 6—9.

(*b*) Sect. 38.

of the marriage he liable to contribute to the assets of the company the same sum as she would have been liable to contribute if she had not married, and he shall be deemed to be a contributory accordingly (*e*).

Winding up by Court.

Circumstances under which company may be wound up by court.

79. A company under this Act may be wound up by the court as hereinafter defined (*d*), under the following circumstances; (that is to say,)

(1.) Whenever the company has passed a special resolution (*e*) requiring the company to be wound up by the court:

(2.) Whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year:

(3.) Whenever the members are reduced in number to less than seven (*f*):

(4.) Whenever the company is unable to pay its debts:

(5.) Whenever the court is of opinion that it is just and equitable that the company should be wound up.

Company when deemed unable to pay its debts.

80. A company under this Act shall be deemed to be unable to pay its debts,

(1.) Whenever a creditor, by assignment or otherwise, to whom the company is indebted, at law or in equity, in a sum exceeding fifty pounds then due, has served on the company, by leaving the same at their registered office, a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand neglected to pay such sum, or to secure or compound for the same to the reasonable satisfaction of the creditor:

(2.) Whenever, in England and Ireland, execution or other process issued on a judgment, decree or order obtained in any court in favour of any creditor, at law or in equity, in any proceeding instituted by such creditor against the company, is returned unsatisfied in whole or in part:

(3.) Whenever, in Scotland, the induciæ of a charge for payment on an extract decree, or an extract registered bond, or an extract registered protest have expired without payment being made:

(4.) Whenever it is proved to the satisfaction of the court that the company is unable to pay its debts.

Definition of "the court."

81. The expression "the court," as used in this part of this Act, shall mean the following authorities; (that is to say,)

In the case of a company engaged in working any mine within and subject to the jurisdiction of the stannaries,—the court of the vice-warden of the stannaries, unless the vice-warden certifies that in his opinion the company would be more advantageously wound up in the high court of chancery, in which case "the court" shall mean the high court of chancery:

In the case of a company registered in England, that is not engaged in working any such mine as aforesaid,—the high court of chancery:

In the case of a company registered in Ireland,—the court of chancery in Ireland:

In all cases of companies registered in Scotland,—the court of session in either division thereof:

Provided that where the court of chancery in England or Ireland makes an order for winding up a company under this Act, it may, if it thinks fit, direct all subsequent proceedings for winding up (*g*) the same to be had in the court of bankruptcy having jurisdiction in the place in which the registered office of the company is situate; and thereupon such last-mentioned court of bankruptcy shall, for the purposes of winding up the company, be deemed to be "the court" within the meaning of the Act, and shall have for the purposes of such winding up all the powers of the high court of chancery, or of the court of chancery in Ireland, as the case may require.

Application for winding up to be made by petition.

82. Any application to the court for the winding up of a company under this Act shall be by petition; it may be presented by the company, or by

(*c*) See 45 & 46 Vict. c. 75, ss. 6—9.
(*d*) Sect. 81.
(*e*) Sect. 51.
(*f*) Sects. 6 and 48.
(*g*) Sect. 12 of 30 & 31 Vict. c. 131, *infra*.

IV. *Winding up by Court.*

any one or more creditor or creditors (*h*), contributory or contributories (*i*), of the company, or by all or any of the above parties, together or separately; and every order which may be made on any such petition shall operate in favour of all the creditors and all the contributories of the company in the same manner as if it had been made upon the joint petition of a creditor and a contributory.

Power of court.

83. Any judge of the high court of chancery may do in chambers any act which the court is hereby authorized to do; and the vice-warden of the stannaries may direct that a petition for winding up a company be heard by him at such time and at such place within the jurisdiction of the stannaries, or within or near to the place where the registered office of the company is situated, as he may deem to be convenient to the parties concerned, or (with the consent of the parties concerned) at any place in England; and all orders made thereupon shall have the same force and effect as if they had been made by the vice-warden sitting at Truro or elsewhere within the jurisdiction of the court, and all parties and persons summoned to attend at the hearing of any such petition shall be compellable to give their attendance before the vice-warden by like process, and in like manner as at the hearing of any cause or matter at the usual sitting of the said court; and the registrar of the court may, subject to exception or appeal to the vice-warden as heretofore used, do and exercise such and the like acts and powers in the matter of winding up (*j*) as he is now used to do and exercise in a suit on the equity side of the said court.

Commencement of winding up by court.

84. A winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up (*k*).

Court may grant injunction.

85. The court may at any time after the presentation of a petition for winding up a company under this Act, and before making an order for winding up the company, upon the application of the company, or of any creditor or contributory of the company, restrain further proceedings in any action, suit, or proceeding against the company, upon such terms as the court thinks fit; the court may also at any time after the presentation of such petition, and before the first appointment of liquidators, appoint provisionally an official liquidator of the estate and effects of the company.

Course to be pursued by court on hearing petition.

86. Upon hearing the petition the court may dismiss the same with or without costs, may adjourn the hearing conditionally or unconditionally, and may make any interim order, or any other order that it deems just.

Actions and suits to be stayed after order for winding up.

87. When an order has been made for winding up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company, except with the leave of the court, and subject to such terms as the court may impose (*l*).

Copy of order to be forwarded to registrar.

88. When an order has been made for winding up a company under this Act, a copy of such order shall forthwith be forwarded by the company to the registrar of joint stock companies, who shall make a minute thereof in his books relating to the company.

Power of court to stay proceedings.

89. The court may at any time after an order has been made for winding up a company, upon the application by motion of any creditor or contributory of the company, and upon proof to the satisfaction of the court that all proceedings in relation to such winding up ought to be stayed, make an order staying the same, either altogether or for a limited time, on such terms and subject to such conditions as it deems fit.

Effect of order on share capital of company limited by guarantee.

90. When an order has been made for winding up a company limited by guarantee and having a capital divided into shares, any share capital that may not have been called up shall be deemed to be assets of the company, and to be a debt (in England and Ireland of the nature of a specialty (*m*)) due to the company from each member to the extent of any sums that may be unpaid on any shares held by him, and payable at such time as may be appointed by the court.

Court may have regard to wishes of creditors or contributories.

91. The court may, as to all matters relating to the winding up, have regard to the wishes of the creditors or contributories, as proved to it by any sufficient evidence, and may, if it thinks it expedient, direct meetings of the

(*h*) See 33 & 34 Vict. c. 61, ss. 2, 21.
(*i*) But see s. 40 of 30 & 31 Vict. c. 131, *infra*.
(*j*) Sect. 12 of 30 & 31 Vict. c. 131, *infra*.
(*k*) See sect. 130.
(*l*) See sect. 160.
(*m*) Sects. 75, 134.

creditors or contributories to be summoned, held and conducted in such manner as the court directs, for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the court: in the case of creditors, regard is to be had to the value of the debts due to each creditor, and in the case of contributories to the number of votes conferred on each contributory by the regulations of the company.

IV. *Winding up by Court.*

Official Liquidators.

Official Liquidators.

Appointment of official liquidator.

92. For the purpose of conducting the proceedings in winding up a company and assisting the court therein, there may be appointed a person or persons to be called an official liquidator or official liquidators; and the court having jurisdiction may appoint such person or persons, either provisionally or otherwise, as it thinks fit, to the office of official liquidator or official liquidators (*n*); in all cases if more persons than one are appointed to the office of official liquidator, the court shall declare whether any act hereby required or authorized to be done by the official liquidator is to be done by all or any one or more of such persons. The court may also determine whether any and what security is to be given by any official liquidator on his appointment; if no official liquidator is appointed, or during any vacancy in such appointment, all the property of the company shall be deemed to be in the custody of the court.

Resignations, removals, filling up vacancies, and compensation.

93. Any official liquidator may resign or be removed by the court on due cause shown: and any vacancy in the office of an official liquidator appointed by the court shall be filled by the court (*o*): there shall be paid to the official liquidator such salary or remuneration, by way of per centage or otherwise, as the court may direct; and if more liquidators than one are appointed, such remuneration shall be distributed amongst them in such proportions as the court directs.

Style and duties of official liquidator.

94. The official liquidator or liquidators shall be described by the style of the official liquidator or official liquidators of the particular company in respect of which he is or they are appointed, and not by his or their individual name or names; he or they shall take into his or their custody, or under his or their control, all the property, effects, and things in actions to which the company is or appears to be entitled, and shall perform such duties in reference to the winding up of the company as may be imposed by the court (*p*).

Powers of official liquidator.

95. The official liquidator shall have power, with the sanction of the court, to do the following things (*q*):

To bring or defend any action, suit, or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company:

To carry on the business of the company, so far as may be necessary, for the beneficial winding-up of the same (*r*):

To sell the real and personal and heritable and moveable property, effects, and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels:

To do all acts, and to execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's seal:

To prove, rank, claim, and draw a dividend, in the matter of the bankruptcy or insolvency or sequestration of any contributory, for any balance against the estate of such contributory, and to take and receive dividends in respect of such balance, in the matter of bankruptcy or insolvency, or sequestration, as a separate debt due from such bankrupt or insolvent, and rateably with the other separate creditors:

To draw, accept, make, and indorse any bill of exchange or promissory note in the name and on behalf of the company, also to raise upon the security of the assets of the company from time to time any requisite sum or sums of money (*s*); and the drawing, accepting, making, or indorsing of every such bill of exchange or promissory note as aforesaid

(*n*) Sect. 85.
(*o*) Sect. 133 (3).
(*p*) Sect. 203.
(*q*) Sect. 96.
(*r*) Sects. 131, 153.
(*s*) Sect. 47.

IV. *Official Liquidators.*

on behalf of the company shall have the same effect with respect to the liability of such company as if such bill or note had been drawn, accepted, made, or endorsed by or on behalf of such company in the course of carrying on the business thereof:

To take out, if necessary, in his official name, letters of administration to any deceased contributory, and to do in his official name any other act that may be necessary for obtaining payment of any moneys due from a contributory or from his estate, and which act cannot be conveniently done in the name of the company; and in all cases where he takes out letters of administration, or otherwise uses his official name for obtaining payment of any moneys due from a contributory, such moneys shall for the purpose of enabling him to take out such letters or recover such moneys, be deemed to be due to the official liquidator himself:

To do and execute all such other things as may be necessary for winding up the affairs of the company and distributing its assets (*t*).

Discretion of official liquidator.

96. The court may provide by any order that the official liquidator may exercise any of the above powers without the sanction or intervention of the court, and where an official liquidator is provisionally appointed (*u*), may limit and restrict his powers by the order appointing him (*x*).

Appointment of solicitor to official liquidator.

97. The official liquidator may, with the sanction of the court, appoint a solicitor or law agent to assist him in the performance of his duties.

Ordinary Powers of Court.

Ordinary Powers of Court.

Collection and application of assets.

98. As soon as may be after making an order for winding up the company, the court shall settle a list of contributories (*y*), with power to rectify the register of members in all cases where such rectification is required in pursuance of this Act (*z*), and shall cause the assets of the company to be collected and applied in discharge of its liabilities (*a*).

Provision as to representative contributories.

99. In settling the list of contributories, the court shall distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or being liable to the debts of others (*b*); it shall not be necessary, where the personal representative of any deceased contributory is placed on the list, to add the heirs or devisees of such contributory, nevertheless such heirs or devisees may be added as and when the court thinks fit.

Power of court to require delivery of property.

100. The court may, at any time after making an order for winding up a company, require any contributory for the time being settled on the list of contributories, trustee, receiver, banker, or agent, or officer of the company, to pay, deliver, convey, surrender, or transfer forthwith, or within such time as the court directs, to or into the hands of the official liquidator (*c*), any sum or balance, books, papers, estate or effects which happen to be in his hands for the time being, and to which the company is primâ facie entitled.

Power of court to order payment of debts by contributory.

101. The court may, at any time after making an order for winding up the company, make an order on any contributory for the time being settled on the list of contributories, directing payment to be made, in manner in the said order mentioned, of any moneys due from him or from the estate of the person whom he represents to the company, exclusive of any moneys which he or the estate of the person whom he represents may be liable to contribute by virtue of any call made or to be made by the court in pursuance of this part of this Act (*d*); and it may, in making such order when the company is not limited, allow to such contributory by way of set-off any moneys due to him or the estate which he represents from the company on any independent dealing or contract with the company, but not any moneys due to him as a member of the company in respect of any dividend or profit (*e*).

Provided, that when all the creditors of any company, whether limited or unlimited, are paid in full, any moneys due on any account whatever to any contributory from the company may be allowed to him by way of set-off against any subsequent call or calls (*f*).

(*t*) Sects. 159, 160, 161.
(*u*) Sect. 85.
(*x*) Sect. 151.
(*y*) Sect. 38.
(*z*) Sect. 35.
(*a*) Sect. 133.
(*b*) Sects. 76, 106.
(*c*) Sect. 103.
(*d*) Sect. 102.
(*e*) Sect. 6 of 30 & 31 Vict. c. 131, *infra*.
(*f*) Sect. 38 (7).

IV. *Ordinary Powers of Court.*

Power of court to make calls.

102. The court may, at any time after making an order for winding up a company, and either before or after it has ascertained the sufficiency of the assets of the company, make calls on and order payment thereof by all or any of the contributories for the time being settled on the list of contributories, to the extent of their liability, for payment of all or any sums it deems necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves, and it may, in making a call, take into consideration the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same (*g*).

Power of court to order payment into bank.

103. The court may order any contributory, purchaser or other person from whom money is due to the company to pay the same into the Bank of England or any branch thereof to the account of the official liquidator instead of to the official liquidator, and such order may be enforced, in the same manner as if it had directed payment to the official liquidator (*h*).

Regulation of account with court.

104. All moneys, bills, notes and other securities paid and delivered into the Bank of England or any branch thereof, in the event of a company being wound up by the court, shall be subject to such order and regulation for the keeping of the account of such moneys and other effects, and for the payment and delivery in, or investment and payment and delivery out of the same as the court may direct.

Provision in case of representative contributory not paying moneys ordered.

105. If any person made a contributory as personal representative of a deceased contributory makes default in paying any sum ordered to be paid by him, proceedings may be taken for administering the personal and real estates of such deceased contributory, or either of such estates, and of compelling payment thereout of the moneys due (*i*).

Order conclusive evidence.

106. Any order made by the court in pursuance of this Act upon any contributory shall, subject to the provisions herein contained for appealing against such order (*k*), be conclusive evidence that the moneys, if any, thereby appearing to be due or ordered to be paid are due, and all other pertinent matters stated in such order are to be taken to be truly stated as against all persons and in all proceedings whatsoever, with the exception of proceedings taken against the real estate of such deceased contributory, in which case such order shall only be primâ facie evidence for the purpose of charging his real estate, unless his heirs or devisees were on the list of contributories at the time of the order being made (*l*).

Court may exclude creditors not proving within certain time.

107. The court may fix a certain day or certain days on or within which creditors of the company are to prove their debts or claims, or to be excluded from the benefit of any distribution made before such debts are proved.

Proceedings in the court of the vice-warden of the stannaries on proof of debts.

108. If in the course of proving the debts and claims of creditors in the court of the vice-warden of the stannaries any debt or claim is disputed by the official liquidator or by any creditor or contributory, or appears to the court to be open to question, the court shall have power, subject to appeal as hereinafter provided (*m*), to adjudicate upon it, and for that purpose the said court shall have and exercise all needful powers of inquiry touching the same by affidavit or by oral examination of witnesses or of parties, whether voluntarily offering themselves for examination or summoned to attend by compulsory process of the court, or to produce documents before the court: and the court shall also have power, incidentally, to decide on the validity and extent of any lien or charge claimed by any creditor on any property of the company in respect of such debt, and to make declarations of right binding on all persons interested; and for the more satisfactory determination of any question of fact, or mixed question of law and fact arising on such inquiry, the vice-warden shall have power, if he thinks fit, to direct and settle any action or issue to be tried either on the common law side of his court, or by a common or special jury, before the justices of assize in and for the counties of Cornwall or Devon, or at any sitting of one of the superior courts in London or Middlesex, which action or issue shall accordingly be tried in due course of law, and without other or further consent of parties; and the finding of the jury in such action or issue shall be con-

(*g*) Sect. 133 (9).
(*h*) Sect. 100.
(*i*) Sects. 76, 95, 106.
(*k*) Sect. 124.
(*l*) Sect. 99.
(*m*) Sect. 124.

IV. *Ordinary Powers of Court.*

clusive of the facts found, unless the judge who tried it makes known to the vice-warden that he was not satisfied with the finding, or unless it appears to the vice-warden that, in consequence of miscarriage, accident, or the subsequent discovery of fresh material evidence, such finding ought not to be conclusive.

Court to adjust rights of contributories.

109. The court shall adjust the rights of the contributories amongst themselves, and distribute any surplus that may remain amongst the parties entitled thereto.

Court to order costs.

110. The court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the estate of the company of the costs, charges and expenses incurred in winding up any company in such order of priority as the court thinks just (*n*).

Dissolution of company.

111. When the affairs of the company have been completely wound up, the court shall make an order that the company be dissolved from the date of such order, and the company shall be dissolved accordingly (*o*).

Registrar to make minute of dissolution of company.

112. Any order so made shall be reported by the official liquidator to the registrar, who shall make a minute accordingly in his books of the dissolution of such company.

Penalty on not reporting dissolution of company.

113. If the official liquidator makes default in reporting to the registrar, in the case of a company being wound up by the court, the order that the company be dissolved, he shall be liable to a penalty not exceeding five pounds for every day during which he is so in default.

114. Repealed, 30 & 31 Vict. c. 47, s. 2.

Extraordinary Powers of Court.

Extraordinary Powers of Court.

Power of court to summon persons before it suspected of having property of company.

115. The court may, after it has made an order for winding up the company, summon before it any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company, or supposed to be indebted to the company, or any person whom the court may deem capable of giving information concerning the trade, dealings, estate or effects of the company (*p*); and the court may require any such officer or person to produce any books, papers, deeds, writings or other documents in his custody or power relating to the company; and if any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the court at the time appointed, having no lawful impediments (made known to the court at the time of its sitting, and allowed by it), the court may cause such person to be apprehended, and brought before the court for examination; nevertheless, in cases where any person claims any lien on papers, deeds or writings or documents produced by him, such production shall be without prejudice to such lien, and the court shall have jurisdiction in the winding up to determine all questions relating to such lien.

Special provisions as to court of vice-warden of the stannaries.

116. If, after an order for winding up in the court of the vice-warden of the stannaries, it appears that any person claims property in, or any lien, legal or equitable, upon any of the machinery, materials, ores or effects on the mine, or on premises occupied by the company in connexion with the mine, or to which the company was at the time of the order primâ facie entitled, it shall be lawful for the vice-warden or the registrar to adjudicate upon such claim on interpleader in the manner provided by section eleven of the Act passed in the eighteenth year of the reign of her present Majesty, chapter thirty-two; and any action or issue directed upon such interpleader may, if the vice-warden think fit, be tried in his court or at the assizes or the sittings in London or Middlesex, before a judge of one of the superior courts, in the manner and on the terms and conditions hereinbefore provided in the case of disputed debts and claims of creditors (*q*).

Examination of parties by court.

117. The court may examine upon oath, either by word of mouth or upon written interrogatories, any person appearing or brought before them in manner aforesaid (*r*) concerning the affairs, dealings, estate or effects of the company, and may reduce into writing the answers of every such person, and require him to subscribe the same.

Power to arrest contributory about to

118. The court may at any time before or after it has made an order for winding up a company, upon proof being given that there is probable cause

(*n*) Sect. 144.
(*o*) Sect. 143.
(*p*) Sects. 117, 127.
(*q*) Sect. 108.
(*r*) Sect. 115.

for believing that any contributory to such company is about to quit the United Kingdom, or otherwise abscond, or to remove or conceal any of his goods or chattels, for the purpose of evading payment of calls, or for avoiding examination in respect of the affairs of the company, cause such contributory to be arrested, and his books, papers, moneys, securities for moneys, goods and chattels to be seized, and him and them to be safely kept until such time as the court may order.

IV. *Extraordinary Powers of Court.*

abscond, or to remove or conceal any of his property.

119. Any powers by this Act conferred on the court shall be deemed to be in addition to and not in restriction of any other powers subsisting either at law or in equity, of instituting proceedings against any contributory, or the estate of any contributory, or against any debtor of the company for the recovery of any call or other sums due from such contributory or debtor, or his estate, and such proceedings may be instituted accordingly.

Powers of court cumulative.

Enforcement of and Appeal from Orders.

Enforcement of and Appeal from Orders.

120. All orders made by the court of chancery in England or Ireland under this Act may be enforced in the same manner in which orders of such court of chancery made in any suit pending therein may be enforced, and for the purposes of this part of this Act the court of the vice-warden of the stannaries shall, in addition to its ordinary powers, have the same power of enforcing any orders made by it as the court of chancery in England has in relation to matters within the jurisdiction of such court, and for the last-mentioned purposes the jurisdiction of the vice-warden of the stannaries shall be deemed to be co-extensive in local limits with the jurisdiction of the court of chancery in England.

Power to enforce orders.

121. Where an order, interlocutor, or decree has been made in Scotland for winding up a company by the court, it shall be competent to the court in Scotland during session, and to the lord ordinary on the bills during vacation, on production by the liquidators of a list certified by them of the names of the contributories liable in payment of any calls which they may wish to enforce, and of the amount due by each contributory respectively, and of the date when the same became due, to pronounce forthwith a decree against such contributories for payment of the sums so certified to be due by each of them respectively, with interest from the said date till payment, at the rate of five pounds per centum per annum, in the same way and to the same effect as if they had severally consented to registration for execution, on a charge of six days, of a legal obligation to pay such calls and interest; and such decree may be extracted immediately, and no suspension thereof shall be competent, except on caution or consignation, unless with special leave of the court or lord ordinary.

Power to order contributories in Scotland to pay calls.

122. Any order made by the court in England for or in the course of the winding-up of a company under this Act shall be enforced in Scotland and Ireland in the courts that would respectively have had jurisdiction in respect of such company if the registered office of the company had been situate in Scotland or Ireland, and in the same manner in all respects as if such order had been made by the courts that are hereby required to enforce the same; and in like manner orders, interlocutors, and decrees made by the court in Scotland for or in the course of the winding-up of a company shall be enforced in England and Ireland, and orders made by the court in Ireland for or in the course of winding up a company shall be enforced in England and Scotland by the courts which would respectively have had jurisdiction in the matter of such company if the registered office of the company were situate in the division of the United Kingdom where the order is required to be enforced, and in the same manner in all respects as if such order had been made by the court required to enforce the same in the case of a company within its own jurisdiction.

Order made in England to be enforced in Ireland and Scotland.

123. Where any order, interlocutor, or decree made by one court is required to be enforced by another court, as hereinbefore provided (*s*), an office copy of the order, interlocutor, or decree so made shall be produced to the proper officer of the court required to enforce the same, and the production of such office copy shall be sufficient evidence of such order, interlocutor, or decree having been made, and thereupon such last-mentioned court shall take such steps in the matter as may be requisite for enforcing such order, interlocutor,

Mode of dealing with orders to be enforced by other courts.

(*s*) Sect. 122.

IV. *Enforcement of and Appeal from Orders.*

or decree, in the same manner as if it were the order, interlocutor, or decree of the court enforcing the same.

Appeals from orders.

124. Rehearings of and appeals from any order or decision made or given in the matter of the winding-up of a company by any court having jurisdiction under this Act, may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same court in cases within its ordinary jurisdiction; subject to this restriction, that no such rehearing or appeal shall be heard unless notice of the same is given within three weeks after any order complained of has been made, in manner in which notices of appeal are ordinarily given, according to the practice of the court appealed from, unless such time is extended by the court of appeal: Provided that it shall be lawful for the lord warden of the stannaries, by a special or general order, to remit at once any appeal allowed and regularly lodged with him against any order or decision of the vice-warden made in the matter of a winding-up to the court of appeal in chancery, which court shall thereupon hear and determine such appeal, and have power to require all such certificates of the vice-warden, records of proceedings below, documents and papers as the lord warden would or might have required upon the hearing of such appeal, and to exercise all other the jurisdiction and powers of the lord warden specified in the Act of Parliament passed in the eighteenth year of the reign of her present Majesty, chapter thirty-two, and any order so made by the court of appeal in chancery shall be final, without any further appeal.

Judicial notice to be taken of signature of officers.

125. In all proceedings under this part of this Act, all courts, judges and persons judicially acting, and all other officers, judicial or ministerial, of any court, or employed in enforcing the process of any court, shall take judicial notice of the signature of any officer of the courts of chancery or bankruptcy in England or in Ireland, or of the court of session in Scotland, or of the registrar of the court of the vice-warden of the stannaries, and also of the official seal or stamp of the several offices of the courts of chancery or bankruptcy in England or Ireland, or of the court of session in Scotland, or of the court of the vice-warden of the stannaries, when such seal or stamp is appended to or impressed on any document made, issued, or signed under the provisions of this part of the Act, or any official copy thereof.

Special commissioners for receiving evidence.

126. [The commissioners of the court of bankruptcy (*t*)] and the judges of the county courts in England who sit at places more than twenty miles from the General Post Office, and the commissioners of bankrupt and the assistant barristers and recorders in Ireland, and the sheriffs of counties in Scotland, shall be commissioners for the purpose of taking evidence under this Act in cases where any company is wound up in any part of the United Kingdom, and it shall be lawful for the court to refer the whole or any part of the examination of any witnesses under this Act to any person hereby appointed commissioner although such commissioner is out of the jurisdiction of the court that made the order or decree for winding up the company; and every such commissioner shall, in addition to any power of summoning and examining witnesses, and requiring the production or delivery of documents, and certifying or punishing defaults by witnesses, which he might lawfully exercise as a [commissioner of the court of bankruptcy (*t*)], judge of a county court, commissioner of bankrupt, assistant barrister or recorder, or as a sheriff of a county, have in the matter so referred to him all the same powers of summoning and examining witnesses, and requiring the production or delivery of documents, and punishing defaults by witnesses, and allowing costs and charges and expenses to witnesses, as the court which made the order for winding up the company has; and the examination so taken shall be returned or reported to such last-mentioned court in such manner as it directs.

Court may order the examination of persons in Scotland.

127. The court may direct the examination in Scotland of any person for the time being in Scotland, whether a contributory of the company or not, in regard to the estate, dealings or affairs of any company in the course of being wound up, or in regard to the estate, dealings or affairs of any person being a contributory of the company, so far as the company may be interested therein by reason of his being such contributory, and the order or commission to take such examination shall be directed to the sheriff of the county in which the person to be examined is residing or happens to be for the time, and the

(*t*) Words within brackets repealed by Statute Law Revision Act, 1875.

IV. *Enforcement of and Appeal from Orders.*

sheriff shall summon such person to appear before him at a time and place to be specified in the summons for examination upon oath as a witness or as a haver, and to produce any books, papers, deeds or documents called for which may be in his possession or power, and the sheriff may take such examination either orally or upon written interrogatories, and shall report the same in writing in the usual form to the court, and shall transmit with such report the books, papers, deeds or documents produced, if the originals thereof are required and specified by the order, or otherwise such copies thereof or extracts therefrom, authenticated by the sheriff, as may be necessary; and in case any person so summoned fails to appear at the time and place specified, or appearing refuses to be examined or to make the production required, the sheriff shall proceed against such person as a witness or haver duly cited, and failing to appear or refusing to give evidence or make production may be proceeded against by the law of Scotland; and the sheriff shall be entitled to such and the like fees, and the witness shall be entitled to such and the like allowances, as sheriffs when acting as commissioners under appointment from the court of session and as witnesses and havers are entitled to in the like cases according to the law and practice of Scotland: If any objection is stated to the sheriff by the witness, either on the ground of his incompetency as a witness, or as to the production required to be made, or on any other ground whatever, the sheriff may, if he thinks fit, report such objection to the court, and suspend the examination of such witness until such objection has been disposed of by the court.

Affidavits, &c., may be sworn in Ireland, Scotland, or the colonies, before any competent court or person.

128. Any affidavit, affirmation, or declaration required to be sworn or made under the provisions or for the purposes of this part of this Act, may be lawfully sworn or made in Great Britain or Ireland, or in any colony, island, plantation or place under the dominion of her Majesty in foreign parts, before any court, judge or person lawfully authorized to take and receive affidavits affirmations or declarations, or before any of her Majesty's consuls or vice-consuls, in any foreign parts out of her Majesty's dominions, and all courts, judges, justices, commissioners and persons acting judicially shall take judicial notice of the seal or stamp or signature (as the case may be) of any such court, judge, person, consul or vice-consul attached, appended, or subscribed to any such affidavit, affirmation or declaration, or to any other document to be used for the purposes of this part of this Act.

Voluntary Winding up of Company.

Voluntary Winding up of Company.

Circumstances under which company may be wound up voluntarily.

129. A company under this Act (*u*) may be wound up voluntarily,

(1.) Whenever the period, if any, fixed for the duration of the company by the articles of association expires, or whenever the event, if any, occurs, upon the occurrence of which it is provided by the articles of association that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily:

(2.) Whenever the company has passed a special resolution (*x*) requiring the company to be wound up voluntarily:

(3.) Whenever the company has passed an extraordinary resolution to the effect that it has been proved to their satisfaction that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same:

For the purposes of this Act any resolution shall be deemed to be extraordinary which is passed in such manner as would, if it had been confirmed by a subsequent meeting, have constituted a special resolution as hereinbefore defined.

Commencement of voluntary winding up.

130. A voluntary winding up (*y*) shall be deemed to commence at the time of the passing of the resolution authorizing such winding up.

Effect of voluntary winding up on status of company.

131. Whenever a company is wound up voluntarily the company shall, from the date of the commencement of such winding up, cease to carry on its business, except in so far as may be required for the beneficial winding up thereof (*z*), and all transfers of shares, except transfers made to or with the sanction of the liquidators, or alteration in the status of the members of the company, taking place after the commencement of such winding up shall be

(*u*) See sect. 199 (2).
(*x*) Sect. 51.
(*y*) See sect. 84.
(*z*) Sect. 95.

IV. *Voluntary Winding up of Company.*

void (*a*), but its corporate state and all its corporate powers shall, notwithstanding it is otherwise provided by its regulations, continue until the affairs of the company are wound up.

Notice of resolution to wind up voluntarily.

132. Notice of any special resolution or extraordinary resolution passed for winding up a company voluntarily shall be given by advertisment as respects companies registered in England in the London Gazette, as respects companies registered in Scotland in the Edinburgh Gazette, and as respects companies registered in Ireland in the Dublin Gazette.

Consequences of voluntarily winding up.

133. The following consequences shall ensue upon the voluntary winding up of a company :—

(1.) The property of the company shall be applied in satisfaction of its liabilities pari passu (*b*), and subject thereto shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company :

(2.) Liquidators shall be appointed for the purpose of winding up the affairs of the company and distributing the property (*c*):

(3.) The company in general meeting shall appoint such persons or person as it thinks fit to be liquidators or a liquidator, and may fix the remuneration to be paid to them or him :

(4.) If one person only is appointed, all the provisions herein contained in reference to several liquidators shall apply to him :

(5.) Upon the appointment of liquidators all the power of the directors shall cease, except in so far as the company in general meeting or the liquidators may sanction the continuance of such powers :

(6.) When several liquidators are appointed, every power hereby given may be exercised by such one or more of them as may be determined at the time of their appointment, or in default of such determination by any number not less than two :

(7.) The liquidators may, without the sanction of the court, exercise all powers by this Act given to the official liquidator (*d*) :

(8.) The liquidators may exercise the powers hereinbefore given to the court of settling the list of contributories of the company (*e*), and any list so settled shall be primâ facie evidence of the liability of the persons named therein to be contributories :

(9.) The liquidators may at any time after the passing of the resolution for winding up the company, and before they have ascertained the sufficiency of the assets of the company, call on all or any of the contributories for the time being settled on the list of contributories to the extent of their liability to pay all or any sums they deem necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves, and the liquidators may in making a call take into consideration the probability that some of the contributories upon whom the same is made may partly or wholly fail to pay their respective portions of the same (*f*) :

(10.) The liquidators shall pay the debts of the company, and adjust the rights of the contributories amongst themselves (*g*).

Effect of winding up on share capital of company limited by guarantee.

134. Where a company limited by guarantee, and having a capital divided into shares, is being wound up voluntarily, any share capital that may not have been called up shall be deemed to be assets of the company, and to be a specialty debt (*h*) due from each member to the company to the extent of any sums that may be unpaid on any shares held by him, and payable at such time as may be appointed by the liquidators.

Power of company to delegate authority to appoint liquidators.

135. A company about to be wound up voluntarily, or in the course of being wound up voluntarily, may, by an extraordinary resolution (*i*), delegate to its creditors, or to any committee of its creditors, the power of appointing liquidators, or any of them, and supplying any vacancies in the appointment

(*a*) Sect. 153.
(*b*) Sect. 159.
(*c*) Sect. 92.
(*d*) Sects. 95, 96, 97.
(*e*) Sect. 98.
(*f*) Sect. 102.
(*g*) Sects. 38, 101, 109, 158.
(*h*) Sects. 75, 90.
(*i*) Sect. 129.

of liquidators, or may by a like resolution enter into any arrangement with respect to the powers to be exercised by the liquidators, and the manner in which they are to be exercised; and any act done by the creditors in pursuance of such delegated power shall have the same effect as if it had been done by the company (*j*).

Arrangement, when binding on creditors.

136. Any arrangement entered into between a company about to be wound up voluntarily, or in the course of being wound up voluntarily, and its creditors (*k*) shall be binding on the company if sanctioned by an extraordinary resolution, and on the creditors if acceded to by three-fourths in number and value of the creditors, subject to such right of appeal as is hereinafter mentioned.

Powers of creditor or contributory to appeal.

137. Any creditor or contributory of a company that has in manner aforesaid entered into any arrangement with its creditors may, within three weeks from the date of the completion of such arrangement, appeal to the court against such arrangement, and the court may thereupon, as it thinks just, amend, vary or confirm the same.

Power of liquidators or contributories in voluntary winding up to apply to court.

138. Where a company is being wound up voluntarily the liquidators or any contributory of the company may apply to the court in England, Ireland or Scotland, or to the lord ordinary on the bills in Scotland in time of vacation, to determine any question arising in the matter of such winding up, or to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court; and the court or lord ordinary, in the case aforesaid, if satisfied that the determination of such question, or the required exercise of power, will be just and beneficial, may accede wholly or partially to such application on such terms and subject to such conditions as the court thinks fit, or it may make such other order, interlocutor or decree on such application as the court thinks just.

Power of liquidators to call general meeting.

139. Where a company is being wound up voluntarily the liquidators may from time to time, during the continuance of such winding up, summon general meetings of the company for the purpose of obtaining the sanction of the company by special resolution (*l*) or extraordinary resolution (*m*), or for any other purposes they think fit; and in the event of the winding up continuing for more than one year the liquidators shall summon a general meeting of the company at the end of the first year, and of each succeeding year from the commencement of the winding up, or as soon thereafter as may be convenient, and shall lay before such meeting an account showing their acts and dealings, and the manner in which the winding up has been conducted during the preceding year.

Power to fill up vacancy in liquidators.

140. If any vacancy occurs in the office of liquidators appointed by the company, by death, resignation or otherwise, the company in general meeting may, subject to any arrangement they may have entered into with their creditors (*n*), fill up such vacancy, and a general meeting for the purpose of filling up such vacancy may be convened by the continuing liquidators, if any, or by any contributory of the company, and shall be deemed to have been duly held if held in manner prescribed by the regulations of the company, or in such other manner as may, on application by the continuing liquidators, if any, or by any contributory of the company, be determined by the court.

Power of court to appoint liquidators.

141. If from any cause whatever there is no liquidator acting in the case of a voluntary winding up, the court may, on the application of a contributory, appoint a liquidator or liquidators; the court may also, on due cause shown (*o*), remove any liquidator, and appoint another liquidator to act in the matter of a voluntary winding up (*p*).

Liquidators on conclusion of winding up to make up an account.

142. As soon as the affairs of the company are fully wound up, the liquidators shall make up an account showing the manner in which such winding up has been conducted, and the property of the company disposed of; and thereupon they shall call a general meeting of the company for the purpose of having the account laid before them, and hearing any explanation that may be given by the liquidators: the meeting shall be called by advertisement, specifying the time, place, and object of such meeting; and such

(*j*) Sect. 133.
(*k*) Sect. 159, and sect. 2 of Joint Stock Companies Arrangement Act, 1870 (33 & 34 Vict. c. 104).
(*l*) Sect. 51.
(*m*) Sect. 129.
(*n*) Sect. 135.
(*o*) Sect. 93.
(*p*) Sect. 152.

IV. *Voluntary Winding-up of Company.*

advertisement shall be published one month at least previously to the meeting, as respects companies registered in England in the London Gazette, and as respects companies registered in Scotland in the Edinburgh Gazette, and as respects companies registered in Ireland in the Dublin Gazette.

Liquidators to report meeting to registrar.

143. The liquidators shall make a return to the registrar of such meeting having been held, and of the date at which the same was held, and on the expiration of three months from the date of the registration of such return the company shall be deemed to be dissolved; if the liquidators make default in making such return to the registrar, they shall incur a penalty not exceeding five pounds for every day during which such default continues.

Costs of voluntary liquidation.

144. All costs, charges and expenses properly incurred in the voluntary winding up of a company, including the remuneration of the liquidators, shall be payable out of the assets of the company in priority to all other claims.

Saving of rights of creditors.

145. The voluntary winding up of a company shall not be a bar to the right of any creditor of such company to have the same wound up by the court, if the court is of opinion that the rights of such creditor will be prejudiced by a voluntary winding up.

Power of court to adopt proceedings of voluntary winding up.

146. Where a company is in course of being wound up voluntarily, and proceedings are taken for the purpose of having the same wound up by the court (*q*), the court may, if it thinks fit, notwithstanding that it makes an order directing the company to be wound up by the court, provide in such order or in any other order for the adoption of all or any of the proceedings taken in the course of the voluntary winding up.

Winding up subject to the Supervision of the Court.

Winding up subject to the Supervision of the Court.

Power of court on application to direct winding up subject to supervision.

147. When a resolution has been passed by a company to wind up voluntarily (*r*), the court may make an order directing that the voluntary winding up should continue, but subject to such supervision of the court, and with such liberty for creditors, contributories, or others, to apply to the court, and generally upon such terms and subject to such conditions as the court thinks just.

Petition for winding up, subject to supervision.

148. A petition, praying wholly or in part that a voluntary winding up should continue, but subject to the supervision of the court, and which winding up is hereinafter referred to as a winding up subject to the supervision of the court, shall, for the purpose of giving jurisdiction to the court over suits and actions, be deemed to be a petition for winding up the company by the Court (*s*).

Court may have regard to wishes of creditors.

149. The court may, in determining whether a company is to be wound up altogether by the court or subject to the supervision of the court, in the appointment of liquidator or liquidators, and in all other matters relating to the winding up subject to supervision, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence, and may direct meetings of the creditors or contributories to be summoned, held and regulated in such manner as the court directs for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the court: in the case of creditors, regard shall be had to the value of the debts due to each creditor, and in the case of contributories to the number of votes conferred on each contributory by the regulations of the company (*t*).

Power to court to appoint additional liquidators in winding up subject to supervision.

150. Where any order is made by the court for a winding up subject to the supervision of the court (*u*), the court may, in such order or in any subsequent order, appoint any additional liquidator or liquidators; and any liquidators so appointed by the court shall have the same powers, be subject to the same obligations, and in all respects stand in the same position as if they had been appointed by the company (*x*): the Court may from time to time remove any liquidators so appointed by the court, and fill up any vacancy occasioned by such removal, or by death or resignation (*y*).

Effect of order of court for winding up subject to supervision.

151. Where an order is made for a winding up subject to the supervision of the court (*z*), the liquidators appointed to conduct such winding up may,

(*q*) Sects. 79, 145.
(*r*) Sect. 129.
(*s*) Sects. 85, 87.
(*t*) Sects. 91, 147.
(*u*) Sect. 147.
(*x*) Sect. 133.
(*y*) Sects. 147, 152.
(*z*) Sect. 147.

IV. *Winding up subject to Supervision of the Court.*

subject to any restrictions imposed by the court (*a*), exercise all their powers, without the sanction or intervention of the court, in the same manner as if the company were being wound up altogether voluntarily (*b*); but save as aforesaid, any order made by the court for a winding up, subject to the supervision of the court shall for all purposes, including the staying of actions, suits and other proceedings, be deemed to be an order of the court for winding up the company by the court, and shall confer full authority on the court to make calls (*c*), or to enforce calls made by the liquidators, and to exercise all other powers which it might have exercised if an order had been made for winding up the company altogether by the court, and in the construction of the provisions whereby the court is empowered to direct any act or thing to be done to or in favour of the official liquidators, the expression official liquidators shall be deemed to mean the liquidators conducting the winding up, subject to the supervision of the court.

Appointment in certain cases of voluntary liquidators to office of official liquidators.

152. Where an order has been made for the winding up of a company subject to the supervision of the court, and such order is afterwards superseded by an order directing the company to be wound up compulsorily (*d*), the court may in such last-mentioned order, or in any subsequent order, appoint the voluntary liquidators or any of them, either provisionally (*e*) or permanently, and either with or without the addition of any other persons, to be official liquidators.

Supplemental Provisions.

Supplemental Provisions.

Dispositions after the commencement of the winding up avoided.

153. Where any company is being wound up by the court or subject to the supervision of the court, all dispositions of the property, effects and things in action of the company, and every transfer of shares, or alteration in the status of the members of the company made between the commencement of the winding up (*f*) and the order for winding up, shall, unless the court otherwise orders, be void (*g*).

The books of the company to be evidence.

154. Where any company is being wound up, all books, accounts, and documents of the company and of the liquidators shall, as between the contributories of the company, be primâ facie evidence of the truth of all matters purporting to be therein recorded.

As to disposal of books, accounts and documents of the company.

155. Where any company has been wound up under this Act, and is about to be dissolved (*h*), the books, accounts, and documents of the company and of the liquidators may be disposed of in the following way; that is to say, where the company has been wound up by or subject to the supervision of the court, in such way as the court directs, and where the company has been wound up voluntarily, in such way as the company by an extraordinary resolution (*i*) directs; but after the lapse of five years from the date of such dissolution, no responsibility shall rest on the company, or the liquidators, or any one to whom the custody of such books, accounts, and documents has been committed, by reason that the same, or any of them, cannot be made forthcoming to any party or parties claiming to be interested therein.

Inspection of books.

156. Where an order has been made for winding up a company by the court, or subject to the supervision of the court, the court may make such order for the inspection by the creditors and contributories of the company of its books and papers as the court thinks just, and any books and papers in the possession of the company may be inspected by creditors or contributories, in conformity with the order of the court, but not further or otherwise (*k*).

Power of assignee to sue.

157. Any person to whom anything in action belonging to the company is assigned, in pursuance of this Act, may bring or defend any action or suit relating to such thing in action in his own name (*l*).

Debts of all descriptions to be proved.

158. In the event of any company being wound up under this Act, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages,

(*a*) Sect. 96.
(*b*) Sect. 133.
(*c*) Sect. 102.
(*d*) Sect. 79.
(*e*) Sects. 85, 92.
(*f*) Sects. 84, 130.
(*g*) Sects. 131, 163, 164.
(*h*) Sect. 143.
(*i*) Sect. 129.
(*k*) Sched. I. Table A. (79).
(*l*) Judicature Act, 1873, s. 25 (6).

IV. *Supplemental Provisions.*

shall be admissible to proof against the company, a just estimate being made, so far as is possible, of the value of all such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value.

General scheme of liquidation may be sanctioned.

159. The liquidators may, with the sanction of the court, where the company is being wound up by the court, or subject to the supervision of the court, and with the sanction of an extraordinary resolution of the company where the company is being wound up altogether voluntarily, pay any classes of creditors in full, or make such compromise or other arrangement as the liquidators may deem expedient with creditors, or persons claiming to be creditors, or persons having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable (*m*).

Power to compromise.

160. The liquidators may, with the sanction of the court, where the company is being wound up by the court, or subject to the supervision of the court, and with the sanction of an extraordinary resolution of the company where the company is being wound up altogether voluntarily, compromise all calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and all claims, whether present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and any contributory or alleged contributory, or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets of the company or the winding up of the company, upon the receipt of such sums, payable at such times, and generally upon such terms as may be agreed upon, with power for the liquidators to take any security for the discharge of such debts or liabilities, and to give complete discharges in respect of all or any such calls, debts, or liabilities.

Power for liquidators to accept shares, &c., as a consideration for sale of property of company.

161. Where any company is proposed to be or is in the course of being wound up altogether voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company, the liquidators of the first-mentioned company may, with the sanction of a special resolution of the company by whom they were appointed, conferring either a general authority on the liquidators or an authority in respect of any particular arrangement, receive in compensation or part compensation for such transfer or sale, shares, policies or other like interests in such other company for the purpose of distribution amongst the members of the company being wound up, or may enter into any other arrangement whereby the members of the company being wound up, may, in lieu of receiving cash, shares, policies or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the purchasing company: and any sale made or arrangement entered into by the liquidators in pursuance of this section shall be binding on the members of the company being wound up; subject to this proviso, that if any member of the company being wound up who has not voted in favour of the special resolution passed by the company of which he is a member at either of the meetings held for passing the same expresses his dissent from any such special resolution in writing addressed to the liquidators or one of them, and left at the registered office of the company not later than seven days after the date of the meeting at which such special resolution was passed, such dissentient member may require the liquidators to do one of the following things as the liquidators may prefer; that is to say, either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determined in manner hereinafter mentioned, such purchase-money to be paid before the company is dissolved, and to be raised by the liquidators in such manner as may be determined by special resolution: no special resolution shall be deemed invalid for the purposes of this section by reason that it is passed antecedently to or concurrently with any resolution for winding up the company, or for appointing liquidators; but if an order be made within a year for winding up the company by or subject to the supervision of the court, such resolution shall not be of any validity unless it is sanctioned by the court.

Mode of determining price.

162. The price to be paid for the purchase of the interest of any dissentient member may be determined by agreement, but if the parties dispute about the same, such dispute shall be settled by arbitration, and for the pur-

(*m*) Sect. 136 and 33 & 34 Vict. c. 104, s. 2.

poses of such arbitration the provisions of "The Companies Clauses Consolidation Act, 1845," with respect to the settlement of disputes by arbitration (*n*) shall be incorporated with this Act; and in the construction of such provisions this Act shall be deemed to be the special Act, and "the company" shall mean the company that is being wound up, and any appointment by the said incorporated provisions directed to be made under the hand of the secretary, or any two of the directors, may be made under the hand of the liquidator, if only one, or any two or more of the liquidators if more than one.

Certain attachments, sequestrations, and executions to be void.

163. Where any company is being wound up by the court, or subject to the supervision of the court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents.

Fraudulent preference.

164. Any such conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property as would, if made or done by or against any individual trader, be deemed, in the event of his bankruptcy, to have been made or done by way of undue or fraudulent preference of the creditors of such trader (*o*), shall, if made or done by or against any company, be deemed, in the event of such company being wound up under this Act, to have been made or done by way of undue or fraudulent preference of the creditors of such company, and shall be invalid accordingly; and for the purposes of this section the presentation of a petition for winding up a company shall, in the case of a company being wound up by the court, or subject to the supervision of the court, and a resolution for winding up the company shall, in the case of a voluntary winding up, be deemed to correspond with the act of bankruptcy in the case of an individual trader; and any conveyance or assignment made by any company formed under this Act of all its estate and effects to trustees for the benefit of all its creditors shall be void to all intents.

Power of court to assess damages against delinquent directors and officers.

165. Where, in the course of the winding-up of any company under this Act, it appears that any past or present director, manager, official or other liquidator, or any officer of such company, has misapplied or retained in his own hands or become liable or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of any liquidator, or of any creditor or contributory of the company, notwithstanding that the offence is one for which the offender is criminally responsible, examine into the conduct of such director, manager, or other officer, and compel him to repay any moneys so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust, as the court thinks just.

Penalty on falsification of books.

166. If any director, officer, or contributory of any company wound up under this Act destroys, mutilates, alters, or falsifies any books, papers, writings, or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account, or other document belonging to the company with intent to defraud or deceive any person, every person so offending shall be deemed to be guilty of a misdemeanor, and upon being convicted shall be liable to imprisonment for any term not exceeding two years, with or without hard labour (*p*).

Prosecution of delinquent directors in the case of winding up by court.

167. Where any order is made for winding up a company by the court or subject to the supervision of the court, if it appear in the course of such winding up that any past or present director, manager, officer, or member of such company has been guilty of any offence in relation to the company for which he is criminally responsible, the court may, on the application of any person interested in such winding up, or of its own motion, direct the official liquidators, or the liquidators (as the case may be), to institute and conduct a prosecution or prosecutions for such offence, and may order the costs and expenses to be paid out of the assets of the company.

Prosecution of delinquent

168. Where a company is being wound up altogether voluntarily, if it appear to the liquidators conducting such winding up that any past or

(*n*) 8 & 9 Vict. c. 16, sects. 128—134.

(*o*) See sect. 48 of Bankruptcy Act, 1883, *infra*.

(*p*) See 24 & 25 Vict. c. 96, s. 83, *supra*.

IV. *Supplemental Provisions.*

directors, &c., in case of voluntary winding up.

present director, manager, officer, or member of such company has been guilty of any offence in relation to the company for which he is criminally responsible, it shall be lawful for the liquidators, with the previous sanction of the court, to prosecute such offender, and all expenses properly incurred by them in such prosecution shall be payable out of the assets of the company in priority to all other liabilities.

Penalty of perjury.

169. If any person, upon any examination upon oath or affirmation authorized under this Act, or in any affidavit, deposition, or solemn affirmation in or about the winding up of any company under this Act, or otherwise in or about any matter arising under this Act, wilfully and corruptly gives false evidence, he shall, upon conviction, be liable to the penalties of wilful perjury.

Power of Courts to make Rules.

Power of Courts to make Rules.

170. [Repealed by 44 & 45 Vict. c. 59.]

Power of court of session in Scotland to make rules.

171. In Scotland the court of session may make such rules concerning the mode of winding up as may be necessary by Act of Sederunt; but, until such rules are made, the general practice of the court of session in suits pending in such court shall, so far as the same is applicable, and not inconsistent with this Act, apply to all proceedings for winding up a company, and official liquidators shall in all respects be considered as possessing the same powers as any trustee on a bankrupt estate (*q*).

Power to make rules in stannaries court.

172. The vice-warden of the stannaries may from time to time, with the consent provided for by section twenty-three of the Act of eighteenth of Victoria, chapter thirty-two, make rules for carrying into effect the powers conferred by this Act upon the court of the vice-warden, but, subject to such rules, the general practice of the said court and of the registrar's office in the said court, including the present practice of the said court in winding up companies, may be applied to all proceedings under this Act; the said vice-warden may likewise, with the same consent, make from time to time rules for specifying the fees to be taken in his said court in proceedings under this Act; and any rules so made shall be of the same force as if they had been enacted in the body of this Act; and the fees paid in respect of proceedings taken under this Act, including fees taken under "The Joint Stock Companies Act, 1856," in the matter of winding up companies, shall be applied exclusively towards payment of such additional officers, or such increase of the salaries of existing officers, or pensions to retired officers, or such other needful expenses of the court, as the lord warden of the stannaries shall from time to time, on the application of the vice-warden or otherwise, think fit to direct, sanction, or assign, and meanwhile shall be kept as a separate fund apart from the ordinary fees of the court arising from other business, to await such direction and order of the lord warden herein, and to accumulate by investment in government securities until the whole shall have been so appropriated (*r*).

Power of lord chancellor of Ireland to make rules.

173. In Ireland the lord chancellor of Ireland may, as respects the winding up of companies in Ireland, with the advice and consent of the master of the rolls in Ireland, exercise the same power of making rules as is by this Act hereinbefore given to the lord chancellor of Great Britain; but until such rules are made the general practice of the court of chancery in Ireland, including the practice hitherto in use in Ireland in winding up companies, shall, so far as the same is applicable, and not inconsistent with this Act, apply to all proceedings for winding up a company (*r*).

PART V.

Registration Office.

Constitution of registration office.

174. The registration of companies under this Act shall be conducted as follows: (that is to say,)

(1.) The board of trade may from time to time appoint such registrars, assistant registrars, clerks, and servants as they may think neces-

(*q*) Sect. 20 of 30 & 31 Vict. c. 131. (*r*) *Ibid.*

sary for the registration of companies under this Act, and remove them at pleasure: V. *Registration Office.*

(2.) The board of trade may make such regulations as they think fit with respect to the duties to be performed by any such registrars, assistant registrars, clerks, and servants as aforesaid:

(3.) The board of trade may from time to time determine the places at which offices for the registration of companies are to be established, so that there be at all times maintained in each of the three parts of the United Kingdom at least one such office, and that no company shall be registered except at an office within that part of the United Kingdom in which by the memorandum of association the registered office of the company is declared to be established; and the board may require that the registrar's office of the court of the vice-warden of the stannaries shall be one of the offices for the registration of companies formed for working mines within the jurisdiction of the court:

(4.) The board of trade may from time to time direct a seal or seals to be prepared for the authentication of any documents required for or connected with the registration of companies:

(5.) Every person may inspect the documents kept by the registrar of joint stock companies; and there shall be paid for such inspection such fees as may be appointed by the board of trade, not exceeding one shilling for each inspection; and any person may require a certificate of the incorporation of any company, or a copy or extract of any other document or any part of any other document, to be certified by the registrar; and there shall be paid for such certificate of incorporation, certified copy or extract, such fees as the board of trade may appoint, not exceeding five shillings for the certificate of incorporation, and not exceeding sixpence for each folio of such copy or extract, or in Scotland for each sheet of two hundred words:

(6.) The existing registrar, assistant registrars, clerks, and other officers and servants in the office for the registration of joint stock companies shall, during the pleasure of the board of trade, hold the offices and receive the salaries hitherto held and received by them, but they shall in the execution of their duties conform to any regulations that may be issued by the board of trade:

(7.) There shall be paid to any registrar, assistant-registrar, clerk or servant that may hereafter be employed in the registration of joint stock companies such salary as the board of trade may, with the sanction of the commissioners of the treasury, direct:

(8.) Whenever any act is herein directed to be done to or by the registrar of joint stock companies, such act shall, until the board of trade otherwise directs, be done in England to or by the existing registrar of joint stock companies, or in his absence to or by such person as the board of trade may for the time being authorize; in Scotland to or by the existing registrar of joint stock companies in Scotland; and in Ireland to or by the existing assistant-registrar of joint stock companies for Ireland, or by such person as the board of trade may for the time being authorize in Scotland or Ireland in the absence of the registrar; but in the event of the board of trade altering the constitution of the existing registry office, such act shall be done to or by such officer or officers and at such place or places with reference to the local situation of the registered offices of the companies to be registered as the board of trade may appoint.

PART VI.

APPLICATION OF ACT TO COMPANIES REGISTERED UNDER THE JOINT STOCK COMPANIES ACTS.

175. The expression "Joint Stock Companies Acts," as used in this Act shall mean "The Joint Stock Companies Act, 1856," "The Joint Stock Companies Acts, 1856, 1857," "The Joint Stock Banking Companies Act, 1857," and "The Act to enable Joint Stock Banking Companies to be formed on the Definition of Joint Stock Companies Acts.

VI. *Application of Act to Companies registered under the Joint Stock Companies Act.*

Principle of Limited Liability," or any one or more of such Acts, as the cass may require; but shall not include the Act passed in the eighth year of the reign of her present Majesty, chapter one hundred and ten, and intituled "An Act for the Registration, Incorporation and Regulation of Joint Stock Companies."

Application of Act to companies formed under Joint Stock Companies Acts.

176. Subject as hereinafter mentioned, this Act, with the exception of table (A) in the first schedule, shall apply to companies formed and registered under the said Joint Stock Companies Acts, or any of them, in the same manner in the case of a limited company as if such company had been formed and registered under this Act as a company limited by shares, and in the case of a company other than a limited company as if such company had been formed and registered as an unlimited company under this Act with this qualification, that whenever reference is made expressly or impliedly to the date of registration, such date shall be deemed to refer to the date at which such companies were respectively registered under the said Joint Stock Companies Acts or any of them, and the power of altering regulations by special resolution given by this Act shall, in the case of any company formed and registered under the said Joint Stock Companies Acts, or any of them, extend to altering any provisions contained in the table marked (B) annexed to "The Joint Stock Companies Act, 1856," and shall also in the case of an unlimited company formed and registered as last aforesaid extend to altering any regulations relating to the amount of capital or its distribution into shares, notwithstanding such regulations are contained in the memorandum of association.

Application of Act to companies registered under Joint Stock Companies Acts.

177. This Act shall apply to companies registered but not formed under the said Joint Stock Companies Acts or any of them in the same manner as it is hereinafter declared to apply to companies registered but not formed under this Act, with this qualification, that wherever reference is made expressly or impliedly to the date of registration, such date shall be deemed to refer to the date at which such companies were respectively registered under the said Joint Stock Companies Acts or any of them.

Mode of transferring shares.

178. Any company registered under the said Joint Stock Companies Acts or any of them may cause its shares to be transferred in manner hitherto in use, or in such other manner as the company may direct.

PART VII.

COMPANIES AUTHORIZED TO REGISTER UNDER THIS ACT.

Regulations as to registration of existing companies.

179. The following regulations shall be observed with respect to the registration of companies under this part of this Act; (that is to say,)

(1.) No company having the liability of its members limited by Act of Parliament or letters patent, and not being a joint stock company as hereinafter defined, shall register under this Act in pursuance of this part thereof:

(2.) No company having the liability of its members limited by Act of Parliament or by letters patent, shall register under this Act in pursuance of this part thereof as an unlimited company, or as a company limited by guarantee:

(3.) No company that is not a joint stock company as hereinafter defined (*u*) shall in pursuance of this part of this Act register under this Act as a company limited by shares:

(4.) No company shall register under this Act in pursuance of this part thereof unless an assent to its so registering is given by a majority of such of its members as may be present, personally or by proxy, in cases where proxies are allowed by the regulations of the company, at some general meeting summoned for the purpose:

(5.) Where a company not having the liability of its members limited by Act of Parliament or letters patent is about to register as a limited company, the majority required to assent as aforesaid shall consist

(*u*) Sect. 181.

of not less than three-fourths of the members present, personally or by proxy, at such last-mentioned general meeting:

(6.) Where a company is about to register as a company limited by guarantee, the assent to its being so registered shall be accompanied by a resolution declaring that each member undertakes to contribute to the assets of the company, in the event of the same being wound up, during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceased to be a member, and of the costs, charges and expenses of winding up the company, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding a specified amount (*x*).

In computing any majority under this section when a poll is demanded regard shall be had to the number of votes to which each member is entitled according to the regulations of the company of which he is a member.

Companies capable of being registered.

180. With the above exceptions, and subject to the foregoing regulations, every company existing at the time of the commencement of this Act (*y*), including any company registered under the said Joint Stock Companies Acts, consisting of seven or more members, and any company hereafter formed in pursuance of any Act of Parliament other than this Act, or of letters patent, or being a company engaged in working mines within and subject to the jurisdiction of the stannaries, or being otherwise duly constituted by law, and consisting of seven or more members, may at any time hereafter register itself under this Act as an unlimited company, or a company limited by shares, or a company limited by guarantee; and no such registration shall be invalid by reason that it has taken place with a view to the company being wound up.

Definition of joint stock company.

181. For the purposes of this part of this Act, so far as the same relates to the description of companies empowered to register as companies limited by shares, a joint stock company shall be deemed to be a company having a permanent paid-up or nominal capital of fixed amount, divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of shares in such capital, or the holders of such stock, and no other persons; and such company when registered with limited liability under this Act shall be deemed to be a company limited by shares.

182. [Repealed by 42 & 43 Vict. c. 76, s. 6.]

Requisitions for registration by companies.

183. Previously to the registration in pursuance of this part of this Act of any joint stock company there shall be delivered to the registrar the following documents; (that is to say,)

(1.) A list showing the names, addresses and occupations of all persons who on a day named in such list, and not being more than six clear days before the day of registration, were members of such company, with the addition of the shares held by such persons respectively, distinguishing, in cases where such shares are numbered, each share by its number:

(2.) A copy of any Act of Parliament, royal charter, letters patent, deed of settlement, contract of copartnery, cost book regulations or other instrument constituting or regulating the company:

(3.) If any such joint stock company is intended to be registered as a limited company, the above list and copy shall be accompanied by a statement specifying the following particulars; (that is to say,)

The nominal capital of the company and the number of shares into which it is divided:

The number of shares taken and the amount paid on each share:

The name of the company, with the addition of the word "limited" as the last word thereof:

With the addition, in the case of the company intended to be registered as a company limited by guarantee, of the resolution declaring the amount of the guarantee.

(*x*) Sect. 9 (4). (*y*) Sect. 176.

VII. *Companies authorized to register under this Act.*

Requisitions for registration by existing company not being a joint stock company.

184. Previously to the registration in pursuance of this part of this Act of any company not being a joint stock company (*a*) there shall be delivered to the registrar a list showing the names, addresses and occupations of the directors or other managers (if any) of the company, also a copy of any Act of Parliament, letters patent, deed of settlement, contract of copartnery, cost book regulations, or other instrument constituting or regulating the company, with the addition, in the case of a company intended to be registered as a company limited by guarantee, of the resolution declaring the amount of guarantee (*b*).

Power for existing company to register amount of stock instead of shares.

185. Where a joint stock company authorized to register under this Act has had the whole or any portion of its capital converted into stock, such company shall, as to the capital so converted, instead of delivering to the registrar a statement of shares, deliver to the registrar a statement of the amount of stock belonging to the company, and the names of the persons who were holders of such stock, on some day to be named in the statement, not more than six clear days before the day of registration.

Authentication of statements of existing companies.

186. The lists of members and directors and any other particulars relating to the company hereby required to be delivered to the registrar shall be verified by a declaration of the directors of the company delivering the same, or any two of them, or of any two other principal officers of the company, made in pursuance of the Act passed in the sixth year of the reign of his late majesty King William the Fourth, chapter sixty-two.

Registrar may require evidence as to nature of company.

187. The registrar may require such evidence as he thinks necessary for the purpose of satisfying himself whether an existing company is or not a joint stock company as hereinbefore defined (*c*).

On registration of banking company with limited liability notice to be given to customers.

188. Every banking company (*d*) existing at the date of the passing of this Act which registers itself as a limited company shall, at least thirty days previous to obtaining a certificate of registration with limited liability, give notice that it is intended so to register the same to every person and partnership firm who have a banking account with the company, and such notice shall be given either by delivering the same to such person or firm, or leaving the same or putting the same into the post addressed to him or them at such address as shall have been last communicated or otherwise become known as his or their address to or by the company; and in case the company omits to give any such notice as is hereinbefore required to be given, then as between the company and the person or persons only who are for the time being interested in the account in respect of which such notice ought to have been given, and so far as respects such account and all variations thereof down to the time at which such notice shall be given, but not further or otherwise, the certificate of registration with limited liability shall have no operation (*e*).

Exemption of certain companies from payment of fees.

189. No fees shall be charged in respect of the registration in pursuance of this part of this Act of any company in cases where such company is not registered as a limited company, or where previously to its being registered as a limited company the liability of the shareholders was limited by some other Act of Parliament or by letters patent.

Power to company to change name.

190. Any company authorized by this part of this Act to register with limited liability shall, for the purpose of obtaining registration with limited liability, change its name, by adding thereto the word "limited."

Certificate of registration of existing companies.

191. Upon compliance with the requisitions in this part of this Act contained with respect to registration, and on payment of such fees, if any, as are payable under the tables marked (B) and (C) in the first schedule hereto, the registrar shall certify under his hand that the company so applying for registration is incorporated as a company under this Act, and, in the case of a limited company, that it is limited, and thereupon such company shall be incorporated, and shall have perpetual succession and a common seal, with power to hold lands; and any banking company in Scotland so incorporated shall be deemed and taken to be a bank incorporated, constituted, or established by or under Act of Parliament.

Certificate to be evidence of compliance with Act.

192. A certificate of incorporation given at any time to any company registered in pursuance of this part of this Act, shall be conclusive evidence

(*a*) Sect. 181.
(*b*) 42 & 43 Vict. c. 76, s. 9.
(*c*) Sect. 181.
(*d*) 42 & 43 Vict. c. 76, s. 6.
(*e*) Sect. 18.

VII. *Companies authorized to register under this Act.*

that all the requisitions herein contained in respect of registration under this Act have been complied with, and that the company is authorized to be registered under this Act as a limited or unlimited company, as the case may be, and the date of incorporation mentioned in such certificate shall be deemed to be the date at which the company is incorporated under this Act.

Transfer of property to company.

193. All such property, real and personal, including all interests and rights in, to, and out of property, real and personal, and including obligations and things in action, as may belong to or be vested in the company at the date of its registration under this Act, shall on registration pass to and vest in the company as incorporated under this Act for all the estate and interest of the company therein.

Registration under this Act not to affect obligations incurred previously to registration.

194. The registration in pursuance of this part of this Act of any company shall not affect or prejudice the liability of such company to have enforced against it, or its right to enforce any debt or obligation incurred, or any contract entered into, by, to, with, or on behalf of such company previously to such registration.

Continuation of existing actions and suits.

195. All such actions, suits, and other legal proceedings as may at the time of the registration of any company registered in pursuance of this part of this Act have been commenced by or against such company, or the public officer or any member thereof, may be continued in the same manner as if such registration had not taken place; nevertheless, execution shall not issue against the effects of any individual member of such company upon any judgment, decree, or order obtained in any action, suit, or proceeding so commenced as aforesaid; but in the event of the property and effects of the company being insufficient to satisfy such judgment, decree, or order, an order may be obtained for winding up the company.

Effect of registration under Act.

196. When a company is registered under this Act in pursuance of this part thereof, all provisions contained in any Act of Parliament, deed of settlement, contract of copartnery, cost book regulations, letters patent, or other instrument constituting or regulating the company, including, in the case of a company registered as a company limited by guarantee, the resolution declaring the amount of the guarantee, shall be deemed to be conditions and regulations of the company, in the same manner and with the same incidents as if they were contained in a registered memorandum of association and articles of association; and all the provisions of this Act shall apply to such company and the members, contributories, and creditors thereof, in the same manner in all respects as if it had been formed under this Act, subject to the provisions following; (that is to say,)

(1.) That table (A) in the first schedule to this Act shall not, unless adopted by special resolution (*f*), apply to any company registered under this Act in pursuance of this part thereof:

(2.) That the provisions of this Act relating to the numbering of shares (*g*) shall not apply to any joint stock company whose shares are not numbered:

(3.) That no company shall have power to alter any provision contained in any Act of Parliament relating to the company (*h*):

(4.) That no company shall have power, without the sanction of the board of trade, to alter any provision contained in any letters patent relating to the company:

(5.) That in the event of the company being wound up, every person shall be a contributory, in respect of the debts and liabilities of the company contracted prior to registration, who is liable, at law or in equity, to pay or contribute to the payment of any debt or liability of the company contracted prior to registration, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members amongst themselves, in respect of any such debt or liability; or to pay or contribute to the payment of the costs, charges, and expenses of winding up the company so far as relates to such debts or liabilities as aforesaid (*i*); and every such contributory shall be liable to contribute to the assets of the company, in the course of the winding up, all sums due from him in respect of any such liability as aforesaid; and in the event of the death, bank-

(*f*) Sect. 51.
(*g*) Sect. 22.
(*h*) 30 & 31 Vict. c. 131, s. 47.
(*i*) Sects. 38, 200.

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ruptcy, or insolvency of any such contributory as last aforesaid, or marriage of any such contributory being a female, the provisions hereinbefore contained (*i*) with respect to the representatives, heirs, and devisees of deceased contributories, and with reference to the assignees of bankrupt or insolvent contributories, and to the husbands of married contributories, shall apply;

(6.) That nothing herein contained shall authorize any company to alter any such provisions contained in any deed of settlement, contract of copartnery, cost book regulations, letters patent, or other instrument constituting or regulating the company, as would, if such company had originally been formed under this Act, have been contained in the memorandum of association (*k*); and are not authorized to be altered by this Act:

But nothing herein contained shall derogate from any power of altering its constitution or regulations which may be vested in any company registering under this Act in pursuance of this part thereof by virtue of any Act of Parliament, deed of settlement, contract of copartnery, letters patent, or other instrument constituting or regulating the company.

Power of court to restrain further proceedings.

197. The court may, at any time after the presentation of a petition for winding up a company registered in pursuance of this part of this Act, and before making an order for winding up the company, upon the application by motion of any creditor of the company, restrain further proceedings in any action, suit, or legal proceeding against any contributory of the company, as well as against the company as hereinbefore provided, upon such terms as the court thinks fit (*l*).

Order for winding up company.

198. Where an order has been made for winding up a company registered in pursuance of this part of the Act, in addition to the provisions hereinbefore contained (*m*), it is hereby further provided that no suit, action, or other legal proceeding shall be commenced or proceeded with against any contributory of the company in respect of any debt of the company, except with the leave of the court, and subject to such terms as the court may impose.

PART VIII.

APPLICATION OF ACT TO UNREGISTERED COMPANIES.

Winding up of unregistered companies.

199. Subject as hereinafter mentioned, any partnership, association, or company, except railway companies incorporated by Act of Parliament, consisting of more than seven members (*n*), and not registered under this Act (*o*), and hereinafter included under the term unregistered company, may be wound up under this Act, and all the provisions of this Act with respect to winding up shall apply to such company, with the following exceptions and additions:

(1.) An unregistered company shall, for the purpose of determining the court having jurisdiction in the matter of the winding up, be deemed to be registered in that part of the United Kingdom where its principal place of business is situate; or, if it has a principal place of business situate in more than one part of the United Kingdom, then in each part of the United Kingdom where it has a principal place of business; moreover the principal place of business of an unregistered company, or (where it has a principal place of business situate in more than one part of the United Kingdom) such one of its principal places of business as is situate in that part of the United Kingdom in which proceedings are being instituted, shall for all the purposes of the winding up of such company be deemed to be the registered office of the company (*p*):

(2.) No unregistered company shall be wound up under this Act voluntarily or subject to the supervision of the court:

(*i*) Sects. 76, 77, 78, 105, 106.
(*k*) Sects. 8, 9, 10.
(*l*) Sect. 201.
(*m*) Sect. 195.
(*n*) Sect 79 (3).
(*o*) Sects. 176, 177.
(*p*) Sect. 39.

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(3.) The circumstances under which an unregistered company may be wound up are as follows; (that is to say,)

(a) Whenever the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs:

(b) Whenever the company is unable to pay its debts:

(c) Whenever the court is of opinion that it is just and equitable that the company should be wound up:

(4.) An unregistered company shall, for the purposes of this Act, be deemed to be unable to pay its debts (*q*),

(a) Whenever a creditor to whom the company is indebted, at law or in equity, by assignment or otherwise, in a sum exceeding fifty pounds then due, has served on the company, by leaving the same at the principal place of business of the company, or by delivering to the secretary or some director or principal officer of the company, or by otherwise serving the same in such manner as the court may approve or direct, a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor:

(b) Whenever any action, suit, or other proceeding has been instituted against any member of the company for any debt or demand due, or claimed to be due, from the company, or from him in his character of member of the company, and notice in writing of the institution of such action, suit, or other legal proceeding having been served upon the company by leaving the same at the principal place of business of the company, or by delivering it to the secretary, or some director, manager, or principal officer of the company, or by otherwise serving the same in such manner as the court may approve or direct, the company has not within ten days after service of such notice paid, secured, or compounded for such debt or demand, or procured such action, suit, or other legal proceeding to be stayed, or indemnified the defendant to his reasonable satisfaction against such action, suit, or other legal proceeding, and against all costs, damages, and expenses to be incurred by him by reason of the same:

(c) Whenever in England or Ireland execution or other process issued on a judgment, decree, or order obtained in any court in favour of any creditor in any proceeding at law or in equity instituted by such creditor against the company, or any member thereof as such, or against any person authorized to be sued as nominal defendant on behalf of the company, is returned unsatisfied:

(d) Whenever, in the case of an unregistered company engaged in working mines within and subject to the jurisdiction of the stannaries, a customary decree or order absolute for the sale of the machinery, materials, and effects of such mine has been made in a creditor's suit in the court of the vice-warden:

(e) Whenever in Scotland the induciæ of a charge for payment on an extract decree, or an extract registered bond, or an extract registered protest, have expired without payment being made:

(f) Whenever it is otherwise proved to the satisfaction of the court that the company is unable to pay its debts.

Who to be deemed a contributory in the event of company being wound up.

200. In the event of an unregistered company being wound up every person shall be deemed to be a contributory (*r*) who is liable at law or in equity to pay or contribute to the payment of any debt or liability of the company, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members amongst themselves, or to pay or contribute to the payment of the costs, charges, and expenses of winding up the company, and every such contributory shall be liable to contribute to the assets of the company in the course of the winding up all sums due from him in respect of any such liability as aforesaid; but in the event of the death, bankruptcy, or insolvency of any contributory, or marriage of any female

(*q*) Sect. 80.

(*r*) Sect. 38.

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contributory, the provisions hereinbefore contained with respect to the personal representatives, heirs, and devisees of a deceased contributory, and to the assignees of a bankrupt or insolvent contributory, and to the husbands of married contributories, shall apply.

Power of court to restrain further proceedings.

201. The court may, at any time after the presentation of a petition for winding up an unregistered company, and before making an order for winding up the company, upon the application of any creditor of the company, restrain further proceedings in any action, suit, or proceeding against any contributory of the company, or against the company as hereinbefore provided (*s*), upon such terms as the court thinks fit.

Effect of order for winding up company.

202. When an order has been made for winding up an unregistered company in addition to the provisions hereinbefore contained in the case of companies formed under this Act (*t*), it is hereby further provided that no suit, action, or other legal proceeding shall be commenced or proceeded with against any contributory of the company in respect of any debt of the company, except with the leave of the court, and subject to such terms as the court may impose.

Provision in case of unregistered company.

203. If any unregistered company has no power to sue and be sued in a common name, or if for any reason it appears expedient, the court may by the order made for winding up such company, or by any subsequent order, direct that all such property, real and personal, including all interest, claims, and rights into and out of property, real and personal, and including things in action, as may belong to or be vested in the company, or to or in any person or persons on trust for or on behalf of the company or any part of such property, is to vest in the official liquidator or official liquidators by his or their official name or names, and thereupon the same or such part thereof as may be specified in the order shall vest accordingly, and the official liquidator or official liquidators may, in his or their official name or names, or in such name or names and after giving such indemnity as the court directs, bring or defend any actions, suits, or other legal proceedings relating to any property vested in him or them, or any actions, suits, or other legal proceedings necessary to be brought or defended for the purposes of effectually winding up the company and recovering the property thereof.

Provisions in this part of Act cumulative.

204. The provisions made by this part of the Act with respect to unregistered companies shall be deemed to be made in addition to and not in restriction of any provisions hereinbefore contained (*u*) with respect to winding up companies by the court, and the court or official liquidator may, in addition to anything contained in this part of the Act, exercise any powers or do any act in the case of unregistered companies which might be exercised or done by it or him in winding up companies formed under this Act, but an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Act, and then only to the extent provided by this part of this Act.

PART IX.

Repeal of Acts and Temporary Provisions.

Repeal of Acts.

205. After the commencement of this Act there shall be repealed the several Acts specified in the first part of the third schedule hereto, with this qualification, that so much of the said Act as is set forth in the second part of the said third schedule shall be hereby re-enacted and continue in force as if unrepealed.

Saving clause as to repeals.

206. No repeal hereby enacted shall affect,

(1.) Anything duly done under any Acts hereby repealed:

(2.) The incorporation of any company registered under any Act hereby repealed:

(3.) Any right or privilege acquired or liability incurred under any Act hereby repealed (*x*):

(*s*) Sect. 85.
(*t*) Sect. 87.
(*u*) Sects. 79—128, 153—173.
(*x*) Sub-sect. (3) repealed by Statute Law Revision Act, 1875.

(4.) Any penalty, forfeiture, or other punishment incurred in respect of any offence against any Act hereby repealed:

(5.) Table B in the schedule annexed to the Joint Stock Companies Act, 1856, or any part thereof, so far as the same applies to any company existing at the time of the commencement of this Act.

207. [Repealed by Statute Law Revision Act, 1875.]

Saving of conveyance deeds.

208. Where previously to the commencement of this Act any conveyance, mortgage or other deed has been made in pursuance of any Act hereby repealed, such deed shall be of the same force as if this Act had not passed, and for the purposes of such deed such repealed Act shall be deemed to remain in full force.

Compulsory registration of certain companies.

209. Every insurance company completely registered under the Act passed in the eighth year of the reign of her present Majesty, chapter one hundred and ten, intituled "An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies," shall on or before the second day of November, one thousand eight hundred and sixty-two, and every other company required by any Act hereby repealed to register under the said Joint Stock Companies Acts, or one of such Acts, and which has not so registered, shall, on or before the expiration of the thirty-first day from the commencement of this Act, register itself as a company under this Act in manner and subject to the regulations hereinbefore contained (*y*), with this exception, that no company completely registered under the said Act of the eighth year of the reign of her present Majesty shall be required to deliver to the registrar a copy of its deed of settlement; and for the purpose of enabling such insurance companies as are mentioned in this section to register under this Act, this Act shall be deemed to come into operation immediately on the passing thereof (*z*); nevertheless the registration of such companies shall not have any effect until the time of the commencement of this Act. No fees shall be charged in respect of the registration of any company required to register by this section.

Penalty on company not registering. 21 Vict. c. 14, s. 28.

210. If any company required by the last section to register under this Act makes default in complying with the provisions thereof, then, from and after the day upon which such company is required to register under this Act until the day on which such company is registered under this Act (which it is empowered to do at any time), the following consequences shall ensue; (that is to say,)

(1.) The company shall be incapable of suing either at law or in equity, but shall not be incapable of being made a defendant to a suit either at law or in equity:

(2.) No dividend shall be payable to any shareholder in such company:

(3.) Each director or manager of the company shall for each day during which the company so being in default carries on business incur a penalty not exceeding five pounds, and such penalty may be recovered by any person, whether a shareholder or not in the company, and be applied by him to his own use:

Nevertheless, such default shall not render the company so being in default illegal, nor subject it to any penalty or disability, other than as specified in this section; and registration under this Act shall cancel any penalty or forfeiture, and put an end to any disability which any company may have incurred under any Act hereby repealed by reason of its not having registered under the said Joint Stock Companies Acts, 1856, 1857, or one of them.

211. [Repealed by Statute Law Revision Act, 1875.]

212. [Repealed by Statute Law Revision Act, 1875.]

(*y*) Sect. 179.

(*z*) Sect. 2.

FIRST SCHEDULE.

TABLE A.

Regulations for Management of a Company limited by Shares.

Shares.

(1.) If several persons are registered as joint holders of any share, any one of such persons may give effectual receipts for any dividend payable in respect of such share.

(2.) Every member shall, on payment of one shilling, or such less sum as the company in general meeting may prescribe, be entitled to a certificate (*a*), under the common seal of the company, specifying the share or shares held by him, and the amount paid up thereon.

(3.) If such certificate is worn out or lost, it may be renewed on payment of one shilling, or such less sum as the company in general meeting may prescribe.

Calls on Shares.

(4.) The directors may from time to time make such calls upon the members in respect of all monies unpaid on their shares as they think fit, provided that twenty-one days' notice at least is given of each call, and each member shall be liable to pay the amount of the calls so made to the persons and at the times and places appointed by the directors.

(5.) A call shall be deemed to have been made at the time when the resolution of the directors authorising such call was passed.

(6.) If the call payable in respect of any share is not paid before or on the day appointed for payment thereof, the holder for the time being of such share shall be liable to pay interest for the same at the rate of five pounds per cent. per annum from the day appointed for the payment thereof to the time of the actual payment.

(7.) The directors may, if they think fit, receive from any member willing to advance the same all or any part of the monies due upon the shares held by him beyond the sums actually called for; and upon the monies so paid in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, the company may pay interest at such rate as the member paying such sum in advance and the directors agree upon.

Transfers of Shares.

(8.) The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register book in respect thereof (*b*).

(9.) Shares in the company shall be transferred in the following form:—

I, *A. B.* of ———, in consideration of the sum of ——— pounds paid to me by *C. D.* of ———, do hereby transfer to the said *C. D.* the share [*or* shares] numbered ——— standing in my name in the books of the ——— company, to hold unto the said *C. D.*, his executors, administrators, and assigns, subject to the several conditions on which I held the same at the time of the execution thereof; and I the said *C. D.* do hereby agree to take the said share [*or* shares] subject to the same conditions. As witness our hands the ——— day of ———.

(10.) The company may decline to register any transfer of shares made by a member who is indebted to them.

(11.) The transfer books shall be closed during the fourteen days immediately preceding the ordinary general meeting in each year.

(*a*) Sect. 31. (*b*) Sect. 22.

Transmission of Shares.

(12.) The executors or administrators of a deceased member shall be the only persons recognized by the company as having any title to his share.

(13.) Any person becoming entitled to a share in consequence of the death, bankruptcy (*c*) or insolvency of any member, or in consequence of the marriage of any female member (*d*), may be registered as a member upon such evidence being produced as may from time to time be required by the company.

(14.) Any person who has become entitled to a share in consequence of the death, bankruptcy or insolvency of any member, or in consequence of the marriage of any female member, may, instead of being registered himself, elect to have some person to be named by him registered as a transferee of such share.

(15.) The person so becoming entitled shall testify such election by executing to his nominee an instrument of transfer of such share.

(16.) The instrument of transfer shall be presented to the company, accompanied with such evidence as the directors may require to prove the title of the transferor, and thereupon the company shall register the transferee as a member.

Forfeiture of Shares.

(17.) If any member fails to pay any call on the day appointed for payment thereof, the directors may at any time thereafter during such time as the call remains unpaid, serve a notice on him, requiring him to pay such call, together with interest and any expenses that may have accrued by reason of such non-payment.

(18.) The notice shall name a further day on or before which such call, and all interest and expenses that have accrued by reason of such non-payment, are to be paid. It shall also name the place where payment is to be made (the place so named being either the registered office of the company or some other place at which calls of the company are usually made payable). The notice shall also state that in the event of non-payment at or before the time and at the place appointed the shares in respect of which such call was made will be liable to be forfeited.

(19.) If the requisitions of any such notice as aforesaid are not complied with, any share in respect of which such notice has been given may, at any time thereafter, before payment of all calls, interest and expenses due in respect thereof has been made, be forfeited, by a resolution of the directors to that effect.

(20.) Any share so forfeited shall be deemed to be the property of the company, and may be disposed of in such manner as the company in general meeting thinks fit.

(21.) Any member whose shares have been forfeited shall notwithstanding be liable to pay to the company all calls owing upon such shares at the time of the forfeiture.

(22.) A statutory declaration in writing, that the call in respect of a share was made and notice thereof given, and that default in payment of the call was made, and that the forfeiture of the share was made by a resolution of the directors to that effect, shall be sufficient evidence of the facts therein stated, as against all persons entitled to such share, and such declaration and the receipt of the company for the price of such share shall constitute a good title to such share, and a certificate of proprietorship shall be delivered to a purchaser, and thereupon he shall be deemed the holder of such share discharged from all calls due prior to such purchase; and he shall not be bound to see to the application of the purchase money, nor shall his title to such share be affected by any irregularity in the proceedings in reference to such sale.

Conversion of Shares into Stock.

(23.) The directors may, with the sanction of the company previously given in general meeting, convert any paid-up shares into stock (*e*).

(*c*) Sect. 75. (*d*) Sect. 78. (*e*) Sect. 12.

(24.) When any shares have been converted into stock, the several holders of such stock may thenceforth transfer their respective interests therein, or any part of such interests, in the same manner and subject to the same regulations as and subject to which any shares in the capital of the company may be transferred, or as near thereto as circumstances admit.

(25.) The several holders of stock shall be entitled to participate in the dividends and profits of the company according to the amount of their respective interests in such stock; and such interests shall, in proportion to the amount thereof, confer on the holders thereof respectively the same privileges and advantages for the purpose of voting at meetings of the company, and for other purposes, as would have been conferred by shares of equal amount in the capital of the company; but so that none of such privileges or advantages, except the participation in the dividends and profits of the company, shall be conferred by any such aliquot part of consolidated stock as would not, if existing in shares, have conferred such privileges or advantages.

Increase in Capital.

(26.) The directors may, with the sanction of a special resolution of the company previously given in general meeting, increase its capital by the issue of new shares, such aggregate increase to be of such amount and to be divided into shares of such respective amounts, as the company in general meeting directs, or, if no direction is given, as the directors think expedient.

(27.) Subject to any direction to the contrary that may be given by the meeting that sanctions the increase of capital, all new shares shall be offered to the members in proportion to the existing shares held by them, and such offer shall be made by notice specifying the number of shares to which the member is entitled, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of such time, or on the receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company.

(28.) Any capital raised by the creation of new shares shall be considered as part of the original capital, and shall be subject to the same provisions with reference to the payment of calls, and the forfeiture of shares on non-payment of calls or otherwise, as if it had been part of the original capital.

General Meetings.

(29.) The first general meeting shall be held at such time, not being more than six months (*f*) after the registration of the company, and at such place, as the directors may determine.

(30.) Subsequent general meetings shall be held at such time and place as may be prescribed by the company in general meeting; and if no other time or place is prescribed, a general meeting shall be held on the first Monday in February in every year, at such place as may be determined by the directors.

(31.) The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

(32.) The directors may, whenever they think fit, and they shall upon a requisition made in writing by not less than one-fifth in number of the members of the company, convene an extraordinary general meeting.

(33.) Any requisition made by the members shall express the object of the meeting proposed to be called, and shall be left at the registered office of the company.

(34.) Upon the receipt of such requisition the directors shall forthwith proceed to convene an extraordinary general meeting. If they do not proceed to convene the same within twenty-one days from the

(*f*) Now four months: 30 & 31 Vict. c. 131, s. 39.

date of the requisition, the requisitionists, or any other members amounting to the required number, may themselves convene an extraordinary general meeting.

Proceedings at General Meetings.

(35.) Seven days' notice at the least (*g*), specifying the place, the day and the hour of meeting, and in case of special business the general nature of such business (*h*), shall be given to the members in manner hereinafter mentioned, or in such other manner (if any), as may be prescribed by the company in general meeting; but the non-receipt of such notice by any member shall not invalidate the proceedings at any general meeting.

(36.) All business shall be deemed special that is transacted at an extraordinary meeting (*i*), and all that is transacted at an ordinary meeting, with the exception of sanctioning a dividend and the consideration of the accounts, balance sheets and the ordinary report of the directors.

(37.) No business shall be transacted at any general meeting except the declaration of a dividend, unless a quorum of members is present at the time when the meeting proceeds to business; and such quorum shall be ascertained as follows; that is to say, if the persons who have taken shares in the company at the time of the meeting do not exceed ten in number, the quorum shall be five; if they exceed ten there shall be added to the above quorum one for every five additional members up to fifty, and one for every ten additional members after fifty, with this limitation, that no quorum shall in any case exceed twenty.

(38.) If within one hour from the time appointed for the meeting a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved: in any other case it shall stand adjourned to the same day in the next week, at the same time and place; and if at such adjourned meeting a quorum is not present it shall be adjourned sine die.

(39.) The chairman (if any) (*k*) of the board of directors shall preside as chairman at every general meeting of the company.

(40.) If there is no such chairman (*k*), or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting, the members present shall choose some one of their number to be chairman.

(41.) The chairman may, with the consent of the meeting, adjourn any meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

(42.) At any general meeting, unless a poll is demanded by at least five members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company (*l*), shall be sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution.

(43.) If a poll is demanded by five or more members it shall be taken in such manner as the chairman directs, and the result of such poll shall be deemed to be the resolution of the company in general meeting. In the case of an equality of votes at any general meeting, the chairman shall be entitled to a second or casting vote.

Votes of Members.

(44.) Every member shall have one vote for every share up to ten (*m*): he shall have an additional vote for every five shares beyond the first ten shares up to one hundred, and an additional vote for every ten shares beyond the first hundred shares.

(*g*) Sect. 52.
(*h*) Arts. (95)—(97).
(*i*) Art. (31).
(*k*) Sect. 52.
(*l*) Sect. 67.
(*m*) Sect. 52.

(45.) If any member is a lunatic or idiot he may vote by his committee, curator bonis or other legal curator.

(46.) If one or more persons are jointly entitled to a share or shares, the member whose name stands first in the register of members as one of the holders of such share or shares, and no other, shall be entitled to vote in respect of the same.

(47.) No member shall be entitled to vote at any general meeting unless all calls due from him have been paid, and no member shall be entitled to vote in respect of any share that he has acquired by transfer at any meeting held after the expiration of three months from the registration of the company, unless he has been possessed of the share in respect of which he claims to vote for at least three months previously to the time of holding the meeting at which he proposes to vote.

(48.) Votes may be given either personally or by proxy.

(49.) The instrument appointing a proxy shall be in writing, under the hand of the appointor, or if such appointor is a corporation, under their common seal, and shall be attested by one or more witness or witnesses: no person shall be appointed a proxy who is not a member of the company.

(50.) The instrument appointing a proxy shall be deposited at the registered office of the company not less than seventy-two hours before the time for holding the meeting at which the person named in such instrument proposes to vote, but no instrument appointing a proxy shall be valid after the expiration of twelve months from the date of its execution.

(51.) Any instrument appointing a proxy shall be in the following form (*n*):—

—— Company, Limited.

I —— of —— in the county of —— being a member of the —— company, limited, and entitled to —— vote *or* —— votes, hereby appoint —— of —— as my proxy, to vote for me and on my behalf at the [ordinary *or* extraordinary, *as the case may be*] general meeting of the company to be held on the —— day of ——, and at any adjournment thereof [*or*, at any meeting of the company that may be held in the year ——].

As witness my hand this —— day of ——.

Signed by the said —— in the presence of ——.

Directors.

(52.) The number of the directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association.

(53.) Until directors are appointed, the subscribers of the memorandum of association shall be deemed to be directors.

(54.) The future remuneration of the directors, and their remuneration for services performed previously to the first general meeting, shall be determined by the company in general meeting.

Powers of Directors.

(55.) The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not by the foregoing Act, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulations of these articles, to the provisions of the foregoing Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

(*n*) This instrument is charged with a duty of 1*d*., which may be denoted by an adhesive stamp. It may not be stamped after execution: 33 & 34 Vict. c. 97, s. 102.

(56.) The continuing directors may act notwithstanding any vacancy in their body.

Disqualification of Directors.

(57.) The office of director shall be vacated,—
If he holds any other office or place of profit under the company;
If he becomes bankrupt or insolvent;
If he is concerned in or participates in the profits of any contract with the company;
But the above rules shall be subject to the following exceptions: That no director shall vacate his office by reason of his being a member of any company which has entered into contracts with or done any work for the company of which he is director; nevertheless he shall not vote in respect of such contract or work; and if he does so vote his vote shall not be counted.

Rotation of Directors.

(58.) At the first ordinary meeting after the registration of the company the whole of the directors shall retire from office; and at the first ordinary meeting in every subsequent year one-third of the directors for the time being, or if their number is not a multiple of three, then the number nearest to one-third shall retire from office.

(59.) The one-third or other nearest number to retire during the first and second years ensuing the first ordinary meeting of the company shall, unless the directors agree among themselves, be determined by ballot: in every subsequent year the one-third or other nearest number who have been longest in office shall retire.

(60.) A retiring director shall be re-eligible.

(61.) The company at the general meeting at which any directors retire in manner aforesaid shall fill up the vacated offices by electing a like number of persons.

(62.) If at any meeting at which an election of directors ought to take place the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week, at the same time and place; and if at such adjourned meeting the places of the vacating directors are not filled up, the vacating directors, or such of them as have not had their places filled up, shall continue in office until the ordinary meeting in the next year, and so on from time to time until their places are filled up.

(63.) The company may from time to time, in general meeting, increase or reduce the number of directors, and may also determine in what rotation such increased or reduced number is to go out of office.

(64.) Any casual vacancy occurring in the board of directors may be filled up by the directors, but any person so chosen shall retain his office so long only as the vacating director would have retained the same if no vacancy had occurred.

(65.) The company, in general meeting, may, by a special resolution, remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead: the person so appointed shall hold office during such time only as the director in whose place he is appointed would have held the same if he had not been removed.

Proceedings of Directors.

(66.) The directors may meet together for the dispatch of business, adjourn, and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business: questions arising at any meeting shall be decided by a majority of votes: in case of an equality of votes the chairman shall have a second or casting vote: a director may at any time summon a meeting of the directors.

(67.) The directors may elect a chairman of their meetings, and determine the period for which he is to hold office; but if no such chairman is

elected, or if at any meeting the chairman is not present at the time appointed for holding the same, the directors present shall choose some one of their number to be chairman of such meeting.

(68.) The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit: any committee so formed shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on them by the directors.

(69.) A committee may elect a chairman of their meetings: if no such chairman is elected, or if he is not present at the time appointed for holding the same, the members present shall choose one of their number to be chairman of such meeting.

(70.) A committee may meet and adjourn as they think proper: questions arising at any meeting shall be determined by a majority of votes of the members present; and in case of an equality of votes the chairman shall have a second or casting vote.

(71.) All acts done, by any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director (*o*).

Dividends.

(72.) The directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares.

(73.) No dividend shall be payable except out of the profits arising from the business of the company.

(74.) The directors may, before recommending any dividend, set aside out of the profits of the company such sum as they think proper as a reserved fund to meet contingencies, or for equalizing dividends, or for repairing or maintaining the works connected with the business of the company, or any part thereof; and the directors may invest the sum so set apart as a reserved fund upon such securities as they may select.

(75.) The directors may deduct from the dividends payable to any member all such sums of money as may be due from him to the company on account of calls or otherwise.

(76.) Notice of any dividend that may have been declared shall be given to each member in manner hereinafter mentioned (*p*); and all dividends unclaimed for three years, after having been declared, may be forfeited by the directors for the benefit of the company.

(77.) No dividend shall bear interest as against the company.

Accounts.

(78.) The directors shall cause true accounts to be kept,—

Of the stock in trade of the company;

Of the sums of money received and expended by the company, and the matter in respect of which such receipt and expenditure takes place: and,

Of the credits and liabilities of the company;

The books of account shall be kept at the registered office of the company, and subject to any reasonable restrictions as to the time and manner of inspecting the same that may be imposed by the company in general meeting, shall be open to the inspection of the members during the hours of business.

(79.) Once at the least in every year the directors shall lay before the company in general meeting a statement of the income and expenditure for the past year, made up to a date not more than three months before such meeting.

(80.) The statement so made shall show, arranged under the most convenient heads, the amount of gross income, distinguishing the several

(*o*) Sect. 67. (*p*) Arts. (95)—(97).

sources from which it has been derived, and the amount of gross expenditure, distinguishing the expenses of the establishment, salaries, and other like matters: Every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting; and in cases where any item of expenditure which may in fairness be distributed over several years has been incurred in any one year the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

(81.) A balance sheet shall be made out in every year, and laid before the company in general meeting, and such balance sheet shall contain a summary of the property and liabilities of the company arranged under the heads appearing in the form annexed to this table (*q*), or as near thereto as circumstances admit.

(82.) A printed copy of such balance sheet shall, seven days previously to such meeting, be served on every member in the manner in which notices are hereinafter directed to be served (*r*).

Audit.

(83.) Once at the least in every year the accounts of the company shall be examined, and the correctness of the balance sheet ascertained by one or more auditor or auditors.

(84.) The first auditors shall be appointed by the directors: Subsequent auditors shall be appointed by the company in general meeting.

(85.) If one auditor only is appointed, all the provisions herein contained relating to auditors shall apply to him.

(86.) The auditors may be members of the company; but no person is eligible as an auditor who is interested otherwise than as a member in any transaction of the company; and no director or other officer of the company is eligible during his continuance in office.

(87.) The election of auditors shall be made by the company at their ordinary meeting in each year.

(88.) The remuneration of the first auditors shall be fixed by the directors; that of subsequent auditors shall be fixed by the company in general meeting.

(89.) Any auditor shall be re-eligible on his quitting office.

(90.) If any casual vacancy occurs in the office of any auditor appointed by the company, the directors shall forthwith call an extraordinary general meeting for the purpose of supplying the same.

(91.) If no election of auditors is made in manner aforesaid the board of trade may, on the application of not less than five members of the company, appoint an auditor for the current year, and fix the remuneration to be paid to him by the company for his services.

(92.) Every auditor shall be supplied with a copy of the balance sheet, and it shall be his duty to examine the same, with the accounts and vouchers relating thereto.

(93.) Every auditor shall have a list delivered to him of all books kept by the company, and shall at all reasonable times have access to the books and accounts of the company: He may at the expense of the company, employ accountants or other persons to assist him in investigating such accounts, and he may in relation to such accounts examine the directors or any other officer of the company.

(94.) The auditors shall make a report to the members upon the balance sheet and accounts, and in every such report they shall state whether, in their opinion, the balance sheet is a full and fair balance sheet, containing the particulars required by these regulations, and properly drawn up so as to exhibit a true and correct view of the state of the company's affairs, and in case they have called for explanations or information from the directors, whether such explanations or information have been given by the directors, and whether they have been satisfactory; and such report shall be read, together with the report of the directors, at the ordinary meeting.

(*q*) *Infra.* (*r*) Arts. (95)—(97).

Notices.

(95.) A notice may be served by the company upon any member either personally or by sending it through the post in a prepaid letter addressed to such member at his registered place of abode.

(96.) All notices directed to be given to the members shall with respect to any share to which persons are jointly entitled, be given to whichever of such persons is named first in the register of members; and notice so given shall be sufficient notice to all the holders of such share.

(97.) Any notice, if served by post, shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post; and in proving such service it shall be sufficient to prove that the letter containing the notices was properly addressed and put into the post office.

Dr. BALANCE SHEET of the Co. made up to 18 .* Cr.

CAPITAL AND LIABILITIES.			£ s. d.	£ s. d.	PROPERTY AND ASSETS.			£ s. d.	£ s. d.
I. CAPITAL ..		Showing:			III. PROPERTY held by the Company.		Showing:		
	1.	The Number of Shares				7.	Immoveable Property, distinguishing—		
	2.	The Amount paid per Share					(a) Freehold Land		
	3.	If any Arreare of Calls, the Nature of the Arrear, and the Names of the Defaulters.					(b) ,, Buildings		
						8.	(c) Leasehold ,, ...		
	4.	The Particulars of any forfeited Shares					Moveable Property, distinguishing—		
							(d) Stock in Trade		
II. DEBTS AND LIABILITIES of the Company.		Showing:					(e) Plant		
	5.	The Amount of Loans on Mortgages or Debenture Bonds.					The Cost to be stated with Deductions for Deterioration in Value as charged to the Reserve Fund or Profit and Loss.		
	6.	The Amount of Debts owing by the Company, distinguishing—			IV. DEBTS owing to the Company.		Showing:		
		(a) Debts for which Acceptances have been given.				9.	Debts considered good for which the Company hold Bills or other Securities.		
		(b) Debts to Tradesmen for Supplies of Stock in Trade or other Articles.				10.	Debts considered good for which the Company hold no Security.		
		(c) Debts for Law Expenses.				11.	Debts considered doubtful and bad.		
		(d) Debts for Interest on Debentures or other Loans.					Any Debt due from a Director or other Officer of the Company to be separately stated.		
		(e) Unclaimed Dividends.							
		(f) Debts not enumerated above.							
VI. RESERVE FUND.		Showing:			V. CASH AND INVESTMENTS.		Showing:		
		The Amount set aside from Profits to meet Contingencies.				12.	The Nature of Investment and Rate of Interest.		
VII. PROFIT AND LOSS.		Showing:				13.	The Amount of Cash, where lodged, and if bearing interest.		
		The disposable Balance for Payment of Dividend, &c.							
CONTINGENT LIABILITIES.		Claims against the Company not acknowledged as Debts.							
		Monies for which the Company is contingently liable.							

* See Art. (81).

TABLE B (*s*).

TABLE OF FEES to be paid to the REGISTRAR OF JOINT STOCK COMPANIES by a Company having a Capital divided into Shares.

	£	s.	d.
For registration of a Company whose nominal capital (*t*) does not exceed 2,000*l.*, a fee of	2	0	0
For registration of a company whose nominal capital (*t*) exceeds 2,000*l.*, the above fee of 2*l.*, with the following additional fees, regulated according to the amount of nominal capital, (that is to say,)			
For every 1,000*l.* of nominal capital, or part of 1,000*l.*, after the first 2,000*l.*, up to 5,000*l.* ..	1	0	0
For every 1,000*l.* of nominal capital, or part of 1,000*l.*, after the first 5,000*l.*, up to 100,000*l.* ..	0	5	0
For every 1,000*l.*, of nominal capital, or part of 1,000*l.* after the first 10,000*l.*	0	1	0
For registration of any increase of capital made after the first registration of the company, the same fees per 1,000*l.*, or part of 1,000*l.*, as would have been payable if such increased capital had formed part of the original capital at the time of registration.			
Provided that no company shall be liable to pay in respect of nominal capital on registration, or afterwards, any greater amount of fees than 50*l.*, taking into account in the case of fees payable on an increase of capital after registration fees paid on registration.			
For registration of any existing company, except such companies as are by this Act exempted from payment of fees in respect of registration under this Act, the same fee as is charged for registering a new company.			
For registering any document hereby required or authorized to be registered, other than the memorandum of association	0	5	0
For making a record of any fact hereby authorized or required to be recorded by the registrar of companies, a fee of	0	5	0

TABLE C.

TABLE OF FEES to be paid to the REGISTRAR OF JOINT STOCK COMPANIES by a Company not having a Capital divided into Shares.

	£	s.	d.
For registration of a company whose number of members as stated in the articles of association does not exceed 20	2	0	0
For registration of a company whose number of members, as stated in the articles of association, exceeds 20, but does not exceed 100	5	0	0
For registration of a company, whose number of members, as stated in the articles of association, exceeds 100, but is not stated to be unlimited, the above fee of 5*l.*, with an additional 5*s.* for every 50 members or less number than 50 members after the first 100.			
For registration of a company in which the number of members is stated in the articles of association to be unlimited, a fee of ..	20	0	0
For registration of an increase on the number of members made after the registration of the company in respect of every 50 members, or less than 50 members, of such increase	0	5	0
Provided that no one company shall be liable to pay on the whole a greater fee than 20*l.* in respect of its number of members, taking into account the fee paid on the first registration of the company.			
For registration of any existing company, except such companies as are by this Act exempted from payment of fees in respect of registration under this Act, the same fee as is charged for registering a new company.			
For registering any document hereby required or authorized to be registered, other than the memorandum of association	0	5	0
For making a record of any fact hereby authorized or required to be recorded by the registrar of companies, a fee of	0	5	0

(*s*) See sects. 17, 71.

(*t*) See as to *ad valorem* stamp duty, 51 Vict. c. 8, s. 11; and 52 Vict. c. 7, s. 16.

FORM D (*u*).

FORM OF STATEMENT referred to in Part III. of the Act.

* The capital of the company is ——, divided into —— shares of —— each.
The number of shares issued is ——.
Calls to the amount of —— pounds per share have been made, under which the sum of —— pounds has been received.
The liabilities of the company on the first day of January [*or* July] were,—
Debts owing to sundry persons by the company:
On judgment, £——.
On specialty, £——.
On notes or bills, £——.
On simple contracts, £——.
On estimated liabilities £——.
The assets of the company on that day were,—
Government securities [*stating them*], £——.
Bills of exchange and promissory notes, £——.
Cash at the bankers, £——.
Other securities, £——.

* If the company has no capital divided into shares the portion of the statement relating to capital and shares must be omitted.

SECOND SCHEDULE.

FORM A (*v*).

MEMORANDUM OF ASSOCIATION of a Company limited by Shares (*x*).

1st. The name of the company is "The Eastern Steam Packet Company Limited."
2nd. The registered office of the company will be situate in England.
3rd. The objects for which the company is established are "the conveyance of passengers and goods in ships or boats between such places as the company may from time to time determine, and the doing all such other things as are incidental or conducive to the attainment of the above object."
4th. The liability of the members is limited.
5th. The capital of the company is two hundred thousand pounds, divided into one thousand shares of two hundred pounds each.

WE, the several persons whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses, and Descriptions of Subscribers.	Number of Shares taken by each Subscriber.
"1. John Jones of ——, in the county of ——, merchant ..	200
"2. John Smith of ——, in the county of ——	25
"3. Thomas Green of ——, in the county of ——	30
"4. John Thompson of ——, in the county of ——	40
"5. Caleb White of ——, in the county of ——	15
"6. Andrew Brown of ——, in the county of ——	5
"7. Cæsar White of ——, in the county of ——	10
Total shares taken	325

Dated the 22nd day of November, 1861.
Witness to the above signatures,
A. B., No. 13, Hute Street, Clerkenwell, Middlesex.

(*u*) Sects. 44, 71. (*v*) Sect. 71. (*x*) Sect. 8.

FORM B.

Memorandum and Articles of Association of a company limited by Guarantee, and not having a Capital divided into Shares (*y*).

Memorandum of Association.

1st. The name of the company is "The Mutual London Marine Association Limited."

2nd. The registered office of the company will be situate in England.

3rd. The objects for which the company is established are, "the mutual insurance of ships belonging to members of the company, and the doing all such other things as are incidental or conducive to the attainment of the above objects."

4th. Every member of the company undertakes to contribute to the assets of the company in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and the costs, charges and expenses of winding up the same, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required not exceeding ten pounds.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association.

Names, addresses, and descriptions of subscribers.

"1. John Jones of ——, in the county of ——, merchant.
"2. John Smith of ——, in the county of ——
"3. Thomas Green of ——, in the county of ——
"4. John Thompson of ——, in the county of ——
"5. Caleb White of ——, in the county of ——
"6. Andrew Brown of ——, in the county of ——
"7. Cæsar White of ——, in the county of ——

Dated the 22nd day of November, 1861.

Witness to the above signatures,
A. B., No. 13, Hute Street, Clerkenwell, Middlesex.

Articles of Association to accompany preceding Memorandum of Association (*z*).

(1.) The company, for the purpose of registration, is declared to consist of five hundred members.

(2.) The directors hereinafter mentioned may, whenever the business of the association requires it, register an increase of members.

Definition of Members.

(3.) Every person shall be deemed to have agreed to become a member of the company who insures any ship or share in a ship in pursuance of the regulations hereinafter contained.

General Meetings.

(4.) The first general meeting shall be held at such time, not being more than three months after the incorporation of the company, and at such place as the directors may determine.

(5.) Subsequent general meetings shall be held at such time and place, as may be prescribed by the company in general meeting (*a*); and if no other time or place is prescribed, a general meeting shall be held on the first Monday in February in every year, at such place as may be determined by the directors.

(6.) The above-mentioned general meetings shall be called ordinary meetings; all other general meetings shall be called extraordinary.

(*y*) Sects. 9, 14.
(*z*) Sect. 14. See Palmer's Company Precedents, 3rd ed., p. 111.
(*a*) Sect. 49.

(7.) The directors may, whenever they think fit, and they shall, upon a requisition made in writing by any five or more members, convene an extraordinary general meeting.

(8.) Any requisition made by the members shall express the object of the meeting proposed to be called, and shall be left at the registered office of the company.

(9.) Upon the receipt of such requisition the directors shall forthwith proceed to convene a general meeting: If they do not proceed to convene the same within twenty-one days from the date of the requisition, the requisitionists or any other five members may themselves convene a meeting.

Proceedings at General Meetings.

(10.) Seven days' notice at the least, specifying the place, the day and the hour of meeting, and in case of special business the general nature of such business, shall be given to the members in manner hereinafter mentioned or in such other manner (if any) as may be prescribed by the company in general meeting; but the non-receipt of such notice by any member shall not invalidate the proceedings at any general meeting.

(11.) All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of the consideration of the accounts, balance sheets, and the ordinary report of the directors.

(12.) No business shall be transacted at any meeting except the declaration of a dividend, unless a quorum of members is present at the commencement of such business; and such quorum shall be ascertained as follows; that is to say, if the members of the company at the time of the meeting do not exceed ten in number, the quorum shall be five; if they exceed ten there shall be added to the above quorum one for every five additional members up to fifty, and one for every ten additional members after fifty, with this limitation, that no quorum shall in any case exceed thirty.

(13.) If within one hour from the time appointed for the meeting a quorum of members is not present, the meeting if convened upon the requisition of the members, shall be dissolved: In any other case it shall stand adjourned to the same day in the following week at the same time and place; and if at such adjourned meeting a quorum of members is not present, it shall be adjourned sine die.

(14.) The chairman (if any) of the directors shall preside as chairman at every general meeting of the company.

(15.) If there is no such chairman, or if at any meeting he is not present at the time of holding the same, the members present shall choose some one of their number to be chairman of such meeting.

(16.) The chairman may, with the consent of the meeting, adjourn any meeting from time to time, and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

(17.) At any general meeting, unless a poll is demanded by at least five members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company, shall be sufficient evidence of the fact, without proof of the number or proportion of the votes recorded in favour of or against such resolution.

(18.) If a poll is demanded in manner aforesaid, the same shall be taken in such manner as the chairman directs, and the result of such poll shall be deemed to be the resolution of the company in general meeting.

Votes of Members.

(19.) Every member shall have one vote and no more.

(20.) If any member is a lunatic or idiot he may vote by his committee, curator bonis, or other legal curator.

(21.) No member shall be entitled to vote at any meeting unless all monies due from him to the company have been paid

(22.) Votes may be given either personally or by proxies: A proxy shall be appointed in writing under the hand of the appointor, or if such appointor is a corporation under its common seal.

(23.) No person shall be appointed a proxy who is not a member, and the instrument appointing him shall be deposited at the registered office of the company not less than forty-eight hours before the time of holding the meeting at which he proposes to vote.

(24.) Any instrument appointing a proxy shall be in the following form:

—— Company Limited.

I —— of —— in the county of —— being a member of the —— Company Limited, hereby appoint —— of —— as my proxy, to vote for me and on my behalf at the [ordinary *or* extraordinary, *as the case may be*] general meeting of the company, to be held on the —— day of ——, and at any adjournment thereof to be held on the —— day of —— next [*or* at any meeting of the company that may be held in the year ——].

As witness my hand this —— day of ——.

Signed by the said —— in the presence of —— (*b*).

Directors.

(25.) The number of the directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association.

(26.) Until directors are appointed, the subscribers of the memorandum of the association shall for all the purposes of this Act be deemed to be directors.

Powers of Directors.

(27.) The business of the company shall be managed by the directors, who may exercise all such powers of the company as are not hereby required to be exercised by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

Election of Directors.

(28.) The directors shall be elected annually by the company in general meeting.

Business of Company.

[*Here insert rules as to mode in which business of insurance is to be conducted* (*c*).]

Accounts.

(29.) The accounts of the company shall be audited by a committee of five members, to be called the audit committee.

(30.) The first audit committee shall be nominated by the directors out of the body of members.

(31.) Subsequent audit committees shall be nominated by the members at the ordinary general meeting in each year.

(32.) The audit committee shall be supplied with a copy of the balance sheet, and it shall be their duty to examine the same with the accounts and vouchers relating thereto.

(33.) The audit committee shall have a list delivered to them of all books kept by the company, and they shall at all reasonable times have access to the books and accounts of the company; they may, at the expense of the company, employ accountants or other persons to assist them in investigating such accounts, and they may in relation to such accounts examine the directors or any other officer of the company.

(*b*) See 33 & 34 Vict. c. 99, and s. 102 of the Stamp Act, 1870.

(*c*) Palmer's Company Precedents, 151.

(34.) The audit committee shall make a report to the members upon the balance sheet and accounts, and in every such report they shall state whether in their opinion the balance sheet is a full and fair balance sheet, containing the particulars required by these regulations of the company, and properly drawn up, so as to exhibit a true and correct view of the state of the company's affairs, and in case they have called for explanation or information from the directors, whether such explanations or information have been given by the directors, and whether they have been satisfactory, and such report shall be read together with the report of the directors at the ordinary meeting.

Notices.

(35.) A notice may be served by the company upon any member either personally, or by sending it through the post in a prepaid letter addressed to such member at his registered place of abode.

(36.) Any notice, if served by post, shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post; and in proving such service it shall be sufficient to prove that the letter containing the notice was properly addressed and put into the post office.

Winding up.

(37.) The company shall be wound up voluntarily whenever an extraordinary resolution, as defined by the Companies Act, 1862, is passed, requiring the company to be wound up voluntarily.

Names, addresses, and descriptions of subscribers.

"1. John Jones of ——, in the county of ——, merchant.
"2. John Smith of ——, in the county of ——
"3. Thomas Green of ——, in the county of ——
"4. John Thompson of ——, in the county of ——
"5. Caleb White of ——, in the county of ——
"6. Andrew Brown of ——, in the county of ——
"7. Cæsar White of ——, in the county of ——

Dated the 22nd day of November, 1861.

Witness to the above signatures,
A. B., No. 13, Hute Street, Clerkenwell, Middlesex.

FORM C.

MEMORANDUM AND ARTICLES OF ASSOCIATION of a company limited by Guarantee, and having a Capital divided into Shares (*d*).

Memorandum of Association.

1st. The name of the company is "The Highland Hotel Company, Limited."

2nd. The registered office of the company will be situate in Scotland.

3rd. The objects for which the company is established are "the facilitating travelling in the highlands of Scotland, by providing hotels and conveyances by sea and by land for the accommodation of travellers, and the doing all such other things as are incidental or conducive to the attainment of the above object."

4th. Every member of the company undertakes to contribute to the assets of the company in the event of the same being wound up during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and the costs, charges and expenses of winding up the same,

(*d*) Sects. 9, 14.

and for the adjustment of the rights of the contributories amongst themselves such amount as may be required not exceeding twenty pounds.

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company, in pursuance of this memorandum of association.

Names, addresses, and descriptions of subscribers.

"1. John Jones of ——, in the county of ——, merchant.
"2. John Smith of ——, in the county of ——
"3. Thomas Green of ——, in the county of ——
"4. John Thompson of ——, in the county of ——
"5. Caleb White of ——, in the county of ——
"6. Andrew Brown of ——, in the county of ——
"7. Cæsar White of ——, in the county of ——

Dated the 22nd day of November, 1861.

Witness to the above signatures,
A. B., No. 13, Hute Street, Clerkenwell, Middlesex.

Articles of Association to accompany preceding Memorandum of Association.

1. The capital of the company shall consist of five hundred thousand pounds divided into five thousand shares of one hundred pounds each.
2. The directors may, with the sanction of the company in general meeting, reduce the amount of shares.
3. The directors may, with the sanction of the company in general meeting, cancel any shares belonging to the company.
4. All the articles of Table A shall be deemed to be incorporated with these articles, and to apply to the company.

We, the several persons whose names and addresses are subscribed, agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses, and Descriptions of Subscribers.	Number of Shares taken by each Subscriber.
"1. John Jones of ——, in the county of ——	200
"2. John Smith of ——, in the county of ——	25
"3. Thomas Green of ——, in the county of ——	30
"4. John Thompson of ——, in the county of —— ..	40
"5. Caleb White of ——, in the county of ——	15
"6. Andrew Brown of ——, in the county of ——	5
"7. Cæsar White of ——, in the county of ——	10
Total shares taken	325

Dated the 22nd day of November, 1861.

Witness to the above signatures,
A. B., No. 13, Hute Street, Clerkenwell, Middlesex.

FORM D.

MEMORANDUM AND ARTICLES OF ASSOCIATION of an unlimited Company, having a Capital divided into Shares (*e*).

Memorandum of Association.

1st. The name of the company is "The Patent Stereotype Company."
2nd. The registered office of the company will be situate in England.
3rd. The objects for which the company is established are "the working of a patent method of founding and casting stereotype plates, of which method John Smith of London, is the sole patentee."

We, the several persons whose names are subscribed, are desirous of being formed into a company, in pursuance of this Memorandum of Association.

Names, addresses, and descriptions of subscribers.

"1. John Jones of ——, in the county of ——, merchant.
"2. John Smith of ——, in the county of ——
"3. Thomas Green of ——, in the county of ——
"4. John Thompson of ——, in the county of ——
"5. Caleb White of ——, in the county of ——
"6. Andrew Brown of ——, in the county of ——
"7. Abel Brown of ——, in the county of ——

Dated the 22nd day of November, 1861.
Witness to the above signatures,
A. B., No. 20, Bond Street, Middlesex.

Articles of Association to accompany the preceding Memorandum of Association.

Capital of the Company.

The capital of the company is two thousand pounds divided into twenty shares of one hundred pounds each.

Application of Table A.

All the articles of Table A. shall be deemed to be incorporated with these articles, and to apply to the company.

We, the several persons whose names and addresses are subscribed, agree to take the number of shares in the capital of the company set opposite our respective names.

Names, Addresses, and Descriptions of Subscribers.	Number of Shares taken by each Subscriber.
"1. John Jones of ——, in the county of ——, merchant..	1
"2. John Smith of ——, in the county of ——	5
"3. Thomas Green of ——, in the county of ——	2
"4. John Thompson of ——, in the county of —— ..	2
"5. Caleb White of ——, in the county of ——	3
"6. Andrew Brown of ——, in the county of——	4
"7. Abel Brown of ——, in the county of ——	1
Total shares taken	18

Dated the 22nd day of November, 1861.
Witness to the above signatures,
A. B., No. 20, Bond Street, Middlesex.

(*e*) Sects. 10, 14.

FORM E. as required by the Second Part of the Act (*f*).

Summary of Capital and Shares of the —— Company, made up to the —— day of ——.

Nominal capital £——, divided into —— shares of £—— each.
Number of shares taken up to the —— day of ——.
There has been called up on each share £——.
Total amount of calls received £——.
Total amount of calls unpaid £——.

List of Persons holding shares in the —— company on the —— day of ——, and of persons who have held shares thereon at any time during the year immediately preceding the said —— day of ——, showing their names and addresses, and an account of the shares so held.

Folio in Register Ledger containing Particulars.	Names, Addresses and Occupations.				Account of Shares.					Remarks.
	Surname.	Christian Name.	Address.	Occupation.	Shares held by existing Members on the —— day of ——.	Additional Shares held by existing Members during preceding year.		Shares held by Persons no longer Members.		
						Number.	Date of Transfer.	Number.	Date of Transfer.	

FORM F.

Licence to hold Lands (*g*).

The lords of the committee of privy council appointed for the consideration of matters relating to trade and foreign plantations hereby license the —— association, limited, to hold the lands hereunder described [*insert description of lands*]. The conditions of this licence are [*insert conditions, if any*].

THIRD SCHEDULE.

First Part (*h*).

(*Repeals certain Acts enumerated.*)

Second Part (*h*).

7 & 8 Vict. c. 113, s. 47.

Existing companies to have the powers of suing and being sued.

Every company of more than six persons established on the sixth day of May, one thousand eight hundred and forty-four, for the purpose of carrying on the trade or business of bankers within the distance of sixty-five miles from London, and not within the provisions of the Act passed in the session holden in the seventh and eighth years of the reign of her present Majesty, chapter one hundred and thirteen, shall have the same powers and privileges

(*f*) Sect. 26. (*g*) Sect. 21. (*h*) Sect. 205.

of suing and being sued in the name of any one of the public officers of such copartnership as the nominal plaintiff, petitioner or defendant on behalf of such copartnership; and all judgments, decrees and orders made and obtained in any such suit may be enforced in like manner as is provided with respect to such companies carrying on the said trade or business at any place in England exceeding the distance of sixty-five miles from London, under the provisions of an Act passed in the seventh year of the reign of King George the Fourth, chapter forty-six, intituled "An Act for the better regulating Copartnerships of certain Bankers in England, and for amending so much of an Act of the thirty-ninth and fortieth years of the reign of his late Majesty King George the Third, intituled 'An Act for establishing an Agreement with the Governor and Company of the Bank of England for advancing the Sum of Three Millions towards the Supply for the Service of the Year One thousand eight hundred,' as relates to the same," provided that such first-mentioned company shall make out and deliver from time to time to the Commissioners of Stamps and Taxes the several accounts or returns required by the last-mentioned Act, and all the provisions of the last-recited Act, as to such accounts or returns shall be taken to apply to the accounts or returns so made out and delivered by such first mentioned companies as if they had been originally included in the provisions of the last-recited Act.

20 & 21 Vict. c. 49, Part of Section XII.

Power to form banking partnerships of ten persons.

Notwithstanding anything contained in any Act passed in the session holden in the seventh and eighth years of the reign of her present Majesty, chapter one hundred and thirteen, and intituled "An Act to regulate Joint Stock Banks in England," or in any other Act, it shall be lawful for any number of persons, not exceeding ten, to carry on in partnership the business of banking, in the same manner and upon the same conditions in all respects as any company of not more than six persons could before the passing of this Act have carried on such business.

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28 & 29 VICT. C. 86.

An Act to amend the Law of Partnership.

[*5th July*, 1865.]

WHEREAS it is expedient to amend the law relating to partnership: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

The advance of money on contract to receive a share of profits not to constitute the lender a partner.

1. The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, of itself, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such.

The remuneration of agents, &c., by share of profits not to make them partners.

2. No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking shall of itself render such servant or agent responsible as a partner therein, nor give him the rights of a partner.

Certain annuitants not to be deemed partners.

3. No person being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of or to be subject to any liabilities incurred by such trader.

Receipt of profits in consideration of sale of good-

4. No person receiving by way of annuity or otherwise a portion of the profits of any business, in consideration of the sale by him of the goodwill of such business, shall, by reason only of such receipt, be deemed to be a

will not to make the seller a partner.

partner of or be subject to the liabilities of the person carrying on such business.

In case of bankruptcy, &c., lender not to rank with other creditors.

5. In the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any Act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan, nor shall any such vendor of a goodwill as aforesaid be entitled to recover any such profits as aforesaid until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied.

Interpretation of "person."

6. In the construction of this Act the word "person" shall include a partnership firm, a joint stock company, and a corporation.

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30 VICT. C. 29.

An Act to amend the Law in respect of the Sale and Purchase of Shares in Joint Stock Banking Companies.

[17*th June*, 1867.]

WHEREAS it is expedient to make provision for the prevention of contracts for the sale and purchase of shares and stock in Joint Stock Banking Companies of which the sellers are not possessed or over which they have no control:

May it therefore please your Majesty that it may be enacted; and be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same:

Contracts for sale, &c. of shares to be void unless the numbers by which such shares are distinguished are set forth in contract.

1. That all contracts, agreements, and tokens of sale and purchase which shall, from and after the first day of July, one thousand eight hundred and sixty-seven, be made or entered into for the sale or transfer, or purporting to be for the sale or transfer, of any share or shares, or of any stock or other interest, in any Joint Stock Banking Company in the United Kingdom of Great Britain and Ireland constituted under or regulated by the provisions of any Act of Parliament, Royal Charter, or letters patent, issuing shares or stock transferable by any deed or written instrument, shall be null and void to all intents and purposes whatsoever, unless such contract, agreement, or other token shall set forth and designate in writing such shares, stock, or interest by the respective numbers by which the same are distinguished at the making of such contract, agreement, or token on the register or books of such banking company as aforesaid, or where there is no such register of shares or stock by distinguishing numbers, then unless such contract, agreement, or other token shall set forth the person or persons in whose name or names such shares, stock, or interest shall at the time of making such contract stand as the registered proprietor thereof in the books of such banking company; and every person, whether principal, broker, or agent, who shall wilfully insert in any such contract, agreement, or other token any false entry of such numbers, or any name or names other than that of the person or persons in whose name such shares, stock, or interest shall stand as aforesaid, shall be guilty of a misdemeanor, and be punished accordingly, and, if in Scotland, shall be guilty of an offence punishable by fine or imprisonment.

Registered shareholders may see lists.

2. Joint Stock Banking Companies shall be bound to show their list of shareholders to any registered shareholder during business hours, from ten of the clock to four of the clock.

Extent of Act limited.

3. This Act shall not extend to shares or stock in the Bank of England or the Bank of Ireland.

30 & 31 VICT. c. 131.

An Act to amend The Companies Act, 1862.
[20*th August*, 1867.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

Preliminary.

Short title.

1. This Act may be cited for all purposes as "The Companies Act, 1867."

Act to be construed as one with 25 & 26 Vict. c. 89.

2. The Companies Act, 1862, is hereinafter referred to as "The Principal Act;" and the principal Act and this Act are hereinafter distinguished as and may be cited for all purposes as "The Companies Acts, 1862 and 1867;" and this Act shall, so far as is consistent with the tenor thereof, be construed as one with the principal Act; and the expression "this Act" in the principal Act, and any expression referring to the principal Act which occurs in any Act or other document, shall be construed to mean the principal Act as amended by this Act.

Commencement of Act.

3. This Act shall come into force on the first day of September one thousand eight hundred and sixty-seven, which date is hereinafter referred to as the commencement of this Act.

Unlimited Liability of Directors.

Unlimited Liability of Directors.

Company may have directors with unlimited liability.

4. Where after the commencement of this Act a company is formed as a limited company under the principal Act, the liability of the directors or managers of such company, or the managing director, may, if so provided by the memorandum of association, be unlimited.

Liability of director, past and present, where liability is unlimited.

5. The following modifications shall be made in the thirty-eighth section of the principal Act, with respect to the contributions to be required in the event of the winding up of a limited company under the principal Act, from any director or manager whose liability is, in pursuance of this Act, unlimited:

(1.) Subject to the provisions hereinafter contained, any such director or manager, whether past or present, shall, in addition to his liability (if any) to contribute as an ordinary member, be liable to contribute as if he were at the date of the commencement of such winding up a member of an unlimited company:

(2.) No contribution required from any past director or manager who has ceased to hold such office for a period of one year or upwards prior to the commencement of the winding up shall exceed the amount (if any) which he is liable to contribute as an ordinary member of the company:

(3.) No contribution required from any past director or manager in respect of any debt or liability of the company contracted after the time at which he ceased to hold such office shall exceed the amount (if any) which he is liable to contribute as an ordinary member of the company:

(4.) Subject to the provisions contained in the regulations of the company no contribution required from any director or manager shall exceed the amount (if any) which he is liable to contribute as an ordinary member, unless the court deems it necessary to require such contribution in order to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of the winding up.

Director with unlimited liability may have set-off as under sect. 101 of 25 & 26 Vict. c. 89.

6. In the event of the winding up of any limited company, the court, if it think fit, may make to any director or manager of such company whose liability is unlimited the same allowance by way of set-off as under the one hundred and first section of the principal Act it may make to a contributory where the company is not limited.

Notice to be given to director on his election

7. In any limited company in which, in pursuance of this Act, the liability of a director or manager is unlimited, the directors or managers of the company (if any), and the member who proposes any person for election or ap-

Unlimited Liability of Directors.

pointment to such office, shall add to such proposal a statement that the liability of the person holding such office will be unlimited, and the promoters, directors, managers, and secretary (if any) of such company, or one of them, shall, before such person accepts such office or acts therein, give him notice in writing that his liability will be unlimited.

that his liability will be unlimited.

If any director, manager, or proposer make default in adding such statement, or if any promoter, director, manager, or secretary make default in giving such notice, he shall be liable to a penalty not exceeding one hundred pounds, and shall also be liable for any damage which the person so elected or appointed may sustain from such default, but the liability of the person elected or appointed shall not be affected by such default.

Existing limited company may, by special resolution, make liability of directors unlimited.

8. Any limited company under the principal Act, whether formed before or after the commencement of this Act, may, by a special resolution (*a*), if authorized so to do by its regulations, as originally framed or as altered by special resolution, from time to time modify the conditions contained in its memorandum of association so far as to render unlimited the liability of its directors or managers, or of the managing director; and such special resolution shall be of the same validity as if it had been originally contained in the memorandum of association, and a copy thereof shall be embodied in or annexed to every copy of the memorandum of association which is issued after the passing of the resolution, and any default in this respect shall be deemed to be a default in complying with the provisions of the fifty-fourth section of the principal Act, and shall be punished accordingly.

Reduction of Capital (b) and Shares.

Reduction of Capital and Shares.

9. Any company limited by shares may, by special resolution, so far modify the conditions contained in its memorandum of association, if authorized so to do by its regulations as originally framed or as altered by special resolution, as to reduce its capital (*b*); but no such resolution for reducing the capital of any company shall come into operation until an order of the court is registered by the Registrar of Joint Stock Companies, as is hereinafter mentioned (*c*).

Power to company to reduce capital.

Company to add "and reduced" to its name for a limited period.

10. The company shall, after the date of the passing of any special resolution for reducing its capital add to its name, until such date as the court may fix, the words "and reduced" (*d*), as the last words in its name, and those words shall, until such date, be deemed to be part of the name of the company within the meaning of the principal Act.

Company to apply to the court for an order confirming reduction.

11. A company which has passed a special resolution for reducing its capital, may apply to the court by petition for an order confirming the reduction, and on the hearing of the petition the court, if satisfied that with respect to every creditor of the company who under the provisions of this Act is entitled to object to the reduction, either his consent to the reduction has been obtained, or his debt or claim has been discharged or has determined, or has been secured as hereinafter provided (*e*), may make an order confirming the reduction on such terms and subject to such conditions as it deems fit.

Definition of the court.

12. The expression "the court," shall in this Act mean the court which has jurisdiction to make an order for winding up the petitioning company, and the eighty-first and eighty-third sections of the principal Act shall be construed as if the term "winding-up" in those sections included proceedings under this Act, and the court, may in any proceedings under this Act make such order as to costs as it deems fit.

Creditors may object to reduction, and list of objecting creditors to be settled by the court.

13. Where a company proposes to reduce its capital, every creditor of the company who at the date fixed by the court is entitled to any debt or claim which, if that date of the commencement of the winding up of the company would be admissible in proof against the company (*f*) shall be entitled to object to the proposed reduction, and to be entered in the list of creditors who are so entitled to object.

The court shall settle a list of such creditors, and for that purpose shall

(*a*) 25 & 26 Vict. c. 89, s. 51, *supra*.
(*b*) See 40 & 41 Vict. c. 26, s. 3, *infra*.
(*c*) *Infra*, s. 15.
(*d*) But see 40 & 41 Vict. c. 26, s. 4 (2), *infra*.
(*e*) *Infra*, s. 14.
(*f*) 25 & 26 Vict. c. 89, s. 158, *supra*.

ascertain as far as possible without requiring an application from any creditor the name of such creditors and the nature and amount of their debts or claims, and may publish notices fixing a certain day or days within which creditors of the company who are not entered on the list are to claim to be so entered or to be excluded from the right of objecting to the proposed reduction.

Reduction of Capital and Shares.

14. Where a creditor whose name is entered on the list of creditors, and whose debt or claim is not discharged or determined, does not consent to the proposed reduction, the court may (if it think fit) dispense with such consent on the company securing the payment of the debt or claim of such creditor by setting apart and appropriating in such manner as the court may direct, a sum of such amount as is hereinafter mentioned: (that is to say,)

Court may dispense with consent of creditor on security being given for his debt.

(1.) If the full amount of the debt or claim of the creditor is admitted by the company, or, though not admitted, is such as the company are willing to set apart and appropriate, then the full amount of the debt or claim shall be set apart and appropriated.

(2.) If the full amount of the debt or claim of the creditor is not admitted by the company, and is not such as the company are willing to set apart and appropriate, or if the amount is contingent or not ascertained, then the court may, if it think fit, inquire into and adjudicate upon the validity of such debt or claim, and the amount for which the company may be liable in respect thereof, in the same manner as if the company were being wound up by the court, and the amount fixed by the court on such inquiry and adjudication shall be set apart and appropriated.

15. The Registrar of Joint Stock Companies, upon the production to him of an order of the court confirming the reduction of the capital of a company, and the delivery to him of a copy of the order and of a minute (approved by the court), showing with respect to the capital of the company, as altered by the order, the amount of such capital, the number of shares in which it is to be divided, and the amount of each share (*g*), shall register the order and minute, and on the registration the special resolution confirmed by the order so registered shall take effect.

Order and minute to be registered.

Notice of such registration shall be published in such manner as the court may direct.

The registrar shall certify under his hand the registration of the order and minute, and his certificate shall be conclusive evidence that all the requisitions of this Act with respect to the reduction of capital have been complied with and that the capital of the company is such as is stated in the minute.

16. The minute when registered shall be deemed to be substituted for the corresponding part of the memorandum of association of the company, and shall be of the same validity and subject to the same alterations as if it had been originally contained in the memorandum of association; and, subject as in this Act mentioned, no member of the company, whether past or present, shall be liable in respect of any share to any call or contribution exceeding in amount the difference (if any) between the amount which has been paid on such share and the amount of the share as fixed by the minute.

Minute to form part of memorandum of association.

17. If any creditor who is entitled in respect of any debt or claim to object to the reduction of the capital of a company under this Act is, in consequence of his ignorance of the proceeding taken with a view to such reduction, or of their nature and effect with respect to his claim, not entered on the list of creditors, and after such reduction the company is unable, within the meaning of the eightieth section of the principal Act, to pay to the creditor the amount of such debt or claim, every person who was a member of the company at the date of the registration of the order and minute relating to the reduction of the capital of the company, shall be liable to contribute for the payment of such debt or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day prior to such registration, and on the company being wound up, the court, on the application of such creditor, and on proof that he was ignorant of the proceedings taken with a view to the reduction, or of their nature and effect with respect to his claim, may, if it think fit, settle a list of such contributories accordingly, and make and enforce calls and orders on the contributories settled on such list in the same

Saving of rights of creditors who are ignorant of proceedings.

(*g*) See 40 & 41 Vict. c. 26, s. 4, *infra*.

Reduction of Capital and Shares.

manner in all respects as if they were ordinary contributories in a winding up; but the provisions of this section shall not affect the rights of the contributories of the company among themselves.

Copy of registered minute.

18. A minute when registered shall be embodied in every copy of the memorandum of association issued after its registration; and if any company makes default in complying with the provisions of this section it shall incur a penalty not exceeding one pound for each copy in respect of which such default is made, and every director and manager of the compsny who shall knowingly and wilfully authorize or permit such default shall incur the like penalty.

Penalty on concealment of name of creditor.

19. If any director, manager, or officer of the company wilfully conceals the name of any creditor of the company who is entitled to object to the proposed reduction, or wilfully misrepresents the nature or amount of the debt or claim of any creditor of the company, or if any director or manager of the company aids or abets in or is privy to any such concealment or misrepresentation as aforesaid, every such director, manager, or officer shall be guilty of a misdemeanor.

Power to make rules extended to making rules concerning matters in this Act.

20. The powers of making rules concerning winding up conferred by the [one hundred and seventieth] (*h*) one hundred and seventy-first, one hundred and seventy-second, and one hundred and seventy-third sections of the principal Act shall respectively extend to making rules concerning matters in which jurisdiction is by this Act given to the court which has the power of making an order to wind up a company, and until such rules are made the practice of the court in matters of the same nature shall, so far as the same is applicable, be followed.

Subdivision of Shares.

Subdivision of Shares.

Shares may be divided into shares of smaller amount.

21. Any company limited by shares may by special resolution so far modify the conditions contained in its memorandum of association, if authorized so to do by its regulations as originally framed or as altered by special resolution, as by subdivision of its existing shares or any of them, to divide its capital, or any part thereof, into shares of smaller amount than is fixed by its memorandum of association (*i*).

Provided, that in the subdivision of the existing shares the proportion between the amount which is paid and the amount (if any) which is unpaid on each share of reduced amount shall be the same as it was in the case of the existing share or shares from which the share of reduced amount is derived.

Special resolution to be embodied in memorandum of association.

22. The statement of the number and amount of the shares into which the capital of the company is divided contained in every copy of the memorandum of association issued after the passing of any such special resolution, shall be in accordance with such resolution; and any company which makes default in complying with the provisions of this section shall incur a penalty not exceeding one pound for each copy in respect of which such default is made; and every director and manager of the company who knowingly or wilfully authorizes or permits such default shall incur the like penalty.

Associations not for Profit.

Associations not for Profit.

Special provisions as to associations formed for purposes not of gain.

23. Where any association is about to be formed under the principal Act as a limited company, if it proves to the Board of Trade that it is formed for the purpose of promoting commerce, art, science, religion, charity, or any other useful object, and that it is the intention of such association to apply the profits, if any, or other income of the association, in promoting its objects, and to prohibit the payment of any dividend to the members of the association, the Board of Trade may by licence, under the hand of one of the secretaries or assistant secretaries, direct such association to be registered with limited liability, without the addition of the word limited to its name (*k*), and such association may be registered accordingly, and upon registration shall enjoy all the privileges and be subject to the obligations by this Act imposed on limited companies, with the exceptions that none of the provisions of this Act that require a limited company to use the word

(*h*) Words within brackets repealed by 44 & 45 Vict. c. 59.

(*i*) See 25 & 26 Vict. c. 89, s. 12.

(*k*) *Ibid.*, s. 8.

limited as any part of its name, or to publish its name, or to send a list of its members, directors, or managers to the registrar, shall apply to an association so registered. *Associations not for Profit.*

The licence by the Board of Trade may be granted upon such conditions and subject to such regulations as the Board think fit to impose, and such conditions and regulations shall be binding on the association, and may, at the option of the said Board, be inserted in the memorandum and articles of association, or in both or one of such documents.

Calls upon Shares. *Calls upon Shares.*

24. Nothing contained in the principal Act shall be deemed to prevent any company under that Act, if authorized by its regulations as originally framed or as altered by special resolution, from doing any one or more of the following things: namely,— Company may have some shares fully paid and others not.

(1.) Making arrangements on the issue of shares for a difference between the holders of such shares in the amount of calls to be paid, and in the time of payment of such calls:

(2.) Accepting from any member of the company who assents thereto the whole or a part of the amount remaining unpaid on any share or shares held by him, either in discharge of the amount of a call payable in respect of any other share or shares held by him or without any call having been made:

(3.) Paying dividend in proportion to the amount paid up on each share in cases where a larger amount is paid upon some shares than on others.

25. Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares. Manner in which shares are to be issued and held.

Transfer of Shares. *Transfer of Shares.*

26. A company shall on the application of a transferor of any share or interest in the company enter in its register of members the name of the transferee of such share or interest, in the same manner and subject to the same conditions as if the application for such entry were made by the transferee (*l*). Transfer may be registered at request of transferor.

Share Warrants to Bearer. *Share Warrants to Bearer.*

27. In the case of a company limited by shares the company, if authorized so to do by its regulations as originally framed, or as altered by special resolution, and subject to the provisions of such regulations, may, with respect to any share which is fully paid up, or with respect to stock, issue under their common seal a warrant stating that the bearer of the warrant is entitled to the share or shares or stock therein specified, and may provide by coupons or otherwise, for the payment of the future dividends on the share or shares or stock included in such warrant, hereinafter referred to as a share warrant. Warrant of limited shares fully paid up may be issued in name of bearer.

28. A share warrant shall entitle the bearer of such warrant to the shares or stock specified in it, and such shares or stock may be transferred by the delivery of the share warrant. Effect of share warrant.

29. The bearer of a share warrant shall, subject to the regulations of the company, be entitled, on surrendering such warrant for cancellation, to have his name entered as a member in the register of members, and the company shall be responsible for any loss incurred by any person by reason of the company entering in its register of members the name of any bearer of a share warrant in respect of the shares or stock specified therein without the share warrant being surrendered and cancelled. Re-registration of bearer of a share warrant in the register.

30. The bearer of a share warrant may, if the regulations of the company so provide, be deemed to be a member of the company within the meaning of the principal Act (*m*), either to the full extent or for such purposes as may be prescribed by the regulations: Regulations of the company may make the bearer of a share warrant a member.

(*l*) 25 & 26 Vict. c. 89, s. 22.

(*m*) *Ibid.* s. 23. See Palmer's Company Precedents, 128.

Share Warrants to Bearer.

Provided that the bearer of a share warrant shall not be qualified in respect of the shares or stock specified in such warrant for being a director or manager of the company in cases where such a qualification is prescribed by the regulations of the company.

Entries in register where share warrants issued.

31. On the issue of a share warrant in respect of any share or stock the company shall strike out of its register of members the name of the member then entered therein as holding such share or stock as if he had ceased to be a member, and shall enter in the register the following particulars:

(1.) The fact of the issue of the warrant:

(2.) A statement of the shares or stock included in the warrant, distinguishing each share by its number:

(3.) The date of the issue of the warrant:

And until the warrant is surrendered the above particulars shall be deemed to be the particulars which are required by the twenty-fifth section of the principal Act to be entered in the register of members of a company; and on the surrender of a warrant the date of such surrender shall be entered as if it were the date at which a person ceased to be a member.

Particulars to be contained in annual summary.

32. After the issue by the company of a share warrant the annual summary required by the twenty-sixth section of the principal Act shall contain the following particulars: the total amount of shares or stock for which share warrants are outstanding at the date of the summary, and the total amount of share warrants which have been issued and surrendered respectively since the last summary was made, and the number of shares or amount of stock comprised in each warrant.

Stamps on share warrants.

33. There shall be charged on every share warrant a stamp duty of an amount equal to three times the amount of the *ad valorem* stamp duty which would be chargeable on a deed transferring the share or shares or stock specified in the warrant, if the consideration for the transfer were the nominal value of such share or shares or stock (*n*).

Penalties on persons committing forgery.

34. Whosoever forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any share warrant or coupon, or any document purporting to be a share warrant or coupon, issued in pursuance of this Act, or demands or endeavours to obtain or receive any share or interest of or in any company under the principal Act, or to receive any dividend or money payable in respect thereof, by virtue of any such forged or altered share warrant, coupon, or document, purporting as aforesaid, knowing the same to be forged or altered, with intent in any of the cases aforesaid to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Penalties on persons falsely personating owner of shares.

35. Whosoever falsely and deceitfully personates any owner of any share or interest of or in any company, or of any share warrant or coupon issued in pursuance of this Act, and thereby obtains or endeavours to obtain any such share or interest, or share warrant or coupon, or receives or endeavours to receive any money due to any such owner, as if such offender were the true and lawful owner, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Penalties on persons engraving plates, &c.

36. Whosoever, without lawful authority or excuse, the proof whereof shall be on the party accused, engraves or makes upon any plate, wood, stone, or other material, any share warrant or coupon purporting to be a share warrant or coupon issued or made by any particular company under and in pursuance of this Act, or to be a blank share warrant or coupon issued or made as aforesaid, or to be a part of such share warrant or coupon, or uses any such plate, wood, stone, or other material, for the making or printing any such share warrant or coupon, or any such blank share warrant or coupon, or any part thereof respectively, or knowingly has in his custody or possession any such plate, wood, stone, or other material, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the

(*n*) By 33 & 34 Vict. c. 127, a penalty of 50*l.* is imposed for issuing a share warrant not duly stamped.

court, to be kept in penal servitude for any term not exceeding fourteen years and not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement. *Share Warrants to Bearer.*

Contracts. *Contracts.*

37. Contracts on behalf of any company under the principal Act may be made as follows; (that is to say,) Contracts, how made.

(1.) Any contract which if made between private persons would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company, and such contract may be in the same manner varied or discharged:

(2.) Any contract which if made between private persons would be by law required to be in writing, and signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under the express or implied authority of the company, and such contract may in the same manner be varied or discharged:

(3.) Any contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under the express or implied authority of the company, and such contract may in the same way be varied or discharged:

And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors and all other parties thereto, their heirs, executors, or administrators, as the case may be.

38. Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors or the company, or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract. Prospectus, &c., to specify dates and names of parties to any contracts made prior to issue of such prospectus, &c.

Meetings. *Meetings.*

39. Every company formed under the principal Act after the commencement of this Act shall hold a general meeting within four months after its memorandum of association is registered; and if such meeting is not held the company shall be liable to a penalty not exceeding five pounds a day for every day after the expiration of such four months until the meeting is held; and every director or manager of the company, and every subscriber of the memorandum of association, who knowingly authorizes or permits such default, shall be liable to the same penalty. Company to hold meeting within four months after registration.

Winding-up. *Winding-up.*

40. No contributory of a company under the principal Act shall be capable of presenting a petition for winding-up such company (*o*) unless the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held by him, and registered in his name, for a period of at least six months during the eighteen months previously to the commencement of the winding-up, or have devolved upon him through the death of a former holder: Contributory when not qualified to present winding-up petition.

Provided that where a share has during the whole or any part of the six months been held by or registered in the name of the wife of a contributory either before or after her marriage, or by or in the name of any trustee or trustees for such wife or for the contributory, such share shall for the purposes of this section be deemed to have been held by and registered in the name of the contributory.

41. Where the High Court of Chancery in England makes an order for winding-up a company under the principal Act, it may, if it thinks fit, direct all subsequent proceedings to be had in a county court held under an Act of Winding-up may be referred to county court.

(*o*) 25 & 26 Vict. c. 89, s. 82.

Winding-up.

the session of the ninth and tenth years of the reign of her present Majesty chapter ninety-five, and the Acts amending the same; and thereupon such county court shall, for the purpose of winding-up the company, be deemed to be "the court" within the meaning of the principal Act (*p*), and shall have, for the purposes of such winding-up, all the jurisdiction and powers of the High Court of Chancery.

As to transfer of suit from one county court to another.

42. If during the progress of a winding-up it is made to appear to the High Court of Chancery that the same could be more conveniently prosecuted in any other county court, it shall be competent for the High Court of Chancery to transfer the same to such other county court, and thereupon the winding-up shall proceed in such other county court.

Parties aggrieved may appeal.

43. If any party in a winding-up under this Act is dissatisfied with the determination or direction of a judge of a county court on any matter in such winding-up, such party may appeal (*q*) from the same to the Vice-Chancellor named for that purpose by the Lord Chancellor by general order; provided that such party shall, within thirty days after such determination or direction, give notice of such appeal to the other party or his attorney, and also deposit with the registrar of the county court the sum of ten pounds as security for the costs of the appeal; and the said court of appeal may make such final or other decree or order as it thinks fit, and may also make such order with respect to the costs of the said appeal as such court may think proper, and such orders shall be final.

Powers to frame rules and orders under sect. 32 of 19 & 20 Vict. c. 108.

44. The county court judges appointed or to be appointed by the Lord Chancellor from time to time to frame rules and orders for regulating the practice of the courts, and forms of proceedings therein, under the thirty-second section of an Act passed in the nineteenth and twentieth year of the reign of her present Majesty, chapter one hundred and eight, shall frame the rules and orders for regulating the practice of the county courts under this Act, and forms of proceedings therein, and from time to time may amend such rules, orders, and forms; and such rules, orders, and forms, or amended rules, orders, and forms, certified under the hands of such judges or of any three or more of them, shall be submitted to the Lord Chancellor, who may allow or disallow or alter the same, and so from time to time; and the rules, orders, and forms, or amended rules, orders, and forms, so allowed or altered, shall from a day to be named by the Lord Chancellor be in force in every county court.

Scale of costs to be framed by the judges.

45. The county court judges mentioned in the last section shall be empowered to frame a scale of costs and charges to be paid to counsel and attorneys with respect to all proceedings in a winding-up under this Act, and from time to time to amend such scale; and such scale or amended scale, certified under the hands of such judges or any three or more of them, shall be submitted to the Lord Chancellor, who from time to time may allow or disallow or alter the same; and the scale or amended scale so allowed or altered shall, from a day to be named by the Lord Chancellor, be in force in every county court.

Remuneration of registrars and high bailiffs in winding-up of companies.

46. The registrars and high bailiffs of the county courts shall be remunerated for the duties to be performed by them under this Act, by receiving, for their own use, such fees as may be from time to time authorized to be taken by any orders to be made by the Commissioners of the Treasury, with the consent of the Lord Chancellor; and the Commissioners of the Treasury are hereby authorized and empowered, with such consent as aforesaid, from time to time to make such orders; provided that it shall be lawful for the said Commissioners, with the like consent as aforesaid, by an order to direct that after the date named in the order any registrar or high bailiff shall, in lieu of receiving such fees, be paid such fixed or fluctuating allowance as may in each case be thought just, and after such date the said fees shall be accounted for and paid over by such registrar or high bailiff in such manner as may be directed in the order.

Saving.

Saving.

Not to exempt companies from provisions of sect. 196 of 25 & 26 Vict. c. 89.

47. Nothing in this Act contained shall exempt any company from the second or third provisions of the one hundred and ninety-sixth section of the principal Act restraining the alteration of any provision in any Act of Parliament or charter.

(*p*) 25 & 26 Vict. c. 89, s. 81. (*q*) See Judicature Act, 1873, s. 45.

30 VICT. c. 15.

An Act for the abolition of certain Exemptions from Local Dues on Shipping and on Goods carried in Ships.

[12*th April*, 1867.]

30 & 31 VICT. c. 124.

An Act to amend the Merchant Shipping Act, 1854.

[20*th August*, 1867.]

31 & 32 VICT. c. 86.

An Act to enable Assignees of Mortgage Policies to sue thereon in their own Names.

[31*st July*, 1868.]

31 & 32 VICT. c. 129.

An Act to amend the Law relating to the Registration of Ships in British Possessions.

[31*st July*, 1868.]

32 VICT. c. 11.

An Act for amending the Law relating to the Coasting Trade and Merchant Shipping in British Possessions.

[13*th May*, 1869.]

33 & 34 VICT. c. 104.

An Act to facilitate Compromises and Arrangements between Creditors and Shareholders of Joint Stock and other Companies in Liquidation.

[10*th August*, 1870.]

34 & 35 VICT. CAP. 110.

An Act to amend the Merchant Shipping Acts.

[21*st August*, 1871.]

WHEREAS it is expedient to amend the Merchant Shipping Acts:

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

Short title.

1. This Act may be cited as the Merchant Shipping Act, 1871.

Act to be construed with Merchant Shipping Acts.

2. This Act shall be construed as one with the Merchant Shipping Act, 1854, and the Acts amending the same, and the said Acts and this Act may be cited collectively as the Merchant Shipping Acts, 1854 to 1871.

Commencement of Act.

3. This Act shall come into operation on the first day of January one thousand eight hundred and seventy-two.

Registry (Part II. of Merchant Shipping Act, 1854).

4. [Repealed by 36 & 37 Vict. c. 85, s. 33.]

Ship's draught of water to be recorded.

5. The Board of Trade may, in any case or class of cases in which they think it expedient so to do, direct any person appointed by them for the purpose to record, in such manner and with such particulars as the Board of Trade direct, the draught of water of any sea-going ship (*a*), as shown on the scale of feet on her stem and on her stern post, upon her leaving any

(*a*) See 36 & 37 Vict. c. 85, s. 4.

dock, wharf, port, or harbour for the purpose of proceeding to sea; and such person shall thereupon keep such record, and shall from time to time forward the same, or a copy thereof, to the Board of Trade; and such record, or any copy thereof, if produced by or out of the custody of the Board of Trade, shall be admissible in evidence of the draught of water of the ship at the time specified in the record (*b*).

The master of every British sea-going ship shall, upon her leaving any dock, wharf, port, or harbour for the purpose of proceeding to sea, record her draught of water in the official logbook (if any), and shall produce such record to any principal officer of Customs whenever required by him so to do, or in default of such production shall incur a penalty not exceeding twenty pounds.

Rules to be observed in naming of ships.

6. With respect to the names of British ships, the following rules shall be observed:

(1.) A ship shall not be described by any name other than that by which she is for the time being registered:

(2.) No change shall be made in the name of a ship without the previous permission of the Board of Trade signified in writing under their seal, or under the hand of one of their secretaries or assistant secretaries. Upon such permission being granted, the ship's name shall forthwith be altered in the register book, to the ship's certificate of registry, and on her bows and stern (*c*):

(3.) If in any case it is shown to the satisfaction of the Board of Trade that the name of any ship has been changed without such permission as aforesaid, they shall direct that her name be altered into that which she bore before such change, and the name shall be altered in the register book, in the ship's certificate of registry, and on her bows and stern accordingly:

(4.) Where a ship having once been registered has ceased to be so registered no person, unless ignorant of such previous registry (proof whereof shall lie on him), shall apply to register, and no registrar shall knowingly register such ship except by the name by which she was previously registered, unless with the permission of the Board of Trade granted as aforesaid.

Every person who acts or suffers any person under his control to act in contravention of this section, or who omits to do, or suffers any person under his control to omit to do, anything required by this section, shall for each offence incur a penalty not exceeding one hundred pounds, and any principal officer of customs may detain the ship until the provisions of this section are complied with.

Application for a change of name shall be made in writing to the Board of Trade. If the Board are of opinion that the application is made on reasonable grounds they may entertain the same, and shall thereupon require notice thereof to be published in such form and manner as they think fit.

Masters and Seamen (Part III. of Merchant Shipping Act, 1854).

Survey of ships alleged by seamen to be unseaworthy.

7. Whenever in any proceeding against any seaman or apprentice belonging to any ship for desertion, or for neglecting or refusing to join or to proceed to sea in his ship, or for being absent from or quitting the same, without leave, it is alleged by one-fourth of the seamen belonging to such ship, or, if the number of such seamen exceed twenty, by not less than five such seamen, that such ship is by reason of unseaworthiness, overloading, improper loading, defective equipment, or for any other reason, not in a fit condition to proceed to sea, or that the accommodation in such ship is insufficient, the court having cognizance of the case shall take such means as may be in their power to satisfy themselves concerning the truth or untruth of such allegation, and shall for that purpose receive the evidence of the person or persons making the same, and shall have power to summon any other witnesses whose evidence they may think it desirable to hear; the court shall thereupon, if satisfied that the allegation is groundless, proceed to adjudicate, but if not so satisfied shall cause such ship to be surveyed (*d*).

(*b*) As to notice by master of kind and quantity of grain cargo, see 43 & 44 Vict. c. 43, s. 6.

(*c*) 36 & 37 Vict. c. 85, s. 3.

(*d*) 39 & 40 Vict. c. 80, ss. 6—12.

Provided that no seaman or apprentice charged with desertion, or with quitting his ship without leave, shall have any right to apply for a survey under this section unless previously to his quitting his ship he has complained to the master of the circumstances so alleged in justification.

For the purposes of this section, the court shall require any of the surveyors appointed by the Board of Trade, under the Merchant Shipping Act, 1854, or any person appointed for the purpose by the Board of Trade, or, if such surveyor or person cannot be obtained without reasonable expense or delay, or is not, in the opinion of the court, competent to deal with the special circumstances of the case, then any other impartial surveyor appointed by the court (*e*), and having no interest in the ship, her freight, or cargo, to survey the ship and to answer any question concerning her which the court may think fit to put. Such surveyor or other person shall survey the ship, and make his report in writing to the court, including an answer to every question put to him by the court. The court shall cause such report to be communicated to the parties, and unless it is proved to the satisfaction of the court that the opinions expressed in such report are erroneous, the court shall determine the questions before them in accordance with those opinions.

For the purposes of such survey, a surveyor shall have all the powers of an inspector appointed by the Board of Trade, under the Merchant Shipping Act, 1854.

The costs (if any) of the survey shall be determined by the Board of Trade according to a scale of fees to be fixed by them, and shall be paid in the first instance out of the Mercantile Marine Fund.

If it is proved to the satisfaction of the court that the ship is in a fit condition to proceed to sea, or, as the case may be, that the accommodation is sufficient, the costs of the survey shall be paid by the person or persons upon whose demand, or in consequence of whose allegation, the survey was made, and may be deducted by the master or owner out of the wages due or to become due to such person or persons, and shall be paid over to the Board of Trade.

If it is proved that the ship is not in a fit condition to proceed to sea, or, as the case may be, that the accommodation is insufficient, the costs of the survey shall be paid to the Board of Trade by the master or owner (*f*).

Power for naval courts to direct survey of ships.

8. Any naval court may, if they think fit, direct a survey of any ship which is the subject of an investigation held before them, and such survey shall be made in the same way, and the surveyor who makes the same shall have the same powers, as if the survey had been directed by a competent court in the course of proceedings against a seaman or apprentice for desertion or a kindred offence.

Safety (*Part IV. of Merchant Shipping Act*, 1854).

9, 10. [Repealed by 36 & 37 Vict. c. 85, s. 33.]

11. [Repealed by 39 & 40 Vict. c. 80, s. 45.]

12. [Repealed by Statute Law Revision Act, 1883.]

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35 & 36 VICT. CAP. 73.

An Act to amend the Merchant Shipping Acts and the Passenger Acts.
[10*th August*, 1872.]

WHEREAS it is expedient to amend the Merchant Shipping Acts and the Passenger Acts:

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

Short title.

1. This Act may be cited as the Merchant Shipping Act, 1872.

Commencement of Act.

2. This Act shall come into operation on the first day of January one thousand eight hundred and seventy-three.

(*e*) 35 & 36 Vict. c. 73, s. 13.

(*f*) 36 & 37 Vict. c. 85, s. 9; and 39 & 40 Vict. c. 80, s. 11.

Measurement of Ships.

Transfer to Board of Trade of duties of Commissioners of Customs with respect to measurement of ships.

3. The twenty-third, twenty-seventh, twenty-eighth, and twenty-ninth sections of the Merchant Shipping Act, 1854, the fourteenth section of the Merchant Shipping Act Amendment Act, 1855 [and the fourth section of the Merchant Shipping Act, 1871] (*g*), shall be read and construed as if the Board of Trade were therein named instead of the Commissioners of Customs.

Registry.

Transfer to registrar-general of seamen of duties of Commissioners of Customs with respect to registry of ships.

4. The forty-sixth, fifty-fourth, ninety-second, and ninety-fourth sections of the Merchant Shipping Act, 1854, shall be read and construed as if the Registrar-General of Seamen were therein named instead of the Commissioners of Customs, and the returns required to be transmitted by the said ninety-fourth section of the Merchant Shipping Act, 1854, shall be transmitted to the Registrar-General of Seamen, and not to the Custom House in London, and the Registrar-General of Seamen shall be called the Registrar-General of Shipping and Seamen.

Pilotage.

Trinity House may modify rules as to pilotage rates.

9. Notwithstanding anything in the three hundred and fifty-eighth section of the Merchant Shipping Act, 1854, the Trinity House may, by bye-law made with the sanction of her Majesty in Council, repeal or relax the provisions of that section within the whole or any part of their district so far as to allow any pilot or class of pilots under their jurisdiction to demand or receive and any master to offer or pay any rate less than the rate for the time being demandable by law (*h*).

Alteration of payments made to Trinity House pilotage fund by Cinque Ports pilots.

10. Whereas in pursuance of the Pilotage Law Amendment Act, 1853, the several funds then belonging to the Cinque Ports pilots were merged into the common fund called the Trinity House Pilotage Fund, and by the same Act power was given to the Trinity House of Deptford Strond, with the approval of the Board of Trade, from time to time to make regulations for altering and determining the payments and contributions to be made to the said pilotage fund by Cinque Ports pilots licensed before the said Act came into operation: And whereas by one of the regulations made under the authority of the said Act it was provided that each of the said Cinque Ports pilots should pay towards the said fund eleven shillings for each turn: And whereas it has proved that the turns have been more numerous than was expected, and that the sums paid to the Trinity House, and carried to the credit of the said fund, in respect of the said turns have been larger than was assumed in making the calculations upon which the said regulation was based: And whereas it is expedient that in lieu of the said sum of eleven shillings per turn the fixed annual sum of thirteen pounds four shillings should for the future be paid by or in respect of each of the said pilots so long as he remains unsuperannuated, and that the excess of the sum heretofore paid in each year by each pilot over the sum of thirteen pounds four shillings should be returned: And whereas doubts have been entertained whether the purposes aforesaid can be effected without the authority of Parliament: Be it enacted, that [the Trinity House of Deptford Strond shall, out of the Trinity House Pilotage Fund, repay to each of the Cinque Ports pilots licensed before the Pilotage Law Amendment Act, 1853, came into operation, or if he be deceased, to his executors or administrators, the aggregate sum by which the sum of eleven shillings per turn heretofore paid by him exceeds the sum which he would have paid if he had paid thirteen pounds four shillings per annum: and that] (*i*) each of the said pilots shall, while he continues to act as pilot, pay to the said Trinity House the sum of eleven shillings per turn as heretofore, from the first day of January in each year, until the sums contributed in the same year amount to an aggregate sum equal to the product of thirteen pounds four shillings multiplied by the number of pilots licensed as above who are then surviving and unsuperannuated, and that when such aggregate sum is made up no further contributions shall be required from the said pilots until after the thirty-first day of December in the same year; and if the said contributions

(*g*) Words within brackets repealed by Statute Law Revision Act, 1883.

(*h*) 2 Maude and Pollock's Merchant Shipping, 4th ed., 68, 180—190.

(*i*) Words within brackets repealed by Statute Law Revision Act, 1883.

during any one year fall short of the said aggregate sum, the said pilots then surviving and unsuperannuated shall, at such time and in such manner as the Trinity House may direct, make good such deficiency by payment of an additional contribution per man, to be calculated pro rata upon the number of turns which each may have carried during the said year, and any such pilot failing to pay such additional contribution shall, in default of such payment, become liable to immediate removal from active service and superannuation upon such proportion of the full pension payable to such pilot as the Trinity House may see fit.

Pilotage authority may grant special sea licences.

11. Any pilotage authority may, if authorized in that behalf by Order in Council, grant special licences qualifying the persons to whom they are granted to act as pilots for any part of the sea or channels beyond the limits of any pilotage authority, so, however, that no pilot so licensed be entitled to supersede an unlicensed pilot outside the limits of the authority by which he is licensed.

Chain Cables.

12. [Repealed by 37 & 38 Vict. c. 51, s. 8.]

General.

Duties of surveyors.

13. All duties in relation to the survey and measurement of ships under this Act or the Acts amended hereby shall be performed by the surveyors appointed under the Fourth Part of the Merchant Shipping Act, 1854, in accordance with such regulations as may be from time to time made by the Board of Trade.

14. [Repealed by 39 & 40 Vict. c. 80, s. 45.]

Penalty on surveyor, &c., receiving gratuity &c., for duties performed under this Act.

15. If any surveyor, or any person employed under the authority of the Passengers Act, 1855, demands or receives directly or indirectly, otherwise than by the direction of the Board of Trade, any fee, remuneration, or gratuity whatever in respect of any of the duties performed by him under this Act or Acts amended hereby, he shall for every such offence incur a penalty not exceeding fifty pounds.

Owner or agent of home-trade ships may enter into time agreements which need not expire half yearly.

16. The owner of home-trade ships or his agent may enter into time agreements, in forms to be sanctioned by the Board of Trade, with individual seamen to serve in any one or more ships belonging to him, which agreements need not expire on either the thirtieth day of June or the thirty-first day of December, anything in the Merchant Shipping Act to the contrary notwithstanding: Provided always, that a duplicate of each agreement entered into under the provisions of the section be forwarded to the Registrar General of Shipping within forty-eight hours after it has been entered into.

Her Majesty may accept offers of persons recomended by the Admiralty to serve as officers of the Royal Naval Reserve.

17. It shall be lawful for her Majesty to accept from time to time the offers of any person whom the Lord High Admiral or the Commissioners for executing his office may recommend, to serve as officers of reserve in the Royal Navy, upon such terms and conditions as to her Majesty may from time to time seem fit, and the officers of the Royal Naval Reserve Act, 1863, shall be read and construed as if this clause formed part of the said Act.

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36 & 37 VICT. CAP. 48.

An Act to make better provision for carrying into effect the Railway and Canal Traffic Act, 1854, and for other purposes connected therewith.
[21*st July*, 1873.]

Preliminary.

Short title

1. This Act may be cited as the Regulation of Railways Act, 1873.

Definitions.

2. In this Act—

The term "railway company" includes any person being the owner or lessee of or working any railway in the United Kingdom constructed or carried on under the powers of any Act of Parliament:

The term "canal company" includes any person being the owner or lessee of, or working, or entitled to charge tolls for the use of any canal in the United Kingdom constructed or carried on under the powers of any Act of Parliament:

The term "person" includes a body of persons corporate or unincorporate:

The term "railway" includes every station, siding, wharf, or dock of or belonging to such railway and used for the purposes of public traffic:

The term "canal" includes any navigation which has been made under or upon which tolls may be levied by authority of Parliament, and also the wharves and landing-places of and belonging to such canal or navigation, and used for the purposes of public traffic:

The term "traffic" includes not only passengers and their luggage, goods, animals, and other things conveyed by any railway company or canal company, but also carriages, wagons, trucks, boats, and vehicles of every description adapted for running or passing on the railway or canal of any such company:

The term "mails" includes mail-bags and post-letter bags:

The term "special Act" means a local or local and personal Act, or an Act of a local and personal nature, and includes a Provisional Order of the Board of Trade confirmed by Act of Parliament, and a certificate granted by the Board of Trade under the Railways Construction Facilities Act, 1864:

The term "the Treasury" means the Commissioners of Her Majesty's Treasury for the time being.

Explanation and Amendment of Law.

Publication of rates.

14. Every railway company and canal company shall keep at each of their stations and wharves a book or books showing every rate for the time being charged for the carriage of traffic, other than passengers and their luggage, from that station or wharf to any place to which they book, including any rates charged under any special contract, and stating the distance from that station or wharf of every station, wharf, siding, or place to which any such rate is charged.

Every such book shall during all reasonable hours be open to the inspection of any person without the payment of any fee.

The commissioners may from time to time, on the application of any person interested, make orders with respect to any particular description of traffic, requiring a railway company or canal company to distinguish in such book how much of each rate is for the conveyance of the traffic on the railway or canal, including therein tolls for the use of the railway or canal, for the use of carriages or vessels, or for locomotive power, and how much is for other expenses, specifying the nature and detail of such other expenses.

Any company failing to comply with the provisions of this section shall for each offence, and in the case of a continuing offence, for every day during which the offence continues, be liable to a penalty not exceeding five pounds, and such penalty shall be recovered and applied in the same manner as penalties imposed by the Railways Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation (Scotland) Act, 1845, (as the case may require,) are for the time being recoverable and applicable.

Power to commissioners to fix terminal charges.

15. The commissioners shall have power to hear and determine any question or dispute which may arise with respect to the terminal charges of any railway company, where such charges have not been fixed by any Act of Parliament, and to decide what is a reasonable sum to be paid to any company for loading and unloading, covering, collection, delivery, and other services of a like nature; any decision of the commissioners under this section shall be binding on all courts and in all legal proceedings whatsoever.

Arrangements between railway companies and canal companies.

16. No railway company or canal company, unless expressly authorized thereto by any Act passed before the passing of this Act, shall, without the sanction of the commissioners, to be signified in such manner as they may by general order or otherwise direct, enter into any agreement whereby any control over or right to interfere in or concerning the traffic carried or rates or tolls levied on any part of a canal is given to the railway company, or any persons managing or connected with the management of any railway; and any such agreement made after the commencement of this Act without such sanction shall be void.

The commissioners shall withhold their sanction from any such agreement which is in their opinion prejudicial to the interests of the public.

Not less than one month before any such agreement is so sanctioned, copies of the intended agreement certified under the hand of the secretary of the railway company or one of the railway companies party or parties thereto, shall be deposited for public inspection at the office of the commissioners, and also at the office of the clerk of the peace of the county, riding, or division in England or Ireland in which the head office of any canal company party to the agree-

ment is situate, and at the office of the principal sheriff clerk of every such county in Scotland, and notice of the intended agreement, setting forth the parties between whom or on whose behalf the same is intended to be made, and such further particulars with respect thereto as the commissioners may require, shall be given by advertisement in the London, Edinburgh, or Dublin Gazette, according as the head office of any canal company party to the agreement is situate in England, Scotland, or Ireland, and shall be sent to the secretary or principal officer of every canal company any of whose canals communicates with the canal of any company party to the agreement; and shall be published in such other way, if any, as the commissioners for the purpose of giving notice to all parties interested therein by order direct.

Maintenance of canals by railway companies.

17. Every railway company owning or having the management of any canal or part of a canal shall at all times keep and maintain such canal or part, and all the reservoirs, works, and conveniences thereto belonging, thoroughly repaired and dredged and in good working condition, and shall preserve the supplies of water to the same, so that the whole of such canal or part may be at all times kept open and navigable for the use of all persons desirous to use and navigate the same without any unnecessary hindrance, interruption, or delay.

Orders of commissioners.

26. Any decision or any order made by the commissioners for the purpose of carrying into effect any of the provisions of this Act may be made a rule or order of any superior court, and shall be enforced either in the manner directed by section three of the Railway and Canal Traffic Act, 1854, as to the writs and orders therein mentioned, or in like manner as any rule or order of such court.

For the purpose of carrying into effect this section, general rules and orders may be made by any superior court in the same manner as general rules and orders may be made with respect to any other proceedings in such court.

Evidence of documents.

30. Every document purporting to be signed by the commissioners, or any one of them, shall be received in evidence without proof of such signature, and until the contrary is proved shall be deemed to have been so signed and to have been duly executed or issued by the commissioners.

Commissioners to make annual reports.

31. The commissioners shall, once in every year, make a report to her Majesty of their proceedings under this Act during the past year, and such report shall be laid before both Houses of Parliament within fourteen days after the making thereof if Parliament is then sitting, and if not, then within fourteen days after the next meeting of Parliament.

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36 & 37 VICT. CAP. 85.

An Act to amend the Merchant Shipping Acts.

[*5th August*, 1873.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

Short title.

1. This Act may be cited as the Merchant Shipping Act, 1873.

Construction of Act.

2. This Act shall be construed as one with the Merchant Shipping Act, 1854, and the Acts amending the same, and the said Acts and this Act may be cited collectively as the Merchant Shipping Acts, 1854 to 1873.

Registry (*Part II. of Merchant Shipping Act*, 1854.)

Particulars to be marked on British ships.

3. Every British ship registered after the passing of this Act shall before registry, and every British ship registered before the passing of this Act shall, on or before the first day of January one thousand eight hundred and seventy-four, be permanently and conspicuously marked to the satisfaction of the Board of Trade, as follows (*k*):—

Her name shall be marked on each of her bows, and her name and the name of her port of registry shall be marked on her stern, on a dark ground in white or yellow letters, or on a light ground in black letters, such letters to be of a length not less than four inches, and of proportionate breadth:

(*k*) See 39 & 40 Vict. c. 80, ss. 25—28.

Her official number and the number denoting her registered tonnage shall be cut in on her main beam:

A scale of feet denoting her draught of water shall be marked on each side of her stem and of her stern post in Roman capital letters or in figures not less than six inches in length, the lower line of such letters or figures to coincide with the draught line denoted thereby. Such letters or figures shall be marked by being cut in and painted white or yellow on a dark ground, or in such other way as the Board of Trade may from time to time approve.

The Board of Trade may, however, exempt any class of ships from the requirements of this section, or any of them.

If the scale of feet showing the ship's draught of water is in any respect inaccurate, so as to be likely to mislead, the owner of the ship shall incur a penalty not exceeding one hundred pounds.

The marks required by this section shall be permanently continued, and no alteration shall be made therein, except in the event of any of the particulars thereby denoted being altered in the manner provided by the Merchant Shipping Acts, 1854 to 1873.

Any owner or master of a British ship who neglects to cause his ship to be marked as aforesaid, or to keep her so marked, and any person who conceals, removes, alters, defaces, or obliterates, or suffers any person under his control to conceal, remove, alter, deface, or obliterate any of the said marks, except in the event aforesaid, or except for the purpose of escaping capture by an enemy, shall for each offence incur a penalty not exceeding one hundred pounds, and any officer of customs on receipt of a certificate from a surveyor or inspector of the Board of Trade that a ship is insufficiently or inaccurately marked may detain the same until the insufficiency or inaccuracy has been remedied.

Provided that no fishing vessel duly registered, lettered, and numbered in pursuance of the Sea Fisheries Act, 1868, shall be required to have her name and port of registry marked under this section.

Provided also, that if any registered British ship is not within a port of the United Kingdom at any time before the first day of January one thousand eight hundred and seventy-four, she shall be marked as by this section required within one month after her next return to a British port of registry subsequent to that date.

Particulars to be entered in record of draught of water.

4. The record of the draught of water of any sea-going ship required under section five of the Merchant Shipping Act, 1871, shall, in addition to the particulars thereby required, specify the extent of her clear side in feet and inches.

The term "clear side" means the height from the water to the upper side of the plank of the deck from which the depth of hold as stated in the register is measured, and the measurement of the clear side is to be taken at the lowest part of the side (*l*).

Every master of a sea-going ship shall, upon the request of any person appointed to record the ship's draught of water, permit such person to enter the ship and to make such inspections and take such measurements as may be requisite for the purpose of such record, and any master who fails so to do, or impedes or suffers any one under his control to impede any person so appointed in the execution of his duty, shall for each offence incur a penalty not exceeding five pounds.

Rules as to names of foreign ships placed on British register.

5. Where a foreign ship, not having at any previous time been registered as a British ship, becomes a British ship, no person shall apply to register, and no registrar shall knowingly register such ship, except by the name which she bore as a foreign ship immediately before becoming a British ship, unless with the permission of the Board of Trade granted in manner directed by section six of the Merchant Shipping Act, 1871.

Any person who acts or suffers any person under his control to act in contravention of this section, shall for each offence incur a penalty not exceeding one hundred pounds.

Restrictions on re-registration of abandoned ships.

6. Where a ship has ceased to be registered as a British ship by reason of having been wrecked or abandoned, or for any reason other than capture by the enemy or transfer to a person not qualified to own a British ship, such ship shall not be re-registered until she has, at the expense of the applicant for registration, been surveyed by one of the surveyors appointed by the Board of Trade and certified by him to be seaworthy.

(*l*) See 43 & 44 Vict. c. 43, s. 6.

Masters and Seamen (Part III. of Merchant Shipping Act, 1854).

Agreements with seamen.

7. Any agreement with a seaman made under section one hundred and forty-nine of the Merchant Shipping Act, 1854, may, instead of stating the nature and duration of the intended voyage or engagement as by that section required, state the maximum period of the voyage or engagement, and the places or parts of the world (if any) to which the voyage or engagement is not to extend.

8. [Repealed, except as to Scotland, by 46 & 47 Vict. c. 41, s. 55.]

Compensation to seamen for unnecessary detention on charge of desertion.

9. If a seaman or apprentice belonging to any ship is detained on a charge of desertion or any kindred offence, and if upon a survey of the ship being made under section seven of the Merchant Shipping Act, 1871, it is proved that she is not in a fit condition to proceed to sea, or that her accommodation is insufficient, the owner or master of the ship shall be liable to pay to such seaman or apprentice such compensation for his detention as the court having cognizance of the proceedings may award.

Power for Board of Trade to establish mercantile marine offices and to hold examinations at certain ports.

10. In any case where the business of a mercantile marine office is conducted otherwise than under a local marine board, the Board of Trade may, if they think fit, instead of conducting such business at a custom-house or otherwise, establish a mercantile marine office, and for that purpose procure the requisite buildings and property, and from time to time appoint and remove all the requisite superintendents, deputies, clerks and servants. They may also in the like case make all such provisions and exercise all such powers with respect to the holding of examinations for the purpose of granting certificates of competency as masters, mates, or engineers, to persons desirous of obtaining the same, as might have been made or exercised by a local marine board.

11. [Repealed by 39 & 40 Vict. c. 80, s. 45.]

Safety and Prevention of Accidents (Part IV. of Merchant Shipping Act, 1854).

12, 13, 14. [Repealed by 39 & 40 Vict. c. 80, s. 45.]

Power for Board of Trade to vary requirements as to boats.

15. In the case of any ship surveyed under the Fourth Part of the Merchant Shipping Act, 1854, the Board of Trade may at the request of the owner authorize the reduction of the number and the variation of the dimensions of the boats required for the ship by section two hundred and ninety-two of that Act, and also the substitution of rafts or other appliances for saving life for any such boats, so nevertheless that the boats so reduced or varied, and the rafts or other appliances so substituted be sufficient for the persons carried on board the ship (*m*).

Section two hundred and ninety-three of the said Act shall extend to any such rafts or appliances in the same manner as if they were boats.

Duties of masters in case of collision.

16. In every case of collision between two vessels it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without danger to his own vessel, crew, and passengers (if any), to stay by the other vessel until he has ascertained that she has no need of further assistance, and to render to the other vessel, her master, crew, and passengers (if any), such assistance as may be practicable and as may be necessary in order to save them from any danger caused by the collision; and also to give to the master or person in charge of the other vessel the name of his own vessel, and of her port of registry, or of the port or place to which she belongs, and also the names of the ports and places from which and to which she is bound.

If he fails so to do, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default.

Every master or person in charge of a British vessel who fails, without reasonable cause, to render such assistance or give such information as aforesaid shall be deemed guilty of a misdemeanor, and if he is a certificated officer an inquiry into his conduct may be held and his certificate may be cancelled or suspended.

(*m*) 2 Maude and Pollock's Merchant Shipping, 4th ed., cccxli.

Liability for infringement of regulations in case of collision.

17. If in any case of collision it is proved to the court before which the case is tried that any of the regulations for preventing collision contained in or made under the Merchant Shipping Acts, 1854 to 1873, has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary.

Signals of distress.

18. The signals specified in the First Schedule to this Act shall be deemed to be signals of distress.

Any master of a vessel who uses or displays, or causes or permits any person under his authority to use or display, any of the said signals, except in the case of a vessel being in distress, shall be liable to pay compensation for any labour undertaken, risk incurred, or loss sustained in consequence of such signal having been supposed to be a signal of distress, and such compensation may, without prejudice to any other remedy, be recovered in the same manner in which salvage is recoverable.

Signals for pilots.

19. If a vessel requires the service of a pilot, the signals to be used and displayed shall be those specified in the Second Schedule to this Act.

Any master of a vessel who uses or displays, or causes or permits any person under his authority to use or display, any of the said signals for any other purpose than that of summoning a pilot, or uses or causes or permits any person under his authority to use any other signal for a pilot, shall incur a penalty not exceeding twenty pounds.

Power to alter rules as to signals.

20. Her Majesty may from time to time by Order in Council repeal or alter the rules as to signals contained in the Schedules to this Act, or make new rules in addition thereto, or in substitution therefor, and any alterations in or additions to such rules made in manner aforesaid shall be of the same force as the rules in the said Schedules.

Private signals.

21. Any shipowner who is desirous of using, for the purposes of a private code, any rockets, lights, or other similar signals, may register such signals with the Board of Trade, and the Board shall give public notice of the signals so registered in such manner as they may think requisite for preventing such signals from being mistaken for signals of distress or signals for pilots.

The Board may refuse to register any signals which in their opinion cannot easily be distinguished from signals of distress or signals for pilots.

When any signal has been so registered the use or display thereof by any person acting under the authority of the shipowner in whose name it is registered shall not subject any person to any of the penalties or liabilities by this Act imposed upon persons using or displaying signals improperly.

Notice to be given of apprehended loss of ship.

22. If the managing owner, or, in the event of there being no managing owner, the ship's husband of any British ship have reason, owing to the non-appearance of such ship, or to any other circumstance, to apprehend that such ship has been wholly lost, he shall, as soon as conveniently may be, send to the Board of Trade notice in writing of such loss and of the probable occasion thereof, stating the name of the ship and her official number (if any), and the port to which she belongs, and if he neglect to do so within a reasonable time he shall incur a penalty not exceeding fifty pounds.

Restrictions on carriage of dangerous goods.

23. If any person sends or attempts to send by, or not being the master or owner of the vessel carries or attempts to carry in any vessel, British, or foreign, any dangerous goods (that is to say,) aquafortis, vitriol, naphtha, benzine, gunpowder, lucifer matches, nitro-glycerine, petroleum, or any other goods of a dangerous nature, without distinctly marking their nature on the outside of the package containing the same, and giving written notice of the nature of such goods and of the name and address of the sender or carrier thereof to the master or owner of the vessel at or before the time of sending the same to be shipped or taking the same on board the vessel, he shall for every such offence incur a penalty not exceeding one hundred pounds: Provided that if such person show that he was merely an agent in the shipment of any such goods as aforesaid, and was not aware and did not suspect and had no reason to suspect that the goods shipped by him were of a dangerous nature, the penalty which he incurs shall not exceed ten pounds.

Penalty for misdescription of dangerous goods.

24. If any person knowingly sends or attempts to send by, or carries or attempts to carry in any vessel, British or foreign, any dangerous goods or goods of a dangerous nature, under a false description, or falsely describes the sender or carrier thereof, he shall incur a penalty not exceeding five hundred pounds.

Power to refuse to carry goods suspected of being dangerous.

25. The master or owner of any vessel, British or foreign, may refuse to take on board any package or parcel which he suspects to contain goods of a dangerous nature, and may require it to be opened to ascertain the fact.

Power to throw overboard dangerous goods.

26. Where any dangerous goods as defined in this Act, or any goods which, in the judgment of the master or owner of the vessel, are of a dangerous nature, have been sent or brought aboard any vessel, British or foreign, without being marked as aforesaid, or without such notice having been given as aforesaid, the master or owner of the vessel may cause such goods to be thrown overboard, together with any package or receptacle in which they are contained; and neither the master nor owner of the vessel shall, in respect of such throwing overboard, be subject to any liability, civil or criminal, in any court.

Forfeiture of dangerous goods improperly sent.

27. Where any dangerous goods have been sent or carried, or attempted to be sent or carried, on board any vessel, British or foreign, without being marked as aforesaid, or without such notice having been given as aforesaid, and where any such goods have been sent or carried, or attempted to be sent or carried, under a false description, or the sender or carrier thereof has been falsely described, it shall be lawful for any court having Admiralty jurisdiction to declare such goods, and any package or receptacle in which they are contained, to be and they shall thereupon be forfeited, and when forfeited shall be disposed of as the court directs.

The court shall have and may exercise the aforesaid powers of forfeiture and disposal notwithstanding that the owner of the goods have not committed any offence under the provisions of this Act relating to dangerous goods, and be not before the court, and have not notice of the proceedings, and notwithstanding that there be no evidence to show to whom the goods belong; nevertheless the court may, in its discretion, require such notice as it may direct to be given to the owner or shipper of the goods before the same are forfeited.

Saving as to Dangerous Goods Acts.

28. The provisions of this Act relating to the carriage of dangerous goods shall be deemed to be in addition to and not in substitution for or in restraint of any other enactment for the like object, so nevertheless that nothing in the said provisions shall be deemed to authorise that any person be sued or prosecuted twice in the same matter (*n*).

Miscellaneous and Repeal.

Her Majesty may, by order in Council, declare certain foreign ports ports of registry.

29. Where, in accordance with the Foreign Jurisdiction Acts, her Majesty exercises jurisdiction without any port out of her Majesty's dominions, it shall be lawful for her Majesty, by Order in Council, to declare such port a port of registry (in this Act referred to as a foreign port of registry), and by the same or any subsequent Order in Council to declare the description of persons who are to be the registrars of British ships at such foreign port of registry, and to make regulations with respect to the registry of British ships thereat.

Upon such order coming into operation it shall have effect as if it were enacted in the Merchant Shipping Acts, 1854 to 1873, and shall, subject to any exceptions and regulations contained in the order, apply in the same manner, as near as may be, as if the port mentioned in the order were an ordinary port of registry.

Fees in respect of surveyors, &c.

30. There shall be paid in respect of the several measurements, inspections, and surveys mentioned in the Third Schedule hereto such fees, not exceeding those specified in that behalf in the said Schedule, as the Board of Trade may from time to time determine.

Board of Trade may sue in name of its officers.

31. In any legal proceedings under the Merchant Shipping Acts, 1854 to 1873, the Board of Trade may take proceedings in the name of any of their officers.

Certain sections not to come into force until 1st November, 1873.

32. The following sections of this Act, that is to say, sections sixteen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight, shall not come into operation until the first day of November one thousand eight hundred and seventy-three.

33. [Repealed by Statute Law Revision Act, 1883, s. 12.]

(*n*) Explosive Substances Act, 1875.

SCHEDULES.

SCHEDULE I.

Signals of Distress.

In the daytime.—The following signals, numbered 1, 2, and 3, when used or displayed together or separately, shall be deemed to be signals of distress in the daytime:

1. A gun fired at intervals of about a minute;
2. The International Code signal of distress indicated by N C;
3. The distant signal, consisting of a square flag having either above or below it a ball, or anything resembling a ball.

At night.—The following signals, numbered 1, 2, and 3, when used or displayed together or separately, shall be deemed to be signals of distress at night:

1. A gun fired at intervals of about a minute;
2. Flames on the ship (as from a burning tar barrel, oil barrel, &c.);
3. Rockets or shells, of any colour or description, fired one at a time, at short intervals.

SCHEDULE II.

Signals to be made by Ships wanting a Pilot.

In the daytime.—The following signals, numbered 1 and 2, when used or displayed together or separately, shall be deemed to be signals for a pilot in the daytime, viz.:

1. To be hoisted at the fore, the Jack or other national colour usually worn by merchant ships, having round it a white border, one fifth of the breadth of the flag; or
2. The International Code pilotage signal indicated by P T.

At night.—The following signals, numbered 1 and 2, when used or displayed together or separately, shall be deemed to be signals for a pilot at night, viz.:

1. The pyrotechnic light commonly known as a blue light every fifteen minutes; or
2. A bright white light, flashed or shown at short or frequent intervals just above the bulwarks, for about a minute at a time.

SCHEDULE III.

Table of Maximum Fees to be paid for the Measurement, Survey, and Inspection of Merchant Ships.

1. *For Measurement of Tonnage.*

	£	s.	d.
For a ship under 50 tons register tonnage	1	0	0
,, from 50 to 100 tons ,,	1	10	0
,, ,, 100 to 200 ,, ,,	2	0	0
,, ,, 200 to 500 ,, ,,	3	0	0
,, ,, 500 to 800 ,, ,,	4	0	0
,, ,, 800 to 1,200 ,, ,,	5	0	0
,, ,, 1,200 to 2,000 ,, ,,	6	0	0
,, ,, 2,000 to 3,000 ,, ,,	7	0	0
,, ,, 3,000 to 4,000 ,, ,,	8	0	0
,, ,, 4,000 to 5,000 ,, ,,	9	0	0
,, ,, 5,000 and upwards ,,	10	0	0

2. *For the Inspection of the Berthing or Sleeping Accommodation of the Crew.*

	£	s.	d.
For each visit to the ship	0	10	0

Provided as follows:

1. The aggregate amount of the fees for any such inspection shall not exceed one pound (£1) whatever be the number of separate visits.
2. When the accommodation is inspected at the same time with the measurement of the tonnage, no separate fee shall be charged for such inspection.

3. *For the Survey of Emigrant Ships.*

	£	s.	d.
a. For an ordinary survey of the ship, and of her equipments, accommodation, stores, light, ventilation, sanitary arrangements, and medical stores	10	0	0
b. For a special survey	15	0	0
c. In respect of the medical examination of passengers and crew for every hundred persons or fraction of a hundred persons examined	1	0	0

4. *For the Inspection of Lights and Fog Signals.*

	£	s.	d.
For each visit made to a ship on the application of the owner, and for each visit made where the lights or fittings are found defective	0	10	0

Provided that the aggregate amount of fees for any such inspection shall not exceed one pound (£1) whatever be the number of separate visits.

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38 & 39 VICT. CAP. 90.

An Act to enlarge the Powers of County Courts in respect of Disputes between Employers and Workmen, and to give other Courts a Limited Civil Jurisdiction in respect of such Disputes.

[13*th August*, 1875.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

Short title.

1. This Act may be cited as the Employers and Workmen Act, 1875.

Commencement of Act.

2. This Act, except so far as it authorizes any rules to be made, or other thing to be done at any time after the passing of this Act, shall come into operation on the first day of September one thousand eight hundred and seventy-five.

PART I.

Jurisdiction—Jurisdiction of County Court.

Power of county court as to ordering of payment of money, set-off, and rescission of contracts and taking security.

3. In any proceeding before a county court in relation to any dispute between an employer and a workman arising out of or incidental to their relation as such (which dispute is hereinafter referred to as a dispute under this Act) the court may, in addition to any jurisdiction it might have exercised if this Act had not passed, exercise all or any of the following powers; (that is to say,)

(1.) It may adjust and set off the one against the other all such claims on the part either of the employer or of the workman, arising out of or incidental to the relation between them, as the court may find to be subsisting, whether such claims are liquidated or unliquidated, and are for wages, damages, or otherwise; and,

(2.) If, having regard to all the circumstances of the case, it thinks it just to do so, it may rescind any contract between the employer and the workman upon such terms as to the apportionment of wages or other sums due thereunder, and as to the payment of wages or damages, or other sums due, as it thinks just; and,

(3.) Where the court might otherwise award damages for any breach of contract it may, if the defendant be willing to give security to the satisfaction of the court for the performance by him of so much of his contract as remains unperformed, with the consent of the plaintiff, accept such security, and order performance of the contract accordingly, in place either of the whole of the damages which would otherwise have been awarded, or some part of such damages.

The security shall be an undertaking by the defendant and one or more surety or sureties that the defendant will perform his contract, subject on non-performance to the payment of a sum to be specified in the undertaking.

Any sum paid by a surety on behalf of a defendant in respect of a security under this Act, together with all costs incurred by such surety in respect of such security, shall be deemed to be a debt due to him from the defendant; and where such security has been given in or under the direction of a court of summary jurisdiction, that court may order payment to the surety of the sum which has so become due to him from the defendant.

Court of Summary Jurisdiction.

Jurisdiction of justices in disputes between employers and workmen.

4. A dispute under this Act between an employer and a workman may be heard and determined by a court of summary jurisdiction, and such court, for the purposes of this Act, shall be deemed to be a court of civil jurisdiction, and in a proceeding in relation to any such dispute the court may order payment of any sum which it may find to be due as wages, or damages, or otherwise, and may exercise all or any of the powers by this Act conferred on a county court: Provided that in any proceeding in relation to any such dispute the court of summary jurisdiction—

(1.) Shall not exercise any jurisdiction where the amount claimed exceeds ten pounds; and

(2.) Shall not make an order for the payment of any sum exceeding ten pounds, exclusive of the costs incurred in the case; and

(3.) Shall not require security to an amount exceeding ten pounds from any defendant or his surety or sureties.

Jurisdiction of justices in disputes between masters and apprentices.

5. Any dispute between an apprentice to whom this Act applies and his master, arising out of or incidental to their relation as such (which dispute is hereinafter referred to as a dispute under this Act), may be heard and determined by a court of summary jurisdiction.

Powers of justices in respect of apprentices.

6. In a proceeding before a court of summary jurisdiction in relation to a dispute under this Act between a master and an apprentice, the court shall have the same powers as if the dispute were between an employer and a workman, and the master were the employer and the apprentice the workman, and the instrument of apprenticeship a contract between an employer and a workman, and shall also have the following powers:

(1.) It may make an order directing the apprentice to perform his duties under the apprenticeship; and

(2.) If it rescinds the instrument of apprenticeship it may, if it thinks it just so to do, order the whole or any part of the premium paid on the binding of the apprentice to be repaid.

Where an order is made directing an apprentice to perform his duties under the apprenticeship, the court may, from time to time, if satisfied after the expiration of not less than one month from the date of the order that the apprentice has failed to comply therewith, order him to be imprisoned for a period not exceeding fourteen days.

Order against surety of apprentice, and power to friend of apprentice to give security.

7. In a proceeding before a court of summary jurisdiction in relation to a dispute under this Act between a master and an apprentice, if there is any person liable, under the instrument of apprenticeship, for the good conduct of the apprentice, that person may, if the court so direct, be summoned in like manner as if he were the defendant in such proceeding to attend on the

hearing of the proceeding, and the court may, in addition to or in substitution for any order which the court is authorized to make against the apprentice, order the person so summoned to pay damages for any breach of the contract of apprenticeship to an amount not exceeding the limit (if any) to which he is liable under the instrument of apprenticeship.

The court may, if the person so summoned, or any other person, is willing to give security to the satisfaction of the court for the performance by the apprentice of his contract of apprenticeship, accept such security instead of or in mitigation of any punishment which it is authorized to inflict upon the apprentice.

PART II.

Procedure.

Mode of giving security.

8. A person may give security under this Act in a county court or court of summary jurisdiction by an oral or written acknowledgment in or under the direction of the court of the undertaking or condition by which and the sum for which he is bound, in such manner and form as may be prescribed by any rule for the time being in force, and in any case where security is so given, the court in or under the direction of which it is given may order payment of any sum which may become due in pursuance of such security.

The Lord Chancellor may at any time after the passing of this Act, and from time to time make, and when made, rescind, alter, and add to, rules with respect to giving security under this Act (*p*).

Summary proceedings.

9. Any dispute or matter in respect of which jurisdiction is given by this Act to a court of summary jurisdiction shall be deemed to be a matter on which that court has authority by law to make an order on complaint in pursuance of the Summary Jurisdiction Act, but shall not be deemed to be a criminal proceeding; and all powers by this Act conferred on a court of summary jurisdiction shall be deemed to be in addition to and not in derogation of any powers conferred on it by the Summary Jurisdiction Act, except that a warrant shall not be issued under that Act for apprehending any person other than an apprentice for failing to appear to answer a complaint in any proceeding under this Act, and that an order made by a court of summary jurisdiction under this Act for the payment of any money shall not be enforced by imprisonment except in the manner and under the conditions by this Act provided; and no goods or chattels shall be taken under a distress ordered by a court of summary jurisdiction which might not be taken under an execution issued by a county court.

A court of summary jurisdiction may direct any sum of money, for the payment of which it makes an order under this Act, to be paid by instalments, and may from time to time rescind or vary such order.

Any sum payable by any person under the order of a court of summary jurisdiction in pursuance of this Act, shall be deemed to be a debt due from him in pursuance of a judgment of a competent court within the meaning of the fifth section of the Debtors Act, 1869, and may be enforced accordingly; and as regards any such debt a court of summary jurisdiction shall be deemed to be a court within the meaning of the said section.

The Lord Chancellor may at any time after the passing of this Act, and from time to time make, and when made, rescind, alter, and add to, rules for carrying into effect the jurisdiction by this Act given to a court of summary jurisdiction, and in particular for the purpose of regulating the costs of any proceedings in a court of summary jurisdiction, with power to provide that the same shall not exceed the costs which would in a similar case be incurred in a county court, and any rules so made in so far as they relate to the exercise of jurisdiction under the said fifth section of the Debtors Act, 1869, shall be deemed to be prescribed rules within the meaning of the said section.

(*p*) See Chitty's Statutes (Annual Continuation), 2, pt. 1, 51, for the Rules of 1886.

Part III.

Definitions and Miscellaneous.

Definitions.

Definitions: "Workman:"

10. In this Act—

The expression "workman" does not include a domestic or menial servant, but save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour.

"The Summary Jurisdiction Act."

The expression "the Summary Jurisdiction Act" means the Act of the session of the eleventh and twelfth years of the reign of her present Majesty, chapter forty-three, intituled "An Act to facilitate the performance of the duties of Justices of the Peace out of sessions within England and Wales with respect to summary convictions and orders," inclusive of any Acts amending the same.

The expression "court of summary jurisdiction" means—

(1.) As respects the city of London, the Lord Mayor or any alderman of the said city sitting at the Mansion House or Guildhall justice room; and

(2.) As respects any police court division in the metropolitan police district, any metropolitan police magistrate sitting at the police court for that division; and

(3.) As respects any city, town, liberty, borough, place, or district for which a stipendiary magistrate is for the time being acting, such stipendiary magistrate sitting at a police court or other place appointed in that behalf; and

(4.) Elsewhere any justice or justices of the peace to whom jurisdiction is given by the Summary Jurisdiction Act: Provided that, as respects any case within the cognizance of such justice or justices as last aforesaid, a complaint under this Act shall be heard and determined and an order for imprisonment made by two or more justices of the peace in petty sessions sitting at some place appointed for holding petty sessions.

Nothing in this section contained shall restrict the jurisdiction of the Lord Mayor or any alderman of the city of London, or of any metropolitan police or stipendiary magistrate in respect of any act or jurisdiction which may now be done or exercised by him out of court.

Set-off in case of factory workers.

11. In the case of a child, young person, or woman subject to the provisions of the Factory Acts, 1833 to 1874 (*q*), any forfeiture on the ground of absence or leaving work shall not be deducted from or set off against a claim for wages or other sum due for work done before such absence or leaving work, except to the amount of the damage (if any) which the employer may have sustained by reason of such absence or leaving work.

Application.

Application to apprentices.

12. This Act in so far as it relates to apprentices shall apply only to an apprentice to the business of a workman as defined by this Act upon whose binding either no premium is paid, or the premium (if any) paid does not exceed twenty-five pounds, and to an apprentice bound under the provisions of the Acts relating to the relief of the poor.

Saving Clause.

Saving of special jurisdiction, and seamen.

13. Nothing in this Act shall take away or abridge any local or special jurisdiction touching apprentices.

This Act shall not apply to seamen or to apprentices to the sea service (*r*).

(*q*) See Factory and Workshop Act, 1878, s. 102.

(*r*) The Act is extended to seamen and apprentices to the sea service by 43 & 44 Vict. c. 16, s. 11.

PART IV.

Application of Act to Scotland.

Application to Scotland.

14. This Act shall extend to Scotland, with the modifications following; (that is to say,)

In this Act with respect to Scotland—

Definitions.

The expression "county court" means the ordinary sheriff court of the county:

The expression "the court of summary jurisdiction" means the small debt court of the sheriff of the county:

The expression "sheriff" includes sheriff substitute:

The expression "instrument of apprenticeship" means indenture:

The expression "plaintiff" or "complainant" means pursuer or complainer:

The expression "defendant" includes defender or respondent:

The expression "The Summary Jurisdiction Act" means the Act of the seventh year of the reign of his Majesty King William the Fourth and the first year of the reign of her present Majesty, chapter forty-one, intituled "An Act for the more effectual recovery of small debts in the Sheriff Courts, and for regulating the establishment of circuit courts for the trial of small debt causes by the sheriffs in Scotland," and the Acts amending the same.

The expression "surety" means cautioner:

This Act shall be read and construed as if for the expression "the Lord Chancellor," wherever it occurs therein, the expression "the Court of Session by act of sederunt" were substituted.

All jurisdictions, powers, and authorities necessary for the purposes of this Act are hereby conferred on sheriffs in their ordinary or small debt courts, as the case may be, who shall have full power to make any order, on any summons, petition, complaint, or other proceeding under this Act, that any county court or court of summary jurisdiction is empowered to make on any complaint or other proceeding under this Act.

Any decree or order pronounced or made by a sheriff under this Act shall be enforced in the same manner and under the same conditions in and under which a decree or order pronounced or made by him in his ordinary or small debt court, as the case may be, is enforced.

PART V.

Application of Act to Ireland.

Application to Ireland.

15. This Act shall extend to Ireland, with the modifications following; (that is to say,)

The expression "county court" shall be construed to mean civil bill court:

The expression "Lord Chancellor" shall be construed to mean the Lord Chancellor of Ireland:

The expression "The Summary Jurisdiction Act" shall be construed to mean, as regards the police districts of Dublin metropolis, the Acts regulating the powers and duties of justices of the peace for such district, and elsewhere in Ireland, the Petty Sessions (Ireland) Act, 1851, and any Act amending the same:

The expression "court of summary jurisdiction" shall be construed to mean any justice or justices of the peace or other magistrate to whom jurisdiction is given by the Summary Jurisdiction Act:

The court of summary jurisdiction, when hearing and determining complaints under this Act, shall in the police district of Dublin metropolis be constituted of one or more of the divisional justices of the said district, and elsewhere in Ireland of two or more justices of the peace in petty sessions sitting at a place appointed for holding petty sessions:

The expression "fifth section of the Debtors Act, 1869," shall be constituted to mean "sixth section of the Debtors Act (Ireland), 1872."

39 & 40 Vict. cap. 80.

An Act to amend the Merchant Shipping Acts.
[*15th August*, 1876.]

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

Short title. Construction of Act.

1. This Act may be cited as the Merchant Shipping Act, 1876.

2. This Act shall be construed as one with the Merchant Shipping Act, 1854, and the Acts amending the same; and the said Acts and this Act may be cited collectively as the Merchant Shipping Acts, 1854 to 1876.

Commencement of Act.

3. This Act shall come into operation on the first day of October, 1876 (which day is in this Act referred to as the commencement of this Act); nevertheless any Orders in Council and general rules under this Act may be made at any time after the passing of this Act, but shall not come into operation before the commencement of this Act.

Unseaworthy Ships.

Sending unseaworthy ship to sea a misdemeanor.

4. Every person who sends or attempts to send, or is party to sending or attempting to send a British ship to sea in such unseaworthy state that the life of any person is likely to be thereby endangered, shall be guilty of a misdemeanor, unless he proves that he used all reasonable means to insure her being sent to sea in a seaworthy state, or that her going to sea in such unseaworthy state was, under the circumstances, reasonable and justifiable, and for the purpose of giving such proof he may give evidence in the same manner as any other witness.

Every master of a British ship who knowingly takes the same to sea in such unseaworthy state that the life of any person is likely to be thereby endangered shall be guilty of a misdemeanor, unless he proves that her going to sea in such unseaworthy state was, under the circumstances, reasonable and justifiable, and for the purpose of giving such proof he may give evidence in the same manner as any other witness.

A prosecution under this section shall not be instituted except by or with the consent of the Board of Trade, or of the governor of the British possession in which such prosecution takes place.

A misdemeanor under this section shall not be punishable upon summary conviction.

Obligation of shipowner to crew with respect to use of reasonable efforts to secure seaworthiness.

5. In every contract of service, express or implied, between the owner of a ship and the master or any seaman thereof, and in every instrument of apprenticeship whereby any person is bound to serve as an apprentice on board any ship, there shall be implied, notwithstanding any agreement to the contrary, an obligation on the owner of the ship, that the owner of the ship, and the master, and every agent charged with the loading of the ship, or the preparing thereof for sea, or the sending thereof to sea, shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences, and to keep her in a seaworthy condition for the voyage during the same: Provided, that nothing in this section shall subject the owner of a ship to any liability by reason of the ship being sent to sea in an unseaworthy state where, owing to special circumstances, the so sending thereof to sea is reasonable and justifiable.

Power to detain unsafe ships, and procedure for such detention.

6. Where a British ship, being in any port of the United Kingdom, is by reason of the defective condition of her hull, equipments or machinery, or by reason of overloading or improper loading, unfit to proceed to sea without serious danger to human life, having regard to the nature of the service for which she is intended, any such ship (hereinafter referred to as "unsafe") may be provisionally detained for the purpose of being surveyed, and either finally detained or released, as follows:

(1.) The Board of Trade, if they have reason to believe on complaint, or otherwise, that a British ship is unsafe, may provisionally order the detention of the ship for the purpose of being surveyed.

(2.) When a ship has been provisionally detained there shall be forthwith served on the master of the ship a written statement of the grounds of her detention, and the Board of Trade may, if they think fit, appoint some competent person or persons to survey the ship and report thereon to the Board.

(3.) The Board of Trade on receiving the report may either order the ship to be released or, if in their opinion the ship is unsafe, may order her to be finally detained, either absolutely, or until the performance of such conditions with respect to the execution of repairs or alterations, or the unloading or reloading of cargo, as the Board think necessary for the protection of human life, and may from time to time vary or add to any such order.

(4.) Before the order for final detention is made a copy of the report shall be served upon the master of the ship, and within seven days after such service the owner or master of the ship may appeal in the prescribed manner to the court of survey (hereinafter mentioned) for the port or district where the ship is detained.

(5.) Where a ship has been provisionally detained, the owner or master of the ship, at any time before the person appointed under this section to survey the ship makes such survey, may require that he shall be accompanied by such person as the owner or master may select out of the list of assessors for the court of survey (nominated as hereinafter mentioned), and in such case if the surveyor and assessors agree, the Board of Trade shall cause the ship to be detained or released accordingly, but if they differ, the Board of Trade may act as if the requisition had not been made, and the owner and the master shall have the like appeal touching the report of the surveyor as is before provided by this section.

(6.) Where a ship has been provisionally detained, the Board of Trade may at any time, if they think it expedient, refer the matter to the court of survey for the port or district where the ship is detained.

(7.) The Board of Trade may at any time, if satisfied that a ship detained under this Act is not unsafe, order her to be released either upon or without any conditions.

(8.) For the better execution of this section, the Board of Trade, with the consent of the Treasury, may from time to time appoint a sufficient number of fit officers, and may remove any of them.

(9.) Any officer so appointed (in this Act referred to as a detaining officer) shall have the same power as the Board of Trade have under this section of provisionally ordering the detention of a ship for the purpose of being surveyed, and of appointing a person or persons to survey her; and if he thinks that a ship so detained by him is not unsafe may order her to be released.

(10.) A detaining officer shall forthwith report to the Board of Trade any order made by him for the detention or release of a ship.

Constitution of court of survey for appeals.

7. A court of survey for a port or district shall consist of a judge sitting with two assessors.

The judge shall be such person as may be summoned for the case in accordance with the rules made under this Act out of a list (from time to time approved for the port or district by one of her Majesty's Principal Secretaries of State, in this Act referred to as a Secretary of State) of wreck commissioners appointed under this Act, stipendiary or metropolitan police magistrates, judges of county courts, and all other fit persons; but in any special case in which the Board of Trade think it expedient to appoint a wreck commissioner, the judge shall be such wreck commissioner.

The assessors shall be persons of nautical engineering or other special skill and experience; one of them shall be appointed by the Board of Trade, either generally or in each case, and the other shall be summoned in accordance with the rules under this Act by the registrar of the court, out of a list of persons periodically nominated for the purpose by the local marine board of the port, or, if there is no such board, by a body of local shipowners or merchants approved for the purpose by a Secretary of State, or if there is no such list, shall be appointed by the judge; if a Secretary of State think fit at any time, on the recommendation of the government of any British possession or any foreign state, to add any person or persons to any such list, such person or

persons shall, until otherwise directed by the Secretary of State, be added to such list, and if there is no such list shall form such list.

The county court registrar, or such other fit person as a Secretary of State may from time to time appoint shall be the registrar of the court, and shall on receiving notice of an appeal on a reference from the Board of Trade, immediately summon the court in the prescribed manner to meet forthwith.

The name of the registrar and his office, together with the rules made under this Act relating to the court of survey, shall be published in the prescribed manner.

Power and procedure of court of survey.

8. With respect to the court of survey the following provisions shall have effect:

(1.) The case shall be heard in open court;

(2.) The judge and each assessor may survey the ship, and shall have for the purposes of this Act all the powers of an inspector appointed by the Board of Trade under the Merchant Shipping Act, 1854;

(3.) The judge may appoint any competent person or persons to survey the ship and report thereon to the court;

(4.) The judge shall have the same power as the Board of Trade have to order the ship to be released or finally detained, but unless one of the assessors concurs in an order for the detention of the ship, the ship shall be released;

(5.) The owner and master of the ship and any person appointed by the owner or master, and also any person appointed by the Board of Trade, may attend at any inspection or survey made in pursuance of this section;

(6.) The judge shall send to the Board of Trade the prescribed report, and each assessor shall either sign the report or report to the Board of Trade the reasons for his dissent.

Rules for procedure of court of survey, &c.

9. The Lord Chancellor of Great Britain may from time to time (with the consent of the Treasury so far as relates to fees) make, and when made revoke, alter, and add to general rules to carry into effect the provisions of this Act with respect to a court of survey, and in particular with respect to the summoning of and procedure before the court, the requiring on an appeal security for costs and damages, the amount and application of fees, and the publication of the rules.

All such rules while in force shall have effect as if enacted in this Act, and the expression "prescribed" in the provisions of this Act relating to the detention of ships or court of survey means prescribed by such rules.

Liability of Board of Trade and shipowner for costs and damages.

10. If it appears that there was not reasonable and probable cause, by reason of the condition of the ship or the act or default of the owner, for the provisional detention of the ship, the Board of Trade shall be liable to pay to the owner of the ship his costs of and incidental to the detention and survey of the ship, and also compensation for any loss or damage sustained by him by reason of the detention or survey.

If a ship is finally detained under this Act, or if it appears that a ship provisionally detained was, at the time of such detention, unsafe within the meaning of this Act, the owner of the ship shall be liable to pay to the Board of Trade their costs of and incidental to the detention and survey of the ship, and those costs shall, without prejudice to any other remedy, be recoverable as salvage is recoverable.

For the purposes of this Act the costs of and incidental to any proceeding before a court of survey, and a reasonable amount in respect of the remuneration of the surveyor or officer of the Board of Trade, shall be deemed to be part of the costs of the detention and survey of the ship, and any dispute as to the amount of costs under this Act may be referred to one of the masters or registrars of the Supreme Court of Judicature, who, on request made to him for that purpose by the Board of Trade, shall ascertain and certify the proper amount of such costs.

An action for any costs or compensation payable by the Board of Trade under this section may be brought against the secretary thereof by his official title as if he were a corporation sole; and if the cause of action arises in Ireland, it shall be lawful for any of the superior courts of common law in Ireland in which such action may be commenced to order that the summons or writ may be served on the Crown and Treasury Solicitor for Ireland, in such manner and on such terms as to extension of time and otherwise as to the court shall seem fit, and that such service shall be deemed good and suffi-

cient service of such summons or writ upon the Secretary of the Board of Trade.

Power to require from complainant security for costs.

11. Where a complaint is made to the Board of Trade or a detaining officer that a British ship is unsafe, the Board or officer may, if they or he think fit, require the complainant to give security to the satisfaction of the Board for the costs and compensation which he may become liable to pay as hereinafter mentioned.

Provided that where the complaint is made by one fourth, being not less than three, of the seamen belonging to the ship, and is not in the opinion of the Board or officer frivolous or vexatious, such security shall not be required, and the Board or officer shall, if the complaint is made in sufficient time before the sailing of the ship, take proper steps for ascertaining whether the ship ought to be detained under this Act.

Where a ship is detained in consequence of any complaint, and the circumstances are such that the Board of Trade are liable under this Act to pay to the owner of the ship any costs or compensation, the complainant shall be liable to pay to the Board of Trade all such costs and compensation as the Board incur or are liable to pay in respect of the detention and survey of the ship.

Supplemental provisions as to detention of ship.

12. (1.) A detaining officer shall have for the purpose of his duties under this Act the same powers as an inspector appointed by the Board of Trade under the Merchant Shipping Act, 1854.

(2.) An order for the detention of a ship, provisional or final, and an order varying the same, shall be served as soon as may be on the master of the ship.

(3.) When a ship has been detained under this Act she shall not be released by reason of her British register being subsequently closed.

(4.) For the purposes of a survey of a ship under this Act any person authorized to make the same may go on board the ship and inspect the same and every part thereof, and the machinery, equipments, and cargo, and may require the unloading or removal of any cargo, ballast, or tackle.

(5.) The provisions of the Merchant Shipping Act, 1854, with respect to persons who wilfully impede an inspector, or disobey a requisition or order of an inspector, shall apply as if those provisions were herein enacted, with the substitution for the inspector of any judge, assessor, officer, or surveyor who under this Act has the same powers as an inspector or has authority to survey a ship.

Foreign Ships, Overloading.

Application to foreign ships of provisions as to detention.

13. Where a foreign ship has taken on board all or any part of her cargo at a port in the United Kingdom, and is whilst at that port unsafe by reason of overloading or improper loading, the provisions of this Act with respect to the detention of ships shall apply to that foreign ship as if she were a British ship, with the following modifications:

(1.) A copy of the order for the provisional detention of the ship shall be forthwith served on the consular officer for the State to which the ship belongs at or nearest to the place where the ship is detained:

(2.) Where a ship has been provisionally detained, the consular officer, on the request of the owner or master of the ship, may require that the person appointed by the Board of Trade to survey the ship shall be accompanied by such person as the consular officer may select, and in such case, if the surveyor and such person agree, the Board of Trade shall cause the ship to be detained or released accordingly, but if they differ, the Board of Trade may act as if the requisition had not been made, and the owner and master shall have the appeal to the court of survey touching the report of the surveyor which is before provided by this Act; and

(3.) Where the owner or master of the ship appeals to the court of survey, the consular officer, on the request of such owner or master, may appoint any competent person who shall be assessor in such case in lieu of the assessor who, if the ship were a British ship, would be appointed otherwise than by the Board of Trade.

In this section the expression "consular officer" means any consul-

general, vice-consul, consular-agent, or other officer recognized by a Secretary of State, as a consular officer of a foreign state.

Appeal on Refusal of certain Certificates to Ships.

Appeal on refusal of certain certificates under Merchant Shipping and Passengers Acts.

14. Whereas by section three hundred and nine of the Merchant Shipping Act, 1854, and enactments amending the same, the owner of a passenger steamer as defined in that Act (*s*) is required to cause the same to be surveyed by a shipwright surveyor and an engineer surveyor, and those surveyors are required to give declarations of certain particulars with respect to the sufficiency or conformity with the Act of the ship and equipments, and to the limits beyond which the ship is not fit to ply, and to the number of passengers which the ship is fit to carry, and of other particulars in the said section mentioned, and the Board of Trade, under section three hundred and twelve of the same Act, issue a certificate upon such declarations, and the passenger steamer cannot lawfully proceed to sea without obtaining such certificate;

And whereas under sections eleven and fifty of the Passengers Act, 1855, and the enactments amending the same, a passenger ship within the meaning of those sections (in this Act referred to as an emigrant ship) cannot lawfully proceed to sea without a certificate of clearance from an emigration officer, or other officer in those sections mentioned, showing that all the requirements of the said sections and enactments have been complied with, and that the ship is in the officer's opinion seaworthy, and that the passengers and crew are in a fit state to proceed to sea, and otherwise as therein mentioned;

And whereas by section thirty of the Merchant Shipping Act Amendment Act, 1862, provision is made for preventing a ship from proceeding to sea in certain cases without a certificate from a surveyor or person appointed by the Board of Trade to the effect that the ship is properly provided with lights, and with the means of making fog signals;

And whereas it is expedient to give in the said cases such appeal as hereinafter mentioned: Be it therefore enacted that—

If a shipowner feels aggrieved,

(1.) by a declaration of a shipwright surveyor or an enginser surveyor respecting a passenger steamer under the above-recited enactments, or by the refusal of a surveyor to give the said declaration; or,

(2.) by the refusal of a certificate of clearance for an emigrant ship under the above-recited enactments; or

(3.) by the refusal of a certificate as to lights or fog signals under the above-recited enactment,

the owner may appeal in the prescribed manner to the court of survey for the port or district where the ship for the time being is.

On such appeal the judge of the court of survey shall report to the Board of Trade on the question raised by the appeal, and the Board of Trade, when satisfied that the requirements of the report and the other provisions of the said enactments have been complied with, may—

(1.) In the case of a passenger steamer give their certificate under section three hundred and twelve of the Merchant Shipping Act, 1854, and

(2.) In the case of an emigrant ship give, or direct the emigration or other officer to give, a certificate of clearance under the above-mentioned enactments, and

(3.) In the case of a refusal of a certificate as to lights or fog signals give or direct a surveyor or other person appointed by them to give a certificate under section thirty of the Merchant Shipping Act Amendment Act, 1862.

Subject to any order made by the judge of the court of survey, the costs of and incidental to an appeal under this section shall follow the event.

Subject as aforesaid, the provisions of this Act with respect to the court of survey and appeals thereto, so far as consistent with the tenour thereof, shall apply to the court of survey when acting under this section, and to appeals under this section.

Where the survey of a ship is made for the purpose of a declaration or certificate under the above-recited enactment, the person appointed to make

(*s*) Sect. 303.

the survey shall, if so required by the owner, be accompanied on the survey by some person appointed by the owner, and in such case, if the said two persons agree, there shall be no appeal to the court of survey in pursuance of this section.

Scientific Referees.

Reference in difficult cases to scientific persons.

15. If the Board of Trade are of opinion that an appeal under this Act involves a question of construction or design or of scientific difficulty or important principle, they may refer the matter to such one or more out of a list of scientific referees from time to time approved by a Secretary of State, as may appear to possess the special qualifications necessary for the particular case, and may be selected by agreement between the Board of Trade and the appellant, or in default of any such agreement by a Secretary of State, and thereupon the appeal shall be determined by the referee or referees, instead of by the court of survey.

The Board of Trade, if the appellant in any appeal so require and give security to the satisfaction of the Board to pay the costs of and incidental to the reference, shall refer that appeal to a referee or referees so selected as aforesaid.

The referee or referees shall have the same powers as a judge of the court of survey.

Passenger Steamers and Emigrant Ships.

Exemption of certain steamers from passenger certificates.

16. Any steamship may carry passengers not exceeding twelve in number although she has not been surveyed by the Board of Trade as a passenger steamer, and does not carry a Board of Trade certificate as provided by the Merchant Shipping Act, 1854, with respect to passenger steamers.

Colonial certificates for passenger steamers.

17. Where the legislature of any British possession provides for the survey of and grant of certificates for passenger steamers, and the Board of Trade report to her Majesty that they are satisfied that the certificates are to the like effect, and are granted after a like survey, and in such manner as to be equally efficient with the certificates granted for the same purpose in the United Kingdom under the Acts relating to merchant shipping, it shall be lawful to her Majesty by Order in Council—

(1.) To declare that the said certificates shall be of the same force as if they had been granted under the said Acts; and

(2.) To declare that all or any of the provisions of the said Acts which relate to certificates granted for passenger steamers under those Acts shall, either without modification or with such modifications as to her Majesty may seem necessary, apply to the certificates referred to in the Order; and

(3.) To impose such conditions and to make such regulations with respect to the said certificates, and to the use, delivery, and cancellation thereof, as to her Majesty may seem fit, and to impose penalties not exceeding fifty pounds for the breach of such conditions and regulations.

Provision against double survey in case of passenger steamers and emigrant ships.

18. In every case where a passenger certificate has been granted to any steamer by the Board of Trade under the provisions of the Merchant Shipping Act, 1854, and remain still in force, it shall not be requisite for the purposes of the employment of such steamer under the Passengers Act that she shall be again surveyed in her hull and machinery in order to qualify her for service under the Passengers Act, 1855, and the Acts amending the same; but for the purposes of employment under those Acts such Board of Trade certificate shall be deemed to satisfy the requirements of the Passengers Acts with respect to such survey, and any further survey of the hull and machinery shall be dispensed with, and so long as a steamship is an emigrant ship that is a passenger ship within the meaning of the Passengers Act, 1855, and the Acts amending the same, and the provisions contained in the said Passengers Acts as to the survey of her hull, machinery, and equipments have been complied with, she shall not be subject to the provisions of the Merchant Shipping Act, 1854, with respect to the survey of and certificate for passenger steamers, or to the enactments amending the same.

Provision as to survey of foreign pas-

19. Where a foreign ship is a passenger steamer subject to the Merchant Shipping Act, 1854, and the Acts amending the same, or an emigrant ship subject to the Passengers Act, 1855, and the Acts amending the same, and

senger steamer or emigrant ship.

the Board of Trade are satisfied, by the production of a foreign certificate of survey attested by a British consular officer at the port of survey, that such ship has been officially surveyed at a foreign port, and are satisfied that the requirements of the said Acts, or any of them, are proved by such survey to have been substantially complied with, the Board may, if they think fit, dispense with any further survey of the ship in respect of the requirements so complied with, and give or direct one of their officers to give a certificate, which shall have the same effect as if given upon survey under the said Acts or any of them: Provided that her Majesty may by Order in Council direct that this section shall not apply in the case of an official survey at any foreign port at which it appears to her Majesty that corresponding provisions are not extended to British ships.

Power to modify Passengers Acts as to food, space, and accommodation in emigrant ships.

20. It shall be lawful for the Board of Trade, if satisfied that the food, space, accommodation, or any other particular or thing provided in an emigrant ship for any class of passengers is superior to the food, space, accommodation, or other particular or thing required by the Passengers Act, 1855, and the Acts amending the same, to exempt such ship from any of the requirements of those Acts with respect to food, space, or accommodation, or other particular or thing, in such manner and upon such conditions as the Board of Trade may think fit.

Provision of signals of distress, inextinguishable lights, and life buoys in passenger steamers and emigrant ships.

21. Every sea-going passenger steamer and every emigrant ship shall be provided to the satisfaction of the Board of Trade—

(1.) With means for making the signals of distress at night specified in the First Schedule to the Merchant Shipping Act, 1873, or in any rules substituted therefor, including means of making flames on the ship which are inextinguishable in water, or such other means of making signals of distress as the Board of Trade may previously approve; and

(2.) With a proper supply of lights inextinguishable in water and fitted for attachment to life buoys.

If any such steamer or ship goes to sea from any port of the United Kingdom without being so provided as required by this section, for each default in any of the above requisites the owner shall, if he appears to be in fault, incur a penalty not exceeding one hundred pounds, and the master shall, if he appears to be in fault, incur a penalty not exceeding fifty pounds.

Grain Cargoes.

22. [Repealed by Merchant Shipping (Carriage of Grain) Act, 1880, s. 11.]

Deck Cargoes.

Space occupied by deck cargo to be liable to dues

23. If any ship, British or foreign, other than home trade ships as defined by the Merchant Shipping Act, 1854, carries as deck cargo, that is to say, in any uncovered space upon deck, or in any covered space not included in the cubical contents forming the ship's registered tonnage, timber, stores, or other goods, all dues payable on the ship's tonnage shall be payable as if there were added to the ship's registered tonnage the tonnage of the space occupied by such goods at the time at which such dues become payable.

The space so occupied shall be deemed to be the space limited by the area occupied by the goods and by straight lines inclosing a rectangular space sufficient to include the goods.

The tonnage of such space shall be ascertained by an officer of the Board of Trade or of Customs, in manner directed by sub-section four of section twenty-one of the Merchant Shipping Act, 1854, and when so ascertained shall be entered by him in the ship's official log-book, and also in a memorandum which he shall deliver to the master, and the master shall, when the said dues are demanded, produce such memorandum in like manner as if it were the certificate of registry, or, in the case of a foreign ship, the document equivalent to a certificate of registry, and in default shall be liable to the same penalty as if he had failed to produce the said certificate or document.

Penalty for carrying deck-loads of timber in winter.

24. After the first day of November one thousand eight hundred and seventy-six, if a ship, British or foreign, arrives between the last day of October and the sixteenth day of April in any year at any port in the United Kingdom from any port out of the United Kingdom, carrying as deck cargo, that is to say, in any uncovered space upon deck, or in any covered space not

included in the cubical contents forming the ship's registered tonnage, any wood goods coming within the following descriptions; (that is to say,)

(*a*) Any square, round, waney, or other timber, or any pitch, pine, mahogany, oak, teak, or other heavy wood goods whatever; or

(*b*) Any more than five spare spars or store spars, whether or not made, dressed, and finally prepared for use; or

(*c*) Any deals, battens, or other light wood goods of any description to a height exceeding three feet above the deck;

the master of the ship, and also the owner, if he is privy to the offence, shall be liable to a penalty not exceeding five pounds for every hundred cubic feet of wood goods carried in contravention of this section, and such penalty may be recovered by action or on indictment or to an amount not exceeding one hundred pounds (whatever may be the maximum penalty recoverable) on summary conviction.

Provided that a master or owner shall not be liable to any penalty under this section—

(1.) In respect of any wood goods which the master has considered it necessary to place or keep on deck during the voyage on account of the springing of any leak, or of any other damage to the ship received or apprehended; or

(2.) If he proves that the ship sailed from the port at which the wood goods were loaded as deck cargo at such time before the last day of October as allowed a sufficient interval according to the ordinary duration of the voyage for the ship to arrive before that day at the said port in the United Kingdom, but was prevented from so arriving by stress of weather or circumstances beyond his control; or

(3.) If he proves that the ship sailed from the port at which the wood goods were loaded as deck cargo at such time before the sixteenth day of April as allowed a reasonable interval according to the ordinary duration of the voyage for the ship to arrive after that day at the said port in the United Kingdom, and by reason of an exceptionally favourable voyage arrived before that day.

Provided further, that nothing in this section shall affect any ship not bound to any port in the United Kingdom which comes into any port of the United Kingdom under stress of weather, or for repairs, or for any other purpose than the delivery of her cargo.

Deck and Load Lines.

Marking of deck-lines.

25. Every British ship (except ships under eighty tons register employed solely in the coasting trade, ships employed solely in fishing, and pleasure yachts) shall be permanently and conspicuously marked with lines of not less than twelve inches in length and one inch in breadth, painted longitudinally on each side amidships, or as near thereto as is practicable, and indicating the position of each deck which is above water.

The upper edge of each of these lines shall be level with the upper side of the deck plank next the waterway at the place of marking.

The lines shall be white or yellow on a dark ground, or black on a light ground.

Marking of load-line on foreign-going British ships.

26. With respect to the marking of a load-line on British ships the following provisions shall have effect:

(1.) The owner of every British ship (except ships under eighty tons register employed solely in the coasting trade, ships employed solely in fishing, and pleasure yachts) shall, before entering his ship outwards from any port in the United Kingdom upon any voyage for which he is required so to enter her, or, if that is not practicable, as soon after as may be, mark upon each of her sides amidships, or as near thereto as practicable, in white or yellow on a dark ground, or in black on a light ground, a circular disc twelve inches in diameter, with a horizontal line eighteen inches in length drawn through its centre:

(2.) The centre of this disc shall indicate the maximum load-line in salt water to which the owner intends to load the ship for that voyage:

(3.) He shall also, upon so entering her, insert in the form of entry delivered to the collector or other principal officer of Customs a statement in writing of the distance in feet and inches between the centre of this disc and the upper edge of each of the lines indicating the position of the ship's deck which is above that centre:

(4.) If default is made in delivering this statement in the case of any ship, any officer of Customs may refuse to enter the ship outwards:

(5.) The master of the ship shall enter a copy of this statement in the agreement with the crew before it is signed by any member of the crew, and no superintendent of any mercantile marine office shall proceed with the engagement of the crew until this entry is made:

(6.) The master of the ship shall also enter a copy of this statement in the official log-book:

(7.) When a ship has been marked as by this section required, she shall be kept so marked until her next return to a port of discharge in the United Kingdom.

Marking of load-line in case of coasting vessels.

27. With respect to the marking of a load-line on British ships employed in the coasting trade, the following provisions shall have effect:

(1.) The owner of every British ship employed in the coasting trade on the coasts of the United Kingdom (except ships under eighty tons register employed solely in that trade) shall, before proceeding to sea from any port, mark upon each of her sides amidships, or as near thereto as is practicable, in white or yellow on a dark ground or in black on a light ground, a circular disc twelve inches in diameter, with a horizontal line eighteen inches in length drawn through its centre:

(2.) The centre of this disc shall indicate the maximum load-line in salt water to which the owner intends to load the ship, until notice is given of an alteration:

(3.) He shall also once in every twelve months immediately before the ship proceeds to sea, send or deliver to the collector or other principal officer of Customs of the port of registry of the ship a statement in writing of the distance in feet and inches between the centre of the disc and the upper edge of each of the lines indicating the position of the ship's decks which is above that centre:

(4.) The owner, before the ship proceeds to sea after any renewal or alteration of the disc shall send or deliver to the collector or other principal officer of Customs of the port of registry of the ship notice in writing of such renewal or alteration, together with such statement in writing as before mentioned of the distance between the centre of the disc and the upper edge of each of the decklines:

(5.) If default is made in sending or delivering any notice or statement required by this section to be sent or delivered, the owner shall be liable to a penalty not exceeding one hundred pounds:

(6.) When a ship has been marked as by this section required, she shall be kept so marked until notice is given of an alteration.

Penalty for offences in relation to marks on ships.

28. Any owner or master of a British ship who neglects to cause his ship to be marked as by this Act required, or to keep her so marked, or who allows the ship to be so loaded as to submerge in salt water the centre of the disc, and any person who conceals, removes, alters, defaces, or obliterates, or suffers any person under his control to conceal, remove, alter, deface, or obliterate, any of the said marks, except in the event of the particulars thereby denoted being lawfully altered, or except for the purpose of escaping capture by an enemy, shall for each offence incur a penalty not exceeding one hundred pounds.

If any of the marks required by this Act is in any respect inaccurate, so as to be likely to mislead, the owner of the ship shall incur a penalty not exceeding one hundred pounds.

Investigations into Shipping Casualties.

Appointment, duties, and powers of wreck commissioners for investigating shipping casualties.

29. For the purpose of rendering investigations into shipping casualties more speedy and effectual it shall be lawful for the Lord High Chancellor of Great Britain to appoint from time to time some fit person or persons to be a wreck commissioner or wreck commissioners for the United Kingdom, so that there shall not be more than three such commissioners at any one time, and to remove any such wreck commissioner; and in case it shall become necessary to appoint a wreck commissioner in Ireland the Lord Chancellor of Ireland shall have the appointment and the power of removal of such wreck commissioner.

It shall be the duty of a wreck commissioner, at the request of the Board

of Trade, to hold any formal investigation into a loss, abandonment, damage, or casualty (in this Act called a shipping casualty) (*t*) under the Eighth Part of the Merchant Shipping Act, 1854, and for that purpose he shall have the same jurisdiction and powers as are thereby conferred on two justices, and all the provisions of the Merchant Shipping Acts, 1854 to 1876, with respect to investigations conducted under the Eighth Part of the Merchant Shipping Act, 1854, shall apply to investigations held by a wreck commissioner (*u*).

Assessors and rules of procedure on formal investigations into shipping casualties.

30. The wreck commissioner, justices, or other authority holding a formal investigation into a shipping casualty shall hold the same with the assistance of an assessor or assessors of nautical engineering or other special skill or knowledge, to be appointed [by the commissioner, justices, or authority] (*v*) out of a list of persons for the time being approved for the purpose by a Secretary of State.

The commissioner, justices, or authority, when of opinion that the investigation is likely to involve the cancellation or suspension of the certificate of a master or mate, shall, where practicable, appoint a person having experience in the merchant service to be one of the assessors.

Each assessor shall either sign the report made on the investigation, or report to the Board of Trade his reasons for his dissent therefrom.

The Lord High Chancellor of Great Britain may from time to time, with the consent of the Treasury so far as relates to fees, make, and when made revoke, alter, and add to general rules for carrying into effect the enactments relating to formal investigations into shipping casualties, and in particular with respect to the summoning of assessors, the procedure, the parties, the persons allowed to appear, the notice to such parties and persons or to persons affected, and the amount and application of fees.

All such rules, while in force, shall have effect as if enacted in this Act.

Every formal investigation into a shipping casualty shall be conducted in such manner that if a charge is made (*x*) against any person that person shall have an opportunity of making a defence (*y*).

Power for wreck commissioners to institute examination with respect to ships in distress under 17 & 18 Vict. c. 104, s. 448.

31. A wreck commissioner may, at the request of the Board of Trade, by himself, or by some deputy approved by the Board of Trade, institute the same examination as a receiver of wreck under section four hundred and forty-eight of the Merchant Shipping Act, 1854, and shall for that purpose have the powers by that section conferred on a receiver of wreck.

Power to hold inquiries or formal investigations as to stranded and missing ships.

32. In the following cases:—

(1.) Whenever any ship on or near the coasts of the United Kingdom or any British ship elsewhere has been stranded or damaged, and any witness is found at any place in the United Kingdom; or

(2.) Whenever a British ship has been lost or is supposed to have been lost, and any evidence can be obtained in the United Kingdom as to the circumstances under which she proceeded to sea or was last heard of,

the Board of Trade (without prejudice to any other powers) may, if they think fit, cause an inquiry to be made or formal investigation to be held, and all the provisions of the Merchant Shipping Acts, 1854 to 1876, shall apply to any such inquiry or investigation as if it had been made or held under the Eighth Part of the Merchant Shipping Act, 1854.

Place of investigation.

33. A formal investigation into a shipping casualty may be held at any place appointed in that behalf by the Board of Trade, and all enactments relating to the authority holding the investigation shall, for the purpose of the investigation, have effect as if the place so appointed were a place appointed for the exercise of the ordinary jurisdiction of that authority.

Miscellaneous.

Enforcing detention of ship.

34. Where under the Merchant Shipping Acts, 1854 to 1876, or any of them, a ship is authorized or ordered to be detained, any commissioned officer on full pay in the naval or military service of her Majesty, or any officer of the Board of Trade or Customs, or any British consular officer may detain the ship, and if the ship after such detention or after service on the master of any notice of or order for such detention proceeds to sea before it is released by competent authority, the master of the ship, and also the owner, and any

(*t*) *Ex parte Story*, 3 Q. B. D. 166.
(*u*) Sects. 432—438.
(*v*) The words within brackets repealed by Statute Law Revision Act, 1883.
(*x*) *Ex parte Minto*, 35 L. T. 808.
(*y*) As to rehearing, see 42 & 43 Vict. c. 72.

person who sends the ship to sea, if such owner or person be party or privy to the offence, shall forfeit and pay to her Majesty a penalty not exceeding one hundred pounds.

Where a ship so proceeding to sea when on board thereof in the execution of his duty any officer authorized to detain the ship, or any surveyor or officer of the Board of Trade or Customs, the owner and master of the ship shall each be liable to pay all expenses of and incidental to the officer or surveyor being so taken to sea, and also a penalty not exceeding one hundred pounds, or, if the offence is not prosecuted in a summary manner, not exceeding ten pounds for every day until the officer or surveyor returns, or until such time as would enable him after leaving the ship to return to the port from which he is taken, and such expenses may be recovered in like manner as the penalty.

Service of order on master, &c.

35. Where any order, notice, statement, or document requires, for the purpose of any provision of this Act, to be served on the master of a ship, the same shall be served, where there is no master, and the ship is in the United Kingdom, on the managing owner of the ship, or if there is no managing owner, on some agent of the owner residing in the United Kingdom, or where no such agent is known or can be found, by affixing a copy thereof to the mast of the ship.

Any such order, notice, statement, or document may be served by delivering a copy thereof personally to the person to be served, or by leaving the same at his last place of abode, or in the case of a master by leaving it for him on board the ship with the person being or appearing to be in command or charge of such ship.

Any person who obstructs the service of any order, notice, statement, or document on the master of a ship shall incur a penalty not exceeding ten pounds, and if the owner or master of the ship is party or privy to such obstruction he shall be guilty of a misdemeanor.

Ship's managing owner or manager to be registered.

36. The name and address of the managing owner for the time being of every British ship registered at any port or place in the United Kingdom shall be registered at the custom-house of the ship's port of registry.

When there is not a managing owner there shall be so registered the name of the ship's husband or other person to whom the management of the ship is intrusted by or on behalf of the owner; and any person whose name is so registered shall, for the purposes of the Merchant Shipping Acts, 1854 to 1876, be under the same obligations, and subject to the same liabilities, as if he were the managing owner.

If default is made in complying with this section the owner shall be liable, or if there be more owners than one each owner shall be liable in proportion to his interest in the ship, to a penalty not exceeding in the whole one hundred pounds each time the ship leaves any port in the United Kingdom.

Power for her Majesty by Order in Council to apply certain provisions of Merchant Shipping Acts to foreign ships.

37. Whenever it has been made to appear to her Majesty that the government of any foreign state is desirous that any of the provisions of the Merchant Shipping Acts, 1854 to 1876, or of any Act hereafter to be passed amending the same, shall apply to the ships of such state, her Majesty may by Order in Council declare that such of the said provisions as are in such order specified shall (subject to the limitations, if any, contained in the order) apply, and thereupon, so long as the order remains in force, such provisions shall apply (subject to the said limitations) to the ships of such state, and to the owners, masters, seamen, and apprentices of such ships, when not locally within the jurisdiction of such state, in the same manner in all respects as if such ships were British ships.

Provisions as to Order in Council.

38. Where her Majesty has power under the Merchant Shipping Act, 1854, or any Act passed or hereafter to be passed amending the same, to make an Order in Council, it shall be lawful for her Majesty from time to time to make such Order in Council, and by Order in Council to revoke, alter, or add to any order so made.

Every such Order in Council shall be published in the *London Gazette*, and shall be laid before both Houses of Parliament within one month after it is made, if Parliament be then sitting, or if not, within one month after the then next meeting of Parliament.

Upon the publication of any such order in the *London Gazette*, the order shall, after the date of such publication, or any later date mentioned in the order, take effect as if it were enacted by Parliament.

Fees, salaries, and costs.

39. [On and after the first day of January one thousand eight hundred and seventy-seven all fees payable in respect of the survey or measurement

of ships under the Merchant Shipping Acts, 1854 to 1876, or in respect of any services performed by any person employed under the authority of the Passengers Act, 1855, shall continue to be paid to the superintendent of a mercantile marine office at such times and in such manner as the Board of Trade from time to time direct, but shall be paid into the receipt of her Majesty's Exchequer in such manner as the Treasury from time to time direct, and shall be carried to and form part of the consolidated fund of the United Kingdom.

On and after the same day the salaries of all surveyors appointed under the Merchant Shipping Acts, 1854 to 1876, and so much of the expenses connected with the survey and measurement of ships under those Acts, and of the salaries and expenses of persons employed under the Passengers Act, 1855, as has heretofore been paid out of the Mercantile Marine Fund, shall be paid out of moneys provided by Parliament, and the Treasury shall have the like control over such salaries and expenses as has heretofore been vested in the Board of Trade] (*z*).

There may be paid out of moneys provided by Parliament, to any wreck commissioner, judge of a court of survey, assessor, registrar of a court of survey, detaining officer, scientific referee, and other officer or person appointed under this Act, such salary or remuneration (if any) as the Treasury from time to time direct.

[There may be paid out of moneys provided by Parliament all costs and compensation payable by the Board of Trade in pursuance of this Act] (*z*).

Legal proceedings in case of offences.

40. For the purpose of punishment, jurisdiction, and legal proceedings an offence under this Act shall be deemed to be an offence under the Merchant Shipping Act, 1854.

Application of Act to Scotland.

41. In the application of this Act to Scotland,—

The provision with respect to a prosecution not being instituted except by or with the consent of the Board of Trade shall not apply.

"Judge of a county court" shall be deemed to include a sheriff and sheriff substitute; and

"Registrar of a county court" shall be deemed to include sheriff clerk; and

"A master of the Supreme Court of Judicature" shall mean the Queen's and Lord Treasurer's Remembrancer.

Application of Act to Ireland.

42. In the application of this Act to Ireland,—

"Judge of a county court" shall be deemed to include chairman of a county and recorder of any borough;

"Registrar of a county court" shall be deemed to include the clerk of the peace or registrar or other person discharging the duties of registrar of the court, of the chairman of a county, or the recorder of a borough;

"Stipendiary magistrate" shall be deemed to include any of the justices of the peace in Dublin metropolis and any resident magistrate; and

"A master of the Supreme Court of Judicature" shall mean one of the masters of the superior courts of common law in Ireland.

Application of Act to Isle of Man.

43. In the application of this Act to the Isle of Man,—

"Judge of a county court" shall mean the water bailiff;

"Stipendiary magistrate" shall mean a high bailiff;

"Registrar of a county court" shall mean a clerk to a deemster or a clerk to justices of the peace;

"A master of the Supreme Court of Judicature" shall mean the clerk of the rolls.

Saving for colonial inland waters.

44. Nothing in this Act shall apply to any vessel employed exclusively in trading or going from place to place in any river or inland water of which the whole or part is in any British possession; and the provisions of this Act relating to deck cargo shall not apply to deck cargo carried by a ship while engaged in the coasting trade of any British possession.

Repeal.

45. [Repealed by Statute Law Revision Act, 1883.]

SCHEDULE.

[Repealed by Statute Law Revision Act, 1883.]

(*z*) The words within brackets repealed by 45 & 46 Vict. c. 55.

40 & 41 VICT. CAP. 26.

An Act to Amend the Companies Acts of 1862 *and* 1867.

[23*rd July*, 1877.]

30 & 31 Vict. c. 131.

WHEREAS doubts have been entertained whether the power given by the Companies Act, 1867, to a company of reducing its capital extends to paid-up capital, and it is expedient to remove such doubts:

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in in this present Parliament assembled, and by the authority of the same, as follows:—

Short title.

1. This Act may be cited for all purposes as the Companies Act, 1877.

Construction of Act. 25 & 26 Vict. c. 89. 30 & 31 Vict. c. 131.

2. This Act shall, so far as is consistent with the tenor thereof, be construed as one with the Companies Acts, 1862 and 1867, and the said Acts and this Act may be referred to as "The Companies Acts, 1862, 1867, and 1877."

Construction of "capital" and powers to reduce capital contained in 30 & 31 Vict. c. 131.

3. The word "capital" as used in the Companies Act, 1867, shall include paid-up capital; and the power to reduce capital conferred by that Act shall include a power to cancel any lost capital, or any capital unrepresented by available assets, or to pay off any capital which may be in excess of the wants of the company; and paid-up capital may be reduced either with or without extinguishing or reducing the liability (if any) remaining on the shares of the company, and to the extent to which such liability is not extinguished or reduced it shall be deemed to be preserved, notwithstanding anything contained in the Companies Act, 1867.

Application of provisions of 30 & 31 Vict. c. 131.

4. The provisions of the Companies Act, 1867, as amended by this Act, shall apply to any company reducing its capital in pursuance of this Act and of the Companies Act, 1867, as amended by this Act:

Provided that where the reduction of the capital of a company does not involve either the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital,

(1.) The creditors of the company shall not, unless the Court otherwise direct, be entitled to object or required to consent to the reduction; and

(2.) It shall not be necessary, before the presentation of the petition for confirming the reduction, to add, and the Court may, if it thinks it expedient so to do, dispense altogether with the addition of the words "and reduced," as mentioned in the Companies Act, 1867.

30 & 31 Vict. c. 131.

In any case that the Court thinks fit so to do, it may require the company to publish in such manner as it thinks fit the reasons for the reduction of its capital, or such other information in regard to the reduction of its capital, as the Court may think expedient with a view to give proper information to the public in relation to the reduction of its capital by a company, and, if the Court thinks fit, the causes which led to such reduction.

The minute required to be registered in the case of reduction of capital shall show, in addition to the other particulars required by law, the amount (if any) at the date of the registration of the minute proposed to be deemed to have been paid up on each share.

Power to reduce capital by the cancellation of unissued shares.

5. Any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorized so to do by its regulations as originally framed or as altered by special resolution, as to reduce its capital by cancelling any shares which, at the date of the passing of such resolution, have not been taken or agreed to be taken by any person; and the provisions of "The Companies Act, 1867," shall not apply to any reduction of capital made in pursuance of this section.

Reception of certified copies of documents as legal evidence. 25 & 26 Vict. c. 89.

6. And whereas it is expedient to make provision for the reception as legal evidence of certificates of incorporation other than the original certificates, and of certified copies of or extracts from any documents filed and registered under the Companies Acts, 1862 to 1877: Be it enacted, that any certificate of the incorporation of any company given by the registrar or by

any assistant-registrar for the time being shall be received in evidence as if it were the original certificate; and any copy of or extract from any of the documents or part of the documents kept and registered at any of the offices for the registration of joint stock companies in England, Scotland, or Ireland, if duly certified to be a true copy under the hand of the registrar or one of the assistant-registrars for the time being, and whom it shall not be necessary to prove to be the registrar or assistant-registrar shall, in all legal proceedings, civil or criminal, and in all cases whatsoever, be received in evidence as of equal validity with the original document. 30 & 31 Vict. c. 131. 40 & 41 Vict. c. 26.

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41 & 42 VICT. CAP. 31 (*a*).

An Act to consolidate and amend the Law for preventing Frauds upon Creditors by secret Bills of Sale of Personal Chattels.

[22*nd July*, 1878.]

WHEREAS it is expedient to consolidate and amend the law relating to bills of sale of personal chattels:

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as the Bills of Sale Act, 1878. Short title.

2. This Act shall come into operation on the first day of January one thousand eight hundred and seventy-nine, which day is in this Act referred to as the commencement of this Act. Commencement.

3. This Act shall apply to every bill of sale executed on or after the first day of January one thousand eight hundred and seventy-nine (whether the same be absolute, or subject or not subject to any trust) whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale. Application of Act.

4. In this Act the following words and expressions shall have the meanings in this section assigned to them respectively, unless there be something in the subject or context repugnant to such construction; (that is to say,) Interpretation of terms.

The expression "bill of sale" shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred, but shall not include the following documents; that is to say, assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented:

The expression "personal chattels" shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops, but shall not include chattel interests in real estate, nor fixtures (except trade machinery as hereinafter defined), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they

(*a*) See, also, the Bills of Sale Amendment Act, *infra*, p. 1069.

grow, nor shares or interests in the stock, funds, or securities of any government, or in the capital or property of incorporated or joint stock companies, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement or of the custom of the country ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale:

Personal chattels shall be deemed to be in the "apparent possession" of the person making or giving a bill of sale, so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person:

"Prescribed" means prescribed by rules made under the provisions of this Act.

Application of Act to trade machinery.

5. From and after the commencement of this Act trade machinery shall, for the purposes of this Act, be deemed to be personal chattels, and any mode of disposition of trade machinery by the owner thereof which would be a bill of sale as to any other personal chattels shall be deemed to be a bill of sale within the meaning of Act.

For the purposes of this Act—

"Trade machinery" means the machinery used in or attached to any factory or workshop;

1st. Exclusive of the fixed motive powers, such as the water-wheels and steam engines, and the steam-boilers, donkey engines, and other fixed appurtenances of the said motive-powers; and

2nd. Exclusive of the fixed power machinery, such as the shafts, wheels, drums, and their fixed appurtenances, which transmit the action of the motive-powers to the other machinery, fixed and loose; and

3rd. Exclusive of the pipes for steam, gas and water in the factory or workshop.

The machinery or effects excluded by this section from the definition of trade machinery shall not be deemed to be personal chattels within the meaning of this Act.

"Factory or workshop" means any premises on which any manual labour is exercised by way of trade, or for purposes of gain, in or incidental to the following purposes or any of them; that is to say,

(a) In or incidental to the making any article or part of an article; or

(b) In or incidental to the altering, repairing, ornamenting, finishing, of any article; or

(c) In or incidental to the adapting for sale any article.

Certain instruments giving powers of distress to be subject to this Act.

6. Every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of this Act, of any personal chattels which may be seized or taken under such power of distress.

Provided, that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent.

Fixtures or growing crops not to be deemed separately assigned when the land passes by the same instrument.

7. No fixtures or growing crops shall be deemed, under this Act, to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed, or from the land on which they grow, without otherwise taking possession of or dealing with such land or building, or land, if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed, or in the land on which such crops grew, is also conveyed or assigned to the same persons or person.

The same rule of construction shall be applied to all deeds or instruments, including fixtures or growing crops, executed before the commencement of

this Act and then subsisting and in force, in all questions arising under any bankruptcy, liquidation, assignment for the benefit of creditors, or execution of any process of any court, which shall take place or be issued after the commencement of this Act.

8. [Repealed by 45 & 46 Vict. c. 43.]

Avoidance of certain duplicate bills of sale.

9. Where a subsequent bill of sale is executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale, and comprises all or any part of the personal chattels comprised in such prior bill of sale, then, if such subsequent bill of sale is given as a security for the same debt as is secured by the prior bill of sale, or for any part of such debt, it shall, to the extent to which it is a security for the same debt or part thereof, and so far as respects the personal chattels or part thereof comprised in the prior bill, be absolutely void, unless it is proved to the satisfaction of the court having cognizance of the case that the subsequent bill of sale was bonâ fide given for the purpose of correcting some material error in the prior bill of sale, and not for the purpose of evading this Act.

Mode of registering bills of sale.

10. A bill of sale shall be attested and registered under this Act in the following manner:

(1.) [The execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor (*a*):]

(2.) Such bill, with every schedule or inventory thereto annexed or therein referred to, and also a true copy of such bill and of every such schedule or inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same (or in case the same is made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process issued), and of every attesting witness to such bill of sale, shall be presented to and the said copy and affidavit shall be filed with the registrar within seven clear days after the making or giving of such bill of sale, in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed:

(3.) If the bill of sale is made or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void.

In case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels.

A transfer or assignment of a registered bill of sale need not be registered.

Renewal of registration.

11. The registration of a bill of sale, whether executed before or after the commencement of this Act, must be renewed once at least every five years, and if a period of five years elapses from the registration or renewed registration of a bill of sale without a renewal or further renewal (as the case may be), the registration shall become void.

The renewal of a registration shall be effected by filing with the registrar an affidavit stating the date of the bill of sale and of the last registration thereof, and the names, residences, and occupations of the parties thereto as stated therein, and that the bill of sale is still a subsisting security.

Every such affidavit may be in the form set forth in the Schedule (A.) to this Act annexed.

A renewal of registration shall not become necessary by reason only of a transfer or assignment of a bill of sale.

Form of register.

12. The registrar shall keep a book (in this Act called "the register") for the purposes of this Act, and shall, upon the filing of any bill of sale or copy

(*a*) Repealed by 45 & 46 Vict. c. 43, s. 10.

under this Act, enter therein in the form set forth in the second schedule (B.) to this Act annexed, or in any other prescribed form, the name, residence, and occupation of the person by whom the bill was made or given (or in case the same was made or given by any person under or in the execution of process, then the name, residence, and occupation of the person against whom such process was issued, and also the name of the person or persons to whom or in whose favour the bill was given), and the other particulars shown in the said schedule or to be prescribed under this Act, and shall number all such bills registered in each year consecutively, according to the respective dates of their registration.

Upon the registration of any affidavit of renewal the like entry shall be made, with the addition of the date and number of the last previous entry relating to the same bill, and the bill of sale or copy originally filed shall be thereupon marked with the number affixed to such affidavit of renewal.

The registrar shall also keep an index of the names of the grantors of registered bills of sale with reference to entries in the register of the bills of sale given by each such grantor.

Such index shall be arranged in divisions corresponding with the letters of the alphabet, so that all grantors whose surnames begin with the same letter (and no others) shall be comprised in one division, but the arrangement within each such division need not be strictly alphabetical.

The registrar.

13. The masters of the Supreme Court of Judicature attached to the Queen's Bench Division of the High Court of Justice, or such other officers as may for the time being be assigned for this purpose under the provisions of the Supreme Court of Judicature Acts, 1873 and 1875, shall be the registrar for the purposes of this Act, and any one of the said masters may perform all or any of the duties of the registrar.

36 & 37 Vict. c. 66. 38 & 39 Vict. c. 77.

Rectification of register.

14. Any judge of the High Court of Justice on being satisfied that the omission to register a bill of sale or an affidavit of renewal thereof within the time prescribed by this Act, or the omission or mis-statement of the name, residence, or occupation of any person, was accidental or due to inadvertence, may in his discretion order such omission or mis-statement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for such registration on such terms and conditions (if any) as to security, notice by advertisement or otherwise, or as to any other matter, as he thinks fit to direct.

Entry of satisfaction.

15. Subject to and in accordance with any rules to be made under and for the purposes of this Act, the registrar may order a memorandum of satisfaction to be written upon any registered copy of a bill of sale, upon the prescribed evidence being given that the debt (if any) for which such bill of sale was made or given has been satisfied or discharged.

Copies may be taken, &c.

16. Any person shall be entitled to have an office copy or extract of any registered bill of sale, and affidavit of execution filed therewith, or copy thereof, and of any affidavit filed therewith, if any, or registered affidavit of renewal, upon paying for the same at the like rate as for office copies of judgments of the High Court of Justice, and any copy of a registered bill of sale, and affidavit purporting to be an office copy thereof, shall in all courts and before all arbitrators or other persons, be admitted as primâ facie evidence thereof, and of the fact and date of registration as shown thereon. Any person shall be entitled at all reasonable times to search the register and every registered bill of sale, upon payment of one shilling for every copy of a bill of sale inspected; such payment shall be made by a judicature stamp.

Affidavits.

17. Every affidavit required by or for the purposes of this Act may be sworn before a master of any division of the High Court of Justice, or before any commissioner empowered to take affidavits in the Supreme Court of Judicature.

Whoever wilfully makes or uses any false affidavit for the purposes of this Act shall be deemed guilty of wilful and corrupt perjury.

Fees.

18. There shall be paid and received in common law stamps the following fees, viz.:

On filing a bill of sale - - - - - - -	2*s.*
On filing the affidavit of execution of a bill of sale -	2*s.*
On the affidavit used for the purpose of re-registering a bill of sale (to include the fee for filing) - -	5*s.*

Collection of fees under 38 & 39 Vict. c. 77, s. 26.

19. Section twenty-six of the Supreme Court of Judicature Act, 1875, and any enactments for the time being in force amending or substituted for

that section, shall apply to fees under this Act, and an order under that section may, if need be, be made in relation to such fees accordingly.

20. [Repealed by 45 & 46 Vict. c. 43.]

Rules. 36 & 37 Vict. c. 66. 38 & 39 Vict. c. 77.

21. Rules for the purposes of this Act may be made and altered from time to time by the like persons and in the like manner in which rules and regulations may be made under and for the purposes of the Supreme Court of Judicature Acts, 1873 and 1875.

Time for registration.

22. When the time for registering a bill of sale expires on a Sunday, or other day on which the registrar's office is closed, the registration shall be valid if made on the next following day on which the office is open.

Repeal of Acts. 17 & 18 Vict. c. 36. 29 & 30 Vict. c. 96.

23. From and after the commencement of this Act, the Bills of Sale Act, 1854, and the Bills of Sale Act, 1866, shall be repealed: Provided that (except as is herein expressly mentioned with respect to construction and with respect to renewal of registration) nothing in this Act shall affect any bill of sale executed before the commencement of this Act, and as regards bills of sale so executed the Acts hereby repealed shall continue in force.

Any renewal after the commencement of this Act of the registration of a bill of sale executed before the commencement of this Act, and registered under the Acts hereby repealed, shall be made under this Act in the same manner as the renewal of a registration made under this Act.

Extent of Act.

24. This Act shall not extend to Scotland or to Ireland.

SCHEDULES.

SCHEDULE A.

I [*A.B.*] of do swear that a bill of sale, bearing date the day of 18 [*insert the date of the bill*], and made between [*insert the names and descriptions of the parties in the original bill of sale*], and which said bill of sale [*or*, and a copy of which said bill of sale, *as the case may be*] was registered on the day of 18 [*insert date of registration*], is still a subsisting security.

Sworn, *&c.*

SCHEDULE B.

Satisfaction entered.	No.	By whom given (or against whom process issued).			To whom given.	Nature of instrument.	Date.	Date of registration.	Date of registration of affidavit of renewal.
		Name.	Residence.	Occupation.					

41 & 42 Vict. cap. 49.

An Act to consolidate the Law relating to Weights and Measures.
[*8th August*, 1878.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

Short title.

1. This Act may be cited as the Weights and Measures Act, 1878.

Commencement.

2. This Act shall not come into operation until the first day of January one thousand eight hundred and seventy-nine, which day is hereinafter referred to as the commencement of this Act.

I.—Law of Weights and Measures.

Uniformity of Weights and Measures.

Uniformity of weights and measures.

3. The same weights and measures shall be used throughout the United Kingdom.

Standards of Measure and Weight.

Imperial standards of measure and weight.

4. The bronze bar and the platinum weight, more particularly described in the first part of the First Schedule to this Act, and at the passing of this Act deposited in the Standards Department of the Board of Trade in the custody of the Warden of the Standards, shall continue to be the imperial standards of measure and weight, and the said bronze bar shall continue to be the imperial standard for determining the imperial standard yard for the United Kingdom, and the said platinum weight shall continue to be the imperial standard for determiuing the imperial standard pound for the United Kingdom.

Parliamentary copies of imperial standards.

5. The four copies of the imperial standards of measure and weight, described in the second part of the First Schedule to this Act, and deposited as therein mentioned, shall be deemed to be parliamentary copies of the said imperial standards.

The Board of Trade shall as soon as may be after the commencement of this Act cause an accurate copy of the imperial standard of measure and an accurate copy of the imperial standard of weight to be made of the same form and material as the said standards, and it shall be lawful for Her Majesty in Council, on the representation of the Board of Trade, to approve the copies so made, and the copies when so approved shall be of the same effect as the said parliamentary copies, and are in this Act included under the name parliamentary copies of the imperial standards of measure and weight.

Restoration of imperial standards.

6. If at any time either of the imperial standards of measure and weight is lost or in any manner destroyed, defaced, or otherwise injured, the Board of Trade may cause the same to be restored by reference to or adoption of any of the parliamentary copies of that standard, or of such of them as may remain available for that purpose.

Restoration of parliamentary copies.

7. If at any time any of the parliamentary copies of either of the imperial standards is lost or in any manner destroyed, defaced, or otherwise injured, the Board of Trade may cause the same to be restored by reference either to the corresponding imperial standard, or to one of the other parliamentary copies of that standard.

Secondary (Board of Trade) standards of measure and weight.

8. The secondary standards of measure and weight which, having been derived from the imperial standards, are at the commencement of this Act in use under the direction of the Board of Trade, and are mentioned in the Second Schedule to this Act, and no others (save as hereinafter mentioned), shall be secondary standards of measure and weight, and shall be called Board of Trade standards.

If at any time any of such standards is lost or in any manner destroyed, defaced, or otherwise injured, the Board of Trade may cause the same to be

restored by reference either to one of the imperial standards or to one of the parliamentary copies of those standards.

The Board of Trade shall from time to time cause such new denominations of standards, being either equivalent to or multiples or aliquot parts of the imperial weights and measures ascertained by this Act, or being equivalent to or multiples of each coin of the realm for the time being, as appear to them to be required, in addition to those mentioned in the Second Schedule to this Act, to be made and duly verified, and those new denominations of standards when approved by Her Majesty in Council shall be Board of Trade standards in like manner as if they were mentioned in the said schedule.

It shall be lawful for Her Majesty by Order in Council to declare that a Board of Trade standard for the time being of any denomination, whether mentioned in the said schedule or approved by Order in Council, shall cease to be such a standard.

Such standards of the Board of Trade as are equivalent to or multiples of any coin of the realm for the time being shall be standard weights for determining the justness of the weight of and for weighing such coin.

Local standards of measure and weight.

9. The standards of measure and weight which are at the commencement of this Act legally in use by inspectors of weights and measures for the purpose of verification or inspection, and all copies of the Board of Trade standards which after the commencement of this Act are compared with those standards and verified by the Board of Trade for the purpose of being used by inspectors of weights and measures under this Act as standards for the verification or inspection of weights and measures, shall be called local standards.

Imperial Measures of Length.

Imperial standard yard.

10. The straight line or distance between the centres of the two gold plugs or pins (as mentioned in the First Schedule to this Act) in the bronze bar by this Act declared to be the imperial standard for determining the imperial standard yard measured when the bar is at the temperature of sixty-two degrees of Fahrenheit's thermometer, and when it is supported on bronze rollers placed under it in such manner as best to avoid flexure of the bar, and to facilitate its free expansion and contraction from variations of temperature, shall be the legal standard measure of length, and shall be called the imperial standard yard, and shall be the only unit or standard measure of extension from which all other measures of extension, whether linear superficial or solid, shall be ascertained.

Linear measures derived from imperial standard yard.

11. One-third part of the imperial standard yard shall be a foot, and the twelfth part of such foot shall be an inch, and the rod, pole, or perch in length shall contain five such yards and a half, and the chain shall contain twenty-two such yards, the furlong two hundred and twenty such yards, and the mile one thousand seven hundred and sixty such yards.

Superficial measures derived from the imperial standard yard.

12. The rood of land shall contain one thousand two hundred and ten square yards according to the imperial standard yard, and the acre of land shall contain four thousand eight hundred and forty such square yards, being one hundred and sixty square rods, poles, or perches.

Imperial Measures of Weight and Capacity.

Imperial standard pound.

13. The weight in vacuô of the platinum weight (mentioned in the First Schedule to this Act), and by this Act declared to be the imperial standard for determining the imperial standard pound, shall be the legal standard measure of weight, and of measure having reference to weight, and shall be called the imperial standard pound, and shall be the only unit or standard measure of weight from which all other weights and all measures having reference to weight shall be ascertained.

Imperial weights derived from imperial standard pound.

14. One sixteenth part of the imperial standard pound shall be an ounce, and one sixteenth part of such ounce shall be a dram, and one seven thousandth part of the imperial standard pound shall be a grain.

A stone shall consist of fourteen imperial standard pounds, and a hundredweight shall consist of eight such stones, and a ton shall consist of twenty such hundredweights.

Four hundred and eighty grains shall be an ounce troy.

All the foregoing weights except the ounce troy shall be deemed to be avoirdupois weights.

Imperial measures of capacity.

15. The unit or standard measure of capacity from which all other measures of capacity, as well for liquids as for dry goods, shall be derived, shall be the gallon containing ten imperial standard pounds weight of distilled water weighed in air against brass weights, with the water and the air at the temperature of sixty-two degrees of Fahrenheit's thermometer, and with the barometer at thirty inches.

The quart shall be one fourth part of the gallon, and the pint shall be one eighth part of the gallon.

Two gallons shall be a peck, and eight gallons shall be a bushel, and eight such bushels shall be a quarter, and thirty-six such bushels shall be a chaldron.

Measure of capacity for goods formerly sold by heaped measure. 5 & 6 Will. 4, c. 63.

16. [A bushel for the sale of any of the following articles, namely, lime, fish, potatoes, fruit, or any other goods and things which before (the passing of the Weights and Measures Act, 1835, that is to say) the ninth day of September one thousand eight hundred and thirty-five, were commonly sold by heaped measure, shall be a hollow cylinder having a plane base, the internal diameter of which shall be double the internal depth, and every measure used for the sale of any of the above-mentioned articles which is a multiple of a bushel, or is a half bushel or a peck, shall be made of the same shape and proportion as the above-mentioned bushel (*b*).]

Measure of capacity when used to be stricken or filled up.

17. In using an imperial measure of capacity, the same shall not be heaped, but either shall be stricken with a round stick or roller, straight and of the same diameter from end to end, or if the article sold cannot from its size or shape be conveniently stricken shall be filled in all parts as nearly to the level of the brim as the size and shape of the article will admit.

Metric Equivalents of Imperial Weights and Measures.

Equivalents of metric weights and measures in terms of imperial weights and measures.

18. The table in the Third Schedule to this Act shall be deemed to set forth the equivalents of imperial weights and measures and of the weights and measures therein expressed in terms of the metric system, and such table may be lawfully used for computing and expressing, in weights and measures, weights and measures of the metric system.

Use of Imperial Weights and Measures.

Trade contracts, sales, dealings, &c. to be in terms of imperial weights or measures.

19. Every contract, bargain, sale, or dealing, made or had in the United Kingdom for any work goods wares or merchandise or other thing which has been or is to be done, sold, delivered, carried, or agreed for by weight or measure, shall be deemed to be made and had according to one of the imperial weights or measures ascertained by this Act, or to some multiple or part thereof, and if not so made or had shall be void; and all tolls and duties charged or collected according to weight or measure shall be charged and collected according to one of the imperial weights or measures ascertained by this Act, or to some multiple or part thereof.

Such contract, bargain, sale, dealing, and collection of tolls and duties as is in this section mentioned is in this Act referred to under the term "trade."

No local or customary measures, nor the use of the heaped measure, shall be lawful.

Any person who sells by any denomination of weight or measure other than one of the imperial weights or measures, or some multiple or part thereof, shall be liable to a fine not exceeding forty shillings for every such sale.

Sale by avoirdupois weight, with exceptions.

20. All articles sold by weight shall be sold by avoirdupois weight; except that—

(1.) Gold and silver, and articles made thereof, including gold and silver thread, lace, or fringe, also platinum, diamonds, and other precious metals or stones, may be sold by the ounce troy or by any decimal parts of such ounce; and all contracts, bargains, sales, and dealings in relation thereto shall be deemed to be made and had by such weight, and when so made or had shall be valid; and

(2.) Drugs, when sold by retail, may be sold by apothecaries weight.

Every person who acts in contravention of this section shall be liable to a fine not exceeding five pounds.

Exception for contract, &c. in metric weights and measures.

21. A contract or dealing shall not be invalid or open to objection on the ground that the weights or measures expressed or referred to therein are

(*b*) Repealed: 52 & 53 Vict. c. 21, s. 5.

weights or measures of the metric system, or on the ground that decimal subdivisions of imperial weights and measures, whether metric or otherwise, are used in such contract or dealing.

Exception for sale of article in vessel not represented as being of imperial or local measure.

22. Nothing in this Act shall prevent the sale, or subject a person to a fine under this Act for the sale, of an article in any vessel, where such vessel is not represented as containing any amount of imperial measure, nor subject a person to a fine under this Act for the possession of a vessel where it is shown that such vessel is not used nor intended for use as a measure.

Penalty on price lists, &c. denoting greater or less weight or measure than the same denomination of imperial weight or measure.

23. Any person who prints, and any clerk of a market or other person who makes, any return, price list, price current, or any journal or other paper containing price list or price current, in which the denomination of weights and measures quoted or referred to denotes or implies a greater or less weight or measure than is denoted or implied by the same denomination of the imperial weights and measures under this Act, shall be liable to a fine not exceeding ten shillings for every copy of every such return, price list, price current, journal, or other paper which he publishes.

Penalty on use or possession unauthorized weight or measure.

24. Every person who uses or has in his possession for use for trade a weight or measure which is not of the denomination of some Board of Trade standard, shall be liable to a fine not exceeding five pounds, or in the case of a second offence ten pounds, and the weight or measure shall be liable to be forfeited.

Unjust Weights and Measures.

Penalty on use or possession of unjust measures, weights, balances, or weighing machines.

25. Every person who uses or has in his possession for use for trade any weight measure scale balance steelyard or weighing machine which is false or unjust, shall be liable to a fine not exceeding five pounds, or in the case of a second offence [twenty] pounds (*c*), and any contract bargain sale or dealing made by the same shall be void, and the weight measure scale balance or steelyard shall be liable to be forfeited.

Penalty for fraud in use of weight, measure, balance, &c.

26. Where any fraud is wilfully committed in the using of any weight measure scale balance steelyard or weighing machine, the person committing such fraud, and every person party to the fraud, shall be liable to a fine not exceeding five pounds, or in the case of a second offence [twenty] pounds (*c*), and the weight measure scale balance or steelyard shall be liable to be forfeited.

Penalty on sale of false weight, measure, balance, &c.

27. A person shall not wilfully or knowingly make or sell, or cause to be made or sold, any false or unjust weight measure scale balance steelyard or weighing machine.

Every person who acts in contravention of this section shall be liable to a fine not exceeding ten pounds, or in the case of a second offence fifty pounds.

Stamping and Verification of Weights and Measures.

Stamping of weights and measures with denomination.

28. Every weight, except where the small size of the weight renders it impracticable, shall have the denomination of such weight stamped on the top or side thereof in legible figures and letters.

Every measure of capacity shall have the denomination thereof stamped on the outside of such measure in legible figures and letters.

A weight or measure not in conformity with this section shall not be stamped with such stamp of verification under this Act as is hereinafter mentioned.

Stamping of verification on measures and weights.

29. Every measure and weight whatsoever used for trade shall be verified and stamped by an inspector with a stamp of verification under this Act.

Every person who uses or has in his possession for use for trade any measure or weight not stamped as required by this section, shall be liable to a fine not exceeding five pounds, or in the case of a second offence ten pounds, and shall be liable to forfeit the said measure or weight, and any contract bargain sale or dealing made by such measure or weight shall be void.

Lead or pewter weights.

30. A weight made of lead or pewter, or of any mixture thereof, shall not be stamped with a stamp of verification or used for trade, unless it be wholly and substantially cased with brass copper or iron, and legibly stamped or marked "cased":

Provided that nothing in this section shall prevent the insertion into a weight of such a plug of lead or pewter as is bonâ fide necessary for the purpose of adjusting it and of affixing thereon the stamp of verification.

A person guilty of any offence against or disobedience to the provisions of

(*c*) 52 & 53 Viot. c. 21, ss. 3, 4.

this section, shall be liable to a penalty not exceeding five pounds, or in case of a second offence ten pounds.

Stamping of verification on weights for coin.

31. Every coin weight, not less in weight than the weight of the lightest coin for the time being current, shall be verified and stamped by the Board of Trade with a mark of verification under this Act, and otherwise shall not be deemed a just weight for determining the weight of gold and silver coin of the realm.

Every person who uses any weight declared by this section not to be a just weight shall be liable to a fine not exceeding fifty pounds.

Forgery, &c. of stamps on measures or weights.

32. If any person forges or counterfeits any stamp used for the stamping under this Act of any measure or weight, or used before the commencement of this Act for the stamping of any measure or weight, under any enactment repealed by this Act, or wilfully increases or diminishes a weight so stamped, he shall be liable to a fine not exceeding fifty pounds.

Any person who knowingly uses, selle, utters, disposes of, or exposes for sale any measure or weight with such forged or counterfeit stamp thereon, or a weight so increased or diminished, shall be liable to a fine not exceeding ten pounds.

All measures and weights with any such forged or counterfeit stamp shall be forfeited (*d*).

II.—Administration.

(a.) *Central.*

Board of Trade.

Powers and duties of Board of Trade as to standards of weights and measures, &c.

33. The Board of Trade shall have all such powers and perform all such duties relative to standards of measure and weight, and to weights and measures, as are by any Act or otherwiee vested in or imposed on the Treasury, or the Comptroller-General of the Exchequer, or the Warden of the Standards; and all things done by the Board of Trade, or any of their officers, or at their office, in relation to standards of weights and measures in pursuance of this Act shall be as valid, and have the like effect and consequences, as if the same had been done by the Treasury, or by the Comptroller-General or other officer of the Exchequer, or by the Warden of the Standards, or at the office of the Exchequer.

It shall be the duty of the Board of Trade to conduct all such comparisons, verifications, and other operations with reference to standards of measure and weight, in aid of scientific researches or otherwise, as the Board of Trade from time to time thinks expedient, and to make from time to time a report to Parliament on their proceedings and business under this Act.

Custody and Verification of Standards and Copies.

Custody of imperial and Board of Trade standards to remain with Board of Trade.

34. The imperial standards of measure and weight, the Board of Trade standards of measure and weight, and all balances, apparatus, books, documents, and things used in connection therewith or relating thereto, deposited at the passing of this Act in the Standards Department, or in any other office of the Board of Trade, shall remain and be in the custody of the Board of Trade.

Custody and periodical verification of parliamentary copies of imperial standards.

35. The parliamentary copies of the imperial standards of measure and weight mentioned in part two of the First Schedule to this Act shall continue to be deposited as therein mentioned.

The copies of the imperial standards of measure and weight made in pursuance of this Act, when approved by Her Majesty in Council, shall be deposited at some office of the Board of Trade, and be in the custody of the Board of Trade.

The Board of Trade shall cause the parliamentary copies of the imperial standards of measure and weight, except the copy immured in the new palace at Westminster, to be compared once in every ten years with each other, and once in every twenty years with the imperial standards of measure and weight.

Periodical verification of Board of Trade standards.

36. Once at least in every five years the Board of Trade shall cause the Board of Trade standards for the time being to be compared with the parliamentary copies of the imperial standards of measure and weight made and approved in pursuance of this Act and with each other, and to be adjusted or renewed, if requisite.

(*b*) This section now applies to weighing machines: 52 & 53 Vict. c. 21, s. 1 (4).

37. The Board of Trade shall cause to be compared with the Board of Trade standards and verified at such places as the Board of Trade in each case direct all copies of any of those standards which are submitted for the purpose by any local authority, and have been used or are intended to be used as local standards, and if they find the same fit for the purpose of being used by inspectors of weights and measures under this Act as standards for the verification and inspection of weights and measures, shall cause them to be stamped as verified or reverified in such manner as to show the date of such verification or re-verification, and every such verification shall be evidenced by an indenture, and every such re-verification shall be evidenced by an indorsement upon the original indenture of verification, or by a new indenture of verification. Verification by Board of Trade of local standards.

Any such indenture or indorsement, if purporting to be signed (either before or after the passing of this Act) by an officer of the Board of Trade, shall be evidence of the verification or re-verification of the weights and measures therein referred to.

Any such indenture or indorsement shall not be liable to stamp duty, nor shall any fee be payable on the verification or re-verification of any local standard.

An account shall be kept by the Board of Trade of all local standards verified or re-verified.

38. Whereas the Board of Trade have obtained accurate copies of the metric standards mentioned in part two of the Third Schedule to this Act, and it is expedient to make the provision hereinafter mentioned for the verification of metric weights and measures, be it therefore enacted as follows: Power of Board of Trade to verify metric weights and measures.

The Board of Trade may, if they think fit, cause to be compared with the metric standards in their custody and verified all metric weights and measures which are submitted to them for the purpose, and are of such shape and construction as may be from time to time in that behalf directed by the Board of Trade, and which the Board of Trade are satisfied are intended to be used for the purpose of science or of manufacture, or for any lawful purpose not being for the purpose of trade within the meaning of this Act.

39. The Board of Trade, on payment of such fee, not exceeding five shillings, as they from time to time prescribe, shall cause all coin weights required by this Act to be verified, to be compared with the standard weights for weighing coin, and, if found to be just, stamped with a mark approved of by the Board, and notified in the London Gazette. Verification and stamping of coin weights.

All fees under this section shall be paid into the Exchequer.

(b.) *Local Administration.*

Local Standards.

40. The local authority (mentioned in the Fourth Schedule to this Act) of every county and borough from time to time shall provide such local standards of measure and weight as they deem requisite for the purpose of the comparison by way of verification or inspection, in accordance with this Act, of all weights and measures in use in their county or borough, and shall fix the places at which such standards are to be deposited. Provision of local standards by local authority.

The said local authority shall also provide from time to time proper means for verifying weights and measures by comparison with the local standards of such authority and for stamping the weights and measures so verified.

41. A local standard of weight shall not be deemed legal nor be used for the purposes of this Act unless it has been verified or re-verified within five years before the time at which it is used. Periodical verification of local standards.

A local standard of measure shall not be deemed legal nor be used for the purposes of this Act unless it has been verified or re-verified within ten years before the time at which it is used.

A local standard of weight or measure which has become defective in consequence of any wear or accident, or has been mended, shall not be legal nor be used for the purpose of this Act until it has been re-verified by the Board of Trade.

A local standard may, save as aforesaid, be re-verified, for the purpose of this section, by such local comparison thereof as is hereinafter mentioned, if on that local comparison it is found correct, but otherwise shall be, and in any case may be, re-verified by the Board of Trade.

A local comparison of a local standard shall be made by an inspector of weights and measures for the county or borough in which such standard is used comparing the same, in the presence of a justice of the peace, with some other local standard which has been verified or re-verified by the Board of Trade, in the case of a weight within the previous five years, and in the case of a measure within the previous ten years.

Upon a local comparison where the local standard is found correct the justice shall sign an indorsement upon the indenture of verification of that standard, stating such local comparison and verification, and the error, if any, found thereon, and the indorsement so signed shall be transmitted to the Board of Trade to be recorded in the account of the verification of local standards. The indorsement when so recorded shall be evidence of the local comparison and verification, and a statement of the record thereof, if purporting to be signed by an officer of the Board of Trade, shall be evidence of the same having been so recorded.

It shall be lawful for Her Majesty from time to time, by Order in Council, to define the amount of error to be tolerated in local standards when verified or re-verified by the Board of Trade, or when re-verified by such a local comparison as is authorised by this section.

Production of local standards.

42. The local standards shall be produced by the person having the custody thereof, upon reasonable notice, at such reasonable time and place within the county, borough, or place for which the same have been provided, as any person by writing under his hand requires, upon payment by the person requiring such production of the reasonable charges of producing the same.

Local Verification and Inspection of Weights and Measures.

Appointment of inspectors of weights and measures.

43. Every local authority shall from time to time appoint a sufficient number of inspectors of weights and measures for safely keeping the local standards provided by such authority, and for the discharge of the other duties of inspectors under this Act; and where they appoint more than one such inspector, shall allot to each inspector (subject to any arrangement made for a chief inspector or inspectors) a separate district, to be distinguished by some name, number, or mark; and the local authority may suspend or dismiss any inspector appointed by them or appoint additional inspectors, as occasion may require, and shall assign reasonable remuneration to each inspector for his duties.

A local authority may, if they think fit, appoint different persons to be inspectors for verification and for inspection respectively of weights and measures under this Act.

[A maker or seller of weights or measures, or a person employed in the making or selling thereof, shall not be an inspector of weights and measures under this Act (*e*).]

An inspector of weights and measures shall forthwith on his appointment enter into a recognizance to the Crown (to be sued for in any court of record) in the sum of two hundred pounds for the due performance of the duties of his office, and for the due payment, at the times fixed by the local authority appointing him, of all fees received by him under this Act, and for the safety of the local standards and the stamps and appliances for verification committed to his charge, and for their due surrender immediately on his removal or other cessation from office to the person appointed by the local authority to receive them.

Verification and stamping by inspectors of weights and measures.

44. The local authority shall from time to time fix the times and places within their jurisdiction at which each inspector appointed by them is to attend for the purpose of the verification of weights and measures; and the inspector shall attend, with the local standards in his custody, at each time and place fixed, and shall examine every measure or weight which is of the same denomination as one of such standards and is brought to him for the purpose of verification, and compare the same with that standard, and if he find the same correct shall stamp it with a stamp of verification in such manner as best to prevent fraud; and in the case of a measure or of a weight of a quarter of a pound or upwards, shall further stamp thereon a name, number, or mark distinguishing the district for which he acts.

He shall also enter in a book kept by him minutes of every such verification, and give, if required, a certificate under his hand of every such stamping.

(*e*) Repealed: see 52 & 53 Vict. c. 21, ss. 12, 36.

An inspector appointed by the local authority for a county may enter a place within the district of an inspector appointed by any other local authority, and there verify and stamp the weights and measures of any person residing within his own district, but if he knowingly stamp a weight or measure of any person residing in the district of an inspector legally appointed by another local authority, he shall be liable to a fine not exceeding twenty shillings for every weight or measure which he so stamps.

Validity of weights and measures stamped throughout the United Kingdom.

45. A weight or measure duly stamped by an inspector under this Act shall be a legal weight or measure throughout the United Kingdom, unless found to be false or unjust, and shall not be liable to be re-stamped because used in any place other than that in which it was originally stamped.

Power to stamp measures made partly of metal and partly of glass.

46. [Where a measure for liquids is constructed with a small window or transparent part through which the contents, whether to the brim or to any other index thereof, may be seen without impediment, such measure may be verified and stamped by inspectors under this Act, although such measure is made partly of metal and partly of glass or other transparent medium, and that whether such measure corresponds exactly to a Board of Trade standard, or whether it exceeds such standard, but has the capacity of such standard indicated by a level line drawn through the centre of the window or transparent part (*f*).]

Fees for comparison and stamping.

47. [An inspector under this Act may take in respect of the verification and stamping of weights and measures such fees not exceeding those specified in the Fifth Schedule to this Act as the authority appointing him from time to time fix, and shall at such times not less often than once a quarter as the said authority direct, account for and pay over to the treasurer of the local rate or such person as the said authority direct all fees taken by him (*g*).]

Where the Board of Trade, upon the application of any local authority from time to time represent to Her Majesty that it would be expedient to alter the fees taken by the inspectors of such authority under this Act (whether specified in the said schedule or in any order previously made under this section) or, for the purpose of adapting those fees to the local standards provided by such authority, to add to the said fees, it shall be lawful for Her Majesty by Order in Council from time to time to alter or add to the said fees.

Power to inspect measures, weights, scales, &c., and to enter shops, &c., for that purpose.

48. Every inspector under this Act authorized in writing under the hand of a justice of the peace, also every justice of the peace, may at all reasonable times inspect all weights measures scales balances steelyards and weighing machines within his jurisdiction which are used or in the possession of any person or on any premises for use for trade, and may compare every such weight and measure with some local standard, and may seize and detain any weight measure scale balance or steelyard which is liable to be forfeited in pursuance of this Act, and may for the purpose of such inspection enter any place, whether a building or in the open air, whether open or enclosed, where he has reasonable cause to believe that there is any weight measure scale balance steelyard or weighing machine which he is authorised by this Act to inspect.

Any person who neglects or refuses to produce for such inspection all weights measures scales balances steelyards and weighing machines in his possession or on his premises, or refuses to permit the justice or inspector to examine the same or any of them, or obstructs the entry of the justice or inspector under this section, or otherwise obstructs or hinders a justice or inspector acting under this section, shall be liable to a fine not exceeding five, or, in the case of a second offence, ten pounds.

Penalty on inspector for misconduct.

49. If an inspector under this Act stamps a weight or measure in contravention of any provision of this Act, or without duly verifying the same by comparison with a local standard, or is guilty of a breach of any duty imposed on him by this Act, or otherwise misconducts himself in the execution of his office, he shall be liable to a fine not exceeding five pounds for each offence.

Local Authorities.

Local authorities and local rate.

50. For the purposes of this Act "the local authority" and "the local rate" shall mean in each of the different areas mentioned in the first column of the Fourth Schedule to this Act the authority and the rate or fund mentioned in that schedule in connexion with that area:

Provided that in England the council of a borough which has not a separate

(*f*) Repealed: 52 & 53 Vict. c. 21, ss. 5, 36.
(*g*) Repealed: 52 & 53 Vict. c. 21, s. 36.

court of quarter sessions shall not, unless they so resolve, be the local authority for the purposes of this Act, and if they so resolve and provide local standards and appoint inspectors after the commencement of this Act, they shall forthwith give notice of such resolution and appointment, under the corporate seal of the borough, to the clerk of the peace of the county in which the borough is situate, and after the expiration of one month from the day on which that notice of the said appointment is given the powers of inspectors of weights and measures appointed by the justices of the county shall, as to such borough and the weights and measures of persons residing therein, cease; but until such notice is given the borough shall be deemed to form part of the said county in like manner as if the same were not a borough.

Where at the commencement of this Act legal local standards are provided and inspectors are appointed by the council of a borough not having a separate court of quarter sessions, that council shall continue to be the local authority until they otherwise resolve.

Expenses of local authority.

51. The expense of providing and re-verifying local standards, the salaries of the inspectors, and all other expenses incurred by the local authority under this Act shall be paid out of the local rate.

The treasurer of the county in which a borough in England having a separate court of quarter sessions is situate shall exclude from the account kept by him of all sums expended out of the county rate to which the borough is liable to contribute all sums expended in pursuance of this Act.

Power of local authorities to combine for purposes of Act.

52. Any two or more local authorities may combine, as regards either the whole or any part of the areas within their jurisdiction, for all or any of the purposes of this Act, upon such terms and in such manner as may be from time to time mutually agreed upon.

An inspector appointed in pursuance of an agreement for such combination shall, subject to the terms of his appointment, have the same authority, jurisdiction and duties as if he had been appointed by each of the authorities who are parties to such agreement.

Power to local authority to make byelaws as to local verification, &c.

53. Any local authority from time to time, with the approval of the Board of Trade, may make, and when made, revoke, alter, and add to, byelaws for regulating the comparison with the local standards of such authority, and the verification and stamping of weights and measures in use in their county or borough, and for regulating the local comparison of the local standards of such authority, and generally for regulating the duties under this Act of the inspectors appointed by the local authority or of any of those inspectors. Such byelaws may impose fines not exceeding twenty shillings for the breach of any byelaw, to be recovered on summary conviction. The Board of Trade before approving any such byelaws shall cause them to be published in such manner as they think sufficient for giving notice thereof to all persons interested (*h*).

Appointment of inspectors in towns and other places.

54. Where a town or other place has been or may hereafter be authorised under any Act, whether local or otherwise, to appoint inspectors or examiners of weights and measures, or where any other place has been or may hereafter be, by charter Act of Parliament or otherwise, possessed of legal jurisdiction, and such town or place is for the time being provided with legal local standards, the magistrates of such town or place, or other persons authorised as aforesaid, may appoint inspectors of weights and measures within the limits of their jurisdiction, and suspend and dismiss such inspectors, and such inspectors shall within such limits exclusively have the same power and discharge the same duties as inspectors of weights and measures appointed under this Act by the local authority for the county, and shall pay over and account for the fees received by them under this Act, to such persons as may be duly authorised by the magistrates or other persons appointing them (*i*).

Power of vestry, &c. in Metropolis to put an end to appointment of inspectors of weights and measures under Local Act.

55. Where in any place in the Metropolis—that is to say, in the parishes and places in which the Metropolitan Board of Works have power to levy the consolidated rate—any vestry commissioners or other body have any duties or powers, under any Local Act charter or otherwise, in relation to the appointment of inspectors or examiners of weights and measures, such vestry commissioners or body may, at a meeting specially convened for the purpose of which not less than fourteen days' notice has been given, resolve that it is expedient that their said duties and powers should cease in such place.

The clerk or other like officer of such vestry commissioners or body shall give notice of such resolution to the clerk of the peace for the county in

(*h*) See 52 & 53 Vict. c. 21, s. 1 (3).
(*i*) As to the county of London, see 52 & 53 Vict. c. 21, s. 16.

which such place is situate, and the clerk of the peace shall lay such notice before the next practicable court of quarter sessions for the county, and after the receipt of such notice by the court of quarter sessions the appointment, and all powers of appointment, of any inspector or examiner appointed under such Local Act charter or otherwise, shall cease in the said place, without prejudice to any proceedings then pending for penalties or otherwise (*k*).

Legal Proceedings.

Prosecution of offences and recovery of fines.

56. All offences under this Act may be prosecuted and all fines and forfeitures under this Act may be recovered on summary conviction before a court of summary jurisdiction in manner provided by the Summary Jurisdiction Act.

The court when hearing and determining an information or complaint under this Act shall be constituted either of two or more justices of the peace in petty sessions sitting at a place appointed for holding petty sessions, or of some magistrate or officer sitting alone or with others at some court or other place appointed for the administration of justice and for the time being empowered by law to do alone any act authorised to be done by more than one justice of the peace.

Provisions as to summary proceedings.

57. The following enactments shall apply to proceedings under this Act before a court of summary jurisdiction; (that is to say,)

1. The description of any offence in the words of this Act, or in similar words, shall be sufficient in law; and
2. Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany in the same section the description of the offence, may be proved by the defendant but need not be specified or negatived in the information or complaint, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant; and
3. A warrant of commitment shall not be held void by reason of any defect therein, if it be therein alleged that the offender has been convicted, and there is a good and valid conviction to sustain the same.
4. Such portion of any fine under this Act, not exceeding a moiety, as the court of summary jurisdiction before whom a person is convicted think fit to direct, may, if the court in their discretion so order, be paid to the informer.
5. All weights measures scales balances and steelyards forfeited under this Act shall be broken up, and the materials thereof may be sold or otherwise disposed of as a court of summary jurisdiction direct, and the proceeds of such sale shall be applied in like manner as fines under this Act.

Limitation as to conviction for second offences.

58. A person shall not be liable to any increased penalty for a second offence under any section of this Act unless that offence was committed after a conviction within five years previously for an offence under the same section.

Evidence as to possession.

59. Where any weight measure scale balance steelyard or weighing machine is found in the possession of any person carrying on trade within the meaning of this Act, or on the premises of any person which, whether a building or in the open air, whether open or enclosed, are used for trade within the meaning of this Act, such person shall be deemed for the purposes of this Act, until the contrary is proved, to have such weight measure scale balance steelyard or weighing machine in his possession for use for trade.

Appeal from conviction.

60. Any person who feels himself aggrieved by a conviction or order of a court of summary jurisdiction under this Act may appeal therefrom, subject in England to the conditions following; that is to say,

(1.) The appeal shall be made to the next practicable court of general or quarter sessions having jurisdiction in the county or place in which the decision of the court was given, and holden not less than twenty-one days after the day on which such decision was given; and

(2.) The appellant shall, within ten days after the day on which the decision was given, serve notice on the other party and on the clerk of the court of summary jurisdiction of his intention to appeal, and of the general grounds of such appeal; and

(3.) The appellant shall, within three days after the day on which he gave

(*k*) Now as to the County of London, see 52 & 53 Vict. c. 21, s. 16.

notice of appeal, enter into a recognizance before a court of summary jurisdiction, with or without a surety or sureties as the court may direct, conditioned to appear at the said sessions and to try such appeal, and to abide the judgment of the court thereon, and to pay such costs as may be awarded by the court, or the appellant may, if the court of summary jurisdiction thinks it expedient, instead of entering into a recognizance, give such other security, by deposit of money with the clerk of the court of summary jurisdiction or otherwise, as the court deems sufficient; and

(4.) Where the appellant is in custody a court of summary jurisdiction may, if it seem fit, on the appellant entering into such recognizance or giving such other security as aforesaid, release him from custody; and

(5.) The court of appeal may adjourn the hearing of the appeal, and upon the hearing thereof may confirm, reverse, or modify the decision of the court of summary jurisdiction, or remit the matter to the court of summary jurisdiction with the opinion of the court of appeal thereon, or make such other order in the matter as the court thinks just. The court of appeal may also make such order as to costs to be paid by either party as the court thinks just; and

(6.) Whenever a decision is reversed by the court of appeal the clerk of the peace shall indorse on the conviction or order appealed against a memorandum that such conviction or order has been quashed, and whenever any copy or certificate of such conviction or order is made, a copy of such memorandum shall be added thereto, and shall be sufficient evidence that the conviction or order has been quashed in every case where such copy or certificate would be sufficient evidence of such conviction or order; and

(7.) Every notice in writing required by this section to be given by an appellant may be signed by him, or by his agent on his behalf, and may be transmitted in a registered letter by the post in the ordinary way, and shall be deemed to have been served at the time when it would be delivered in the ordinary course of the post.

Provision as to action against person acting in execution of Act.

61. In an action for any act done in pursuance or execution or intended execution of this Act, or in respect of any alleged neglect or default in the execution of this Act, tender of amends before the action is commenced may in lieu of or in addition to any other plea be pleaded, if the action was commenced after such tender, or is proceeded with after payment into court of any money in satisfaction of the plaintiff's claim. If the action is commenced after such tender, or is proceeded with after such payment, and the plaintiff does not recover more than the sum tendered or paid respectively, the plaintiff shall not recover any costs incurred after such tender or payment, and the defendant shall be entitled to his costs, to be taxed as between solicitor and client, as from the time of such tender or payment; but this provision shall not affect costs on any injunction in the action.

III.—Miscellaneous.

Continuance of inquisition recorded for ascertaining rents and tolls payable.

62. Every inquisition which, in pursuance of any Act hereby repealed, has been taken for ascertaining the amount of contracts to be performed or rents to be paid in grain or malt, or in any other commodity or thing, or with reference to the measure or weight of any grain, malt or other commodity or thing, and the amount of any toll, rate or duty payable according to any weight or measure in use before the passing of the said Act, and has been enrolled of record in her Majesty's Court of Exchequer, shall continue in force, and may be given in evidence in any legal proceeding, and the amount ascertained by such inquisition shall, when converted into imperial weights and measures, continue to be the rule of payment in regard to all such contracts rents tolls rates or duties.

Orders in Council.

63. It shall be lawful for her Majesty in Council from time to time to make orders for the purposes of this Act, and to revoke and vary any such order.

All Orders in Council made under this Act shall be published in the London Edinburgh and Dublin Gazettes, and shall be forthwith laid before both Houses of Parliament, and shall have full effect as part of this Act.

Effect of schedules.

64. The schedules to this Act, with the notes thereto, shall be construed and have effect as part of this Act.

65. Where an enactment refers to any Act repealed by this Act, or to any enactment thereof, the same shall be construed to refer to this Act or to the corresponding enactment of this Act. Construction of Acts referring to repealed enactments.

Savings and Definitions.

66. Nothing in this Act shall affect the validity of the models of gas holders verified and deposited in the standards department of the Board of Trade in pursuance of the Act of the session of the twenty-second and twenty-third years of the reign of her present Majesty, chapter sixty-six, intituled "An Act for regulating measures used in sales of gas," and of the Acts amending the same, and the provisions of this Act with respect to Board of Trade standards shall apply to such models; and the provisions of this Act with respect to defining the amount of error to be tolerated in local standards when verified or re-verified, shall apply to defining the amount of error to be tolerated in such copies of the said models of gas holders as are provided by any justices council commissioners or other local authority in pursuance of the said Acts. Saving as to models of gas holders under 22 & 23 Vict. c. 66.

67. Nothing in this Act shall extend to prohibit, defeat, injure, or lessen the rights granted by charter to the master, wardens, and commonalty of the mystery of Founders of the City of London. Saving as to rights of the Founders Company.

68. Nothing in this Act shall prohibit, defeat, injure, or lessen the right of the mayor and commonalty and citizens of the City of London, or of the lord mayor of the City of London for the time being, with respect to the stamping or sealing of weights and measures, or with respect to the gauging of wine or oil, or other gaugeable liquors. Saving as to London.

69. Nothing in this Act shall extend to supersede, limit, take away, lessen, or prevent the authority which any person or body politic or corporate, or any person appointed at any court leet for any hundred or manor, or any jury or ward inquest, may have or possess for the examining, regulating, seizing, breaking, or destroying any weights, balances, or measures within their respective jurisdictions, and for the purposes of this section the court of burgesses of the City of Westminster shall be deemed to be a body politic, and nothing in this Act shall be deemed to repeal or supersede the Acts relating to that court, or lessen, diminish, or alter the powers of the same. Act not to abridge the power of the leet jury, &c.

70. In this Act, unless the context otherwise requires,— Definitions:

The expression "the Summary Jurisdiction Act" means the Act of the session of the eleventh and twelfth years of the reign of her present Majesty, chapter forty-three, intituled "An Act to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales with respect to summary convictions and orders," inclusive of any Acts amending the same: "Summary Jurisdiction Act:"

The expression "court of summary jurisdiction" means any justice or justices of the peace, metropolitan police magistrate, stipendiary or other magistrate or officer, by whatever name called, to whom jurisdiction is given by the Summary Jurisdiction Act or any Acts therein referred to: "Court of summary jurisdiction:"

The expression "quarter sessions" includes general sessions: "Quarter sessions:"

The expression "Treasury" means the Commissioners of her Majesty's Treasury: "Treasury:"

The expression "person" includes a body corporate: "Person:"

The expression "stamping" includes casting, engraving, etching, branding, or otherwise marking, in such manner as to be so far as practicable indelible, and the expression "stamp" and other expressions relating thereto shall be construed accordingly: "Stamping:"

The expression "coin weight" means a weight used or intended to be used for weighing coin: "Coin weight:"

The expression "Weights and Measures Act, 1835," means the Act of the fifth and sixth years of the reign of King William the Fourth, chapter sixty-three, intituled "An Act to repeal an Act of the fourth and fifth year of his present Majesty, relating to weights and measures, and to make other provisions instead thereof." "Weights and Measures Act, 1835."

IV.—APPLICATION OF ACT TO SCOTLAND.

This Act shall apply to Scotland, with the following modifications:—

71. In the application of this Act to Scotland, the expression "rents and Application of imperial weights

and measures to tolls, &c.

tolls" includes all stipends, feu duties, customs, casualties, and other demands whatsoever payable in grain, malt, or meal, or any other commodity or thing.

The fiars prices of all grain in every county shall be struck by the imperial quarter, and all other returns of the prices of grain shall be set forth by the same, without reference to any other measure whatsoever.

Any person who acts in contravention of this provision shall be liable to a fine not exceeding five pounds.

Recovery and application of penalties.

72. All offences under this Act which may be prosecuted, and all fines and forfeitures under this Act which may be recovered on summary conviction, may in Scotland be prosecuted or recovered, with expenses, before the sheriff or sheriff substitute or two or more justices of the peace of the county, or the magistrates of the burgh wherein the offence was committed or the offender resides, at the instance either of the procurator fiscal or of any person who prosecutes.

Every person found liable in Scotland in any fine recoverable summarily under this Act shall, failing payment thereof immediate or within a specified time, as the case may be, and expenses, be liable to be imprisoned for a term not exceeding sixty days, and the conviction and warrant may be in the form number three of Schedule K. of the Summary Procedure Act, 1864.

27 & 28 Vict. c. 53.

All fines and forfeitures so recovered, subject to any payment made to the informer, shall be paid as follows:

(a) To the Queen's and Lord Treasurer's Remembrancer, on behalf of her Majesty, when the court is the sheriff court:

(b) To the collector of county rates, in aid of the county general assessment, when the court is the justice of the peace court:

(c) To the treasurer of the burgh, in aid of the funds of the burgh, when the court is a burgh court:

(d) To the treasurer of the board of police, or commissioners of police, in aid of the police funds, when the court is a police court.

Appeal.

73. An appeal against a conviction under this Act in Scotland shall be to the Court of Justiciary at the next circuit court, or where there are no circuit courts, to the High Court of Justiciary at Edinburgh, and not otherwise, and such appeal may be made in the manner and under the rules, limitations, and conditions contained in the Act of the twentieth year of the reign of King George the Second, chapter forty-three, intituled "An Act for taking away and abolishing heritable jurisdictions in Scotland," or as near thereto as circumstances admit; with this variation, that the appellant shall find caution to pay the fine and expenses awarded against him by the conviction or order appealed from, together with any additional expenses awarded by the court dismissing the appeal.

Definitions as regards Scotland.

74. In the application of this Act to Scotland,—

The expression "enter into a recognizance" means grant a bond of caution:

The expression "any court of record" includes the Court of Session and the ordinary sheriff court:

The expression "burgh" shall include royal burgh and parliamentary burgh:

The expression "plaintiff" means pursuer, and the expression "defendant" means defender:

The expression "solicitor" means writer or agent:

27 & 28 Vict. c. 53.

The expression "Summary Jurisdiction Act" means the Summary Procedure Act, 1864, inclusive of any Act amending the same.

Power of sheriff.

75. A sheriff or sheriff substitute shall have the same power in relation to a local comparison of standards, and to the inspection comparison seizure and detention of weights and measures, and to entry for that purpose, as is given by this Act to a justice of the peace.

V.—Application of Act to Ireland.

This Act shall apply to Ireland with the following modifications:—

Contracts to be made by denominations of imperial weight, otherwise to be void.

76. In Ireland every contract bargain sale or dealing—

For any quantity of corn, grain, pulses, potatoes, hay, straw, flax, roots, carcases of beef or mutton, butter, wool, or dead pigs, sold, delivered, or agreed for;

Or for any quantity of any other commodity sold, delivered, or agreed for

by weight (not being a commodity which may by law be sold by the troy ounce or by apothecaries weight),

shall be made or had by one of the following denominations of Imperial weight; namely:—

the ounce avoirdupois;
the imperial pound of sixteen ounces;
the stone of fourteen pounds;
the quarter-hundred of twenty-eight pounds;
the half-hundred of fifty-six pounds;
the hundredweight of one hundred and twelve pounds; or
the ton of twenty hundredweight;

and not by any local or customary denomination of weight whatsoever, otherwise such contract bargain sale or dealing shall be void:

Provided always, that nothing in the present section shall be deemed to prevent the use in any contract bargain sale or dealing of the denomination of the quarter, half, or other aliquot part of the ounce pound or other denomination aforesaid, or shall be deemed to extend to any contract bargain sale or dealing relating to standing or growing crops.

Mode of weighing.

77. In Ireland every article sold by weight shall, if weighed, be weighed in full net standing beam; and for the purposes of every contract bargain sale or dealing the weight so ascertained shall be deemed the true weight of the article, and no deduction or allowance for tret or beamage, or on any other account, or under any other name whatsoever, the weight of any sack vessel or other covering in which such article may be contained alone excepted, shall be claimed or made by any purchaser on any pretext whatever under a penalty not exceeding five pounds.

Deductions prohibited.

A proceeding for the recovery of a penalty under this section shall be begun within three months after the offence is committed.

Providing of local standards and sub-standards.

78. (1.) The local authority in Ireland shall provide one complete set of local standards for their county or borough; also so many copies in iron or other sufficient material of the local standards.

(2.) The said copies of the local standards when duly verified as hereinafter mentioned shall be the local sub-standards, and shall be used for the verification of weights and measures brought by the public for verification as if they were local standards.

(3.) Not less than one set of local sub-standards, and one set of accurate scales, shall be provided for each petty sessions district in a county, and not less than two such sets shall be provided for a borough.

(4.) The local authority shall have the local standards from time to time duly compared and re-verified in manner directed by this Act.

(5.) The Commissioners of the Dublin Metropolitan Police shall not be under any obligation to provide local standards, but they may, with the assent of the Chief Secretary or Under-Secretary to the Lord Lieutenant, procure such sub-standards scales and stamps as they think necessary for the purposes of this Act in the district for which they are the local authority.

Inquiry by judge of assize and chairman of quarter sessions as to provision of local standards and sub-standards.

79. In Ireland, in every year—

(a) In the case of a county, the judge of assize at the first assizes held for the county by inquiry of the foreman of the grand jury; and

(b) In the case of every borough in a county, the recorder of the borough, or, if there be no recorder, the chairman of the quarter sessions for that county at the quarter sessions held next after the twenty-fifth day of March,

shall inquire whether one complete set of local standards, and a sufficient number of local sub-standards of weights and measures, and a sufficient number of scales and stamps (for verification), have been provided in such county or in such borough.

If it appear to the judge or chairman upon such inquiry that the same have not been so provided, he shall forthwith order the proper officer to provide a complete set of local standards and such sub-standards scales and stamps as appear to the judge or chairman making the order to be sufficient for the purposes of this Act, and that order shall have the effect in the case of a county of a presentment on the county for, and in the case of a borough, of an order on the council of the borough to raise by way of rate, the sum

necessary to execute the order, and the said officer shall within three months after he receives the order fully execute the same, and in default shall be liable to a fine not exceeding twenty pounds.

The proper officer shall, in the case of a county, be the treasurer of the county, and in the case of a borough, the town clerk or other proper officer of the borough.

Expenses of ex-officio inspectors.

80. Expenses incurred by any member of the Royal Irish constabulary as an ex-officio inspector of weights and measures in the execution of this Act shall be payable to such inspector by the person acting as treasurer of the local authority of the district on presentation of accounts of such expenses, to be furnished quarterly certified to be correct by the county inspector of the county.

The secretary of every grand jury being a local authority under this Act shall, at each assizes or presenting term, and the clerk of every other local authority shall once in every year lay before each such grand jury or other local authority an estimate of the sum which may appear to be necessary to meet such expenses until the next assizes or presenting term, or for the ensuing year; and every such grand jury or other local authority shall, without previous application to presentment sessions or other preliminary proceedings, present in advance to the person acting as treasurer the sum specified in such estimate, to be raised and paid out of the local rate; and if the sum so raised proves more than sufficient for the purpose, the balance shall be carried to the credit of the local rate by the person acting as treasurer, and if the sum so raised proves insufficient, the person acting as treasurer shall apply for payment of such expenses any other available funds in his hands.

Ex-officio inspectors of weights and measures.

81. Nothing in this Act shall authorise the local authority in Ireland, except the local authority of the borough of Dublin, to appoint inspectors of weights and measures, but such head or other constables in each petty sessions district as may be from time to time selected by the inspector general of constabulary, with the approval of the Lord Lieutenant, shall be ex-officio inspectors of weights and measures under this Act within that district, and shall perform their duties under this Act under the direction of the justices of petty sessions, without fee or reward, and notwithstanding any manorial jurisdiction or claim of jurisdiction within such district:

Provided that if within one month from the date of such selection the justices signify their disapproval of the selection of any head or other constable, another selection shall be made by the same authority, subject to the same conditions, and the inspector general of constabulary shall within three days after any selection has been made in a petty sessions district, give or cause to be given to the clerk of that district notice of such selection, and the clerk shall immediately make known the said selection to the justices of the district.

An ex-officio inspector of weights and measures may exercise, without any authority from a justice of the peace, the powers given by this Act to an inspector of weights and measures having such authority.

In the district in which the commissioners of the Dublin metropolitan police are the local authority under this Act, such of the superintendents inspectors or acting inspectors of the said police as may be selected by the local authority with the approval of the Lord Lieutenant shall be ex-officio inspectors of weights and measures within the said district (*a*).

Custody and use of local standards.

82. The local standards of every county or borough in Ireland shall be in the custody of such sub-inspector of constabulary as may be from time to time appointed for that county or borough by the inspector-general of constabulary, with the approval of the Lord Lieutenant.

Such sub-inspector shall, subject to such regulations as the inspector general of constabulary, with the approval of the Lord Lieutenant, from time to time makes, compare with the local standards in his custody, and adjust and verify the local sub-standards sent to him for the purpose, and when the same are correct shall stamp the same with a stamp of verification, and for the purpose of such verification and stamping, and of the verification of local standards, such sub-inspector of constabulary shall be deemed to be an inspector of weights and measures appointed under this Act.

Custody and periodical verification of local sub-standards.

83. The local sub-standards shall be deposited in the custody of the ex-officio inspector of weights and measures, and shall at least once in every year, and also at other times when required by the county inspector of con-

(*a*) Amended: 52 & 53 Vict. c. 21, s. 19.

stabulary of the county, or by the justices in petty sessions of the county, be compared with the local standards of the county and verified, and when so verified shall until the expiration of one year or any shorter period at which the next comparison of the same under this section is made be deemed to be local sub-standards and be valid local standards for the purpose of the comparison by way of verification or inspection of weights and measures under this Act.

The sub-standards provided by the commissioners of the Dublin metropolitan police shall be verified by comparison with the local standards of the city of Dublin, as directed by this section, with this qualification, that the said commissioners, and not the county inspector or the justices, shall have authority to require the same to be verified oftener than once a year.

Any person who uses any sub-standard for any purpose other than that authorized by this Act shall be liable to a fine not exceeding five pounds.

Recovery of fines, &c.

84. For the purpose of the prosecution of offences and the recovery of fines under this Act, in Ireland,—

(1.) The expression "Summary Jurisdiction Acts" in this Act means, within the police district of Dublin metropolis, the Acts regulating the powers and duties of justices of the peace for such district, or of the police of such district, and elsewhere in Ireland the Petty Sessions (Ireland) Act, 1851, and any Act amending or affecting the same; and

14 & 15 Vict. c. 93.

(2.) A court of summary jurisdiction when hearing and determining an information or complaint in any matter arising under this Act shall be constituted within the police district of Dublin metropolis of one of the divisional justices of that district sitting at a police court within the district, and elsewhere of a stipendiary magistrate sitting alone, or with others, or of two or more justices of the peace sitting in petty sessions at a place appointed for holding petty sessions; and

(3.) Appeals from a court of summary jurisdiction shall lie in the manner and subject to the conditions and regulations prescribed in the twenty-fourth section of the Petty Sessions (Ireland) Act, 1851, and any Acts amending the same.

14 & 15 Vict. c. 93.

Definitions.

85. In this Act, unless the context otherwise requires,

The expression "Lord Lieutenant" means the lieutenant or other chief governor or governors of Ireland for the time being:

The expression "treasurer" includes the finance committee and the secretary of the grand jury for the county of Dublin.

VI.—REPEAL.

Repeal.

86. The Acts mentioned in the first part of the Sixth Schedule to this Act are hereby repealed to the extent in the third column of that schedule mentioned; subject to the following qualification, that is to say, that so much of the said Acts as is set forth in the second part of that schedule shall be re-enacted (*b*) in manner therein appearing, and shall be in force as if enacted in the body of this Act.

Provided that,—

(1.) Every inspector appointed in pursuance of any enactment hereby repealed shall continue in office as if he had been appointed in pursuance of this Act; and

(2.) Any person holding office as examiner of weights and measures under any enactment repealed by this Act, and not being an inspector of weights and measures within the meaning of this Act, shall continue in office and receive the same remuneration, and have the same powers and duties and be subject to the same liabilities and to the same power of dismissal as if this Act had not passed.

(3.) Every notice published in a Gazette in relation to coin weights in pursuance of any enactment hereby repealed shall continue in force.

(4.) All weights and measures duly verified and stamped in pursuance of any enactment hereby repealed, shall continue and be as valid as if they had been verified and stamped in pursuance of this Act, and that although such weights or measures could not have been verified and stamped in pursuance of this Act; and all weights and measures which at the commencement of this Act may lawfully be used without being stamped with a stamp of verification or a stamp

(*b*) See 52 & 53 Vict. c. 21, s. 36, and 5th Sched.

of their denomination, and which are required by this Act to be stamped with such a stamp, may, notwithstanding they are not so stamped, be used until the expiration of six months after the commencement of this Act, without being subject to be seized or forfeited, and without rendering the person using or having possession of the same subject to any fine.

(5.) This repeal shall not affect—

(a) The past operation of any enactment hereby repealed, nor anything duly done or suffered under any enactment hereby repealed; nor

(b) Any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment hereby repealed; nor

(c) Any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment hereby repealed; nor

(d) Any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid; and any such investigation, legal proceeding, and remedy may be carried on as if this Act had not passed; and

(6.) This repeal shall not revive any enactment, right, office, privilege, matter, or thing not in force or existing at the commencement of this Act.

SCHEDULES.

FIRST SCHEDULE.

Sections 4, 10, 13, 64.

PART I.

Imperial Standards.

The following standards were constructed under the direction of the Commissioners of her Majesty's Treasury, after the destruction of the former imperial standards in the fire at the Houses of Parliament.

The imperial standard for determining the length of the imperial standard yard is a solid square bar, thirty-eight inches long and one inch square in transverse section, the bar being of bronze or gun-metal; near to each end a cylindrical hole is sunk (the distance between the centres of the two holes being thirty-six inches) to the depth of half an inch, at the bottom of this hole is inserted in a smaller hole a gold plug or pin, about one-tenth of an inch in diameter, and upon the surface of this pin there are cut three fine lines at intervals of about the one-hundreth part of an inch transverse to the axis of the bar, and two lines at nearly the same interval parallel to the axis of the bar; the measure of length of the imperial standard yard is given by the interval between the middle transversal line at one end and the middle transversal line at the other end, the part of each line which is employed being the point midway between the longitudinal lines; and the said points are in this Act referred to as the centres of the said gold plugs or pins; and such bar is marked "copper 16 oz., tin 2½, zinc 1. Mr. Baily's metal. No. 1 standard yard at 62°·00 Fahrenheit. Cast in 1845. Troughton & Simms, London."

The imperial standard for determining the weight of the imperial standard pound is of platinum, the form being that of a cylinder nearly 1·35 inch in height and 1·15 inch in diameter, with a groove or channel round it, whose middle is about 0·34 inch below the top of the cylinder, for insertion of the points of the ivory fork by which it is to be lifted; the edges are carefully rounded off, and such standard pound is marked, P.S. 1844, 1 lb.

Sections 5, 35, 64.

PART II.

Parliamentary Copies of Imperial Standards.

The following copies of the standards above mentioned in part one of this Schedule were constructed at the same time as the above standards. They are of the same construction and form as the above standards, and they are respectively marked and deposited as follows:—

(1.) One of the copies of the imperial standard for determining the

imperial standard yard, being a bronze bar, marked "copper 16 oz., tin 2½, zinc 1. Mr. Baily's metal. No. 2. Standard yard at 61°·94 Fahrenheit. Cast in 1845. Troughton & Simms, London;" and one of the copies of the imperial standard for determining the imperial standard pound marked No. 1., P.C. 1844, 1 lb., have been deposited at the Royal Mint;

(2.) One other of the copies of the imperial standard for determining the imperial standard yard, being a bronze bar, marked "copper 16 oz., tin 2½, zinc 1. Mr. Baily's metal. No. 3. Standard yard at 62°·10 Fahrenheit. Cast in 1845. Troughton & Simms, London," and one other of the copies of the imperial standard for determining the imperial standard pound marked No. 2., P.C. 1844, 1 lb., have been delivered to the Royal Society of London;

(3.) One other of the copies of the imperial standard for determining the imperial standard yard, being a bronze bar, marked "copper 16 oz., tin 2½, zinc 1. Mr. Baily's metal. No. 5. Standard yard at 62°·16 Fahrenheit. Cast in 1845. Troughton & Simms, London," and one other of the copies of the imperial standard for determining the imperial standard pound marked No. 3., P.C. 1844, 1 lb., have been deposited in the Royal Observatory of Greenwich;

(4.) The other of the copies of the imperial standard for determining the imperial standard yard, being a bronze bar, marked "copper 16 oz., tin 2½, zinc 1. Mr. Baily's metal. No. 4. Standard yard at 61°·98 Fahrenheit. Cast in 1845. Troughton & Simms, London," and the other of the copies of the imperial standard for determining the imperial standard pound marked No. 4., P.C. 1844, 1 lb., have been immured in the New Palace at Westminster.

SECOND SCHEDULE.

Sections 8, 64.

BOARD OF TRADE STANDARDS.

STANDARDS of the measures and weights following are at the commencement of this Act in use under the direction of the Board of Trade.

MEASURES OF LENGTH.	MEASURES OF CAPACITY.
Denomination of Standard.	Denomination of Standard.
MEASURE OF LENGTH.	MEASURES OF CAPACITY.
100 feet.	Bushel.
66 feet, or a chain of 100 links.	Half-bushel.
Rod, pole, or perch.	Peck.
10 feet.	Gallon.
6 feet, or 2 yards.	Half-gallon.
5 feet.	Quart.
4 feet.	Pint.
3 feet, or 1 yard.	Half-pint.
2 feet.	Gill.
1 foot.	Half-gill.
1 inch divided into 12 duodecimal, 10 decimal, and 16 binary equal parts.	Quarter-gill.
	MEASURES USED IN THE SALE OF DRUGS.
	Fluid ounces:— 4, 3, 2, 1.
	Fluid drachms:— 4, 3, 2, 1.
	Minims:— 30, 20, 10, 5, 4, 3, 2, 1.

NOTE.—The brass gallon marked "Imperial Standard Gallon, Anno Domini MDCCCXXIV., Anno V G^iv Regis," which has a diameter equal to its height, and was made in pursuance of 5 Geo. 4, c. 74, s. 6, and is at the passing of this Act in the custody of the Warden of the Standards, shall be deemed to be a Board of Trade standard for the gallon.

Weights.

Denomination of Standard.	Denomination of Standard.	Denomination of Standard.
AVOIRDUPOIS WEIGHTS.	TROY BULLION WEIGHTS.	DECIMAL GRAIN WEIGHTS.
56 pounds.	500 ounces.	4,000 grains.
28 ,,	400 ,,	2,000 ,,
14 ,,	300 ,,	1,000 ,,
7 ,,	200 ,,	500 ,,
4 ,,	100 ,,	300 ,,
2 ,,	50 ,,	200 ,,
1 pound.	40 ,,	100 ,,
8 ounces.	30 ,,	50 ,,
4 ,,	20 ,,	30 ,,
2 ,,	10 ,,	20 ,,
1 ounce.	5 ,,	10 ,,
8 drams.	4 ,,	5 ,,
4 ,,	3 ,,	3 ,,
2 ,,	2 ,,	2 ,,
1 dram.	1 ounce.	1 ,,
½ ,,	0·5 ,,	0·5 grain.
240 grains, commonly called 10 pennyweights.	0·4 ,,	0·3 ,,
	0·3 ,,	0·2 ,,
120 grains, commonly called 5 pennyweights.	0·2 ,,	0·1 ,,
	0·1 ,,	0·05 ,,
72 grains, commonly called 3 pennyweights.	0·05 ,,	0·03 ,,
	0·04 ,,	0·02 ,,
48 grains, commonly called 2 pennyweights.	0·03 ,,	0·01 ,,
	0·02 ,,	
24 grains, commonly called 1 pennyweight.	0·01 ,,	
	0·005 ,,	
	0·004 ,,	
	0·003 ,,	
	0·002 ,,	
	0·001 ,,	

Coin Weights.

Denomination of Coin.	Standard Weight.	
	Imperial Weight.	Metric Weight.
Gold:	*Grains.*	*Grams.*
Five pound	616·37239	39·94028
Two pound	246·54895	15·97611
Sovereign	123·27447	7·98805
Half Sovereign	61·63723	3·99402
Silver:		
Crown	436·36363	28·27590
Half-crown	218·18181	14·13795
Florin	174·54545	11·31036
Shilling	87·27272	5·65518
Sixpence	43·63636	2·82759
Groat, or fourpence	29·09090	1·88506
Threepence	21·81818	1·41379
Twopence	14·54545	0·94253
Penny	7·27272	0·47126
Bronze:		
Penny	145·83333	9·44984
Halfpenny	87·50000	5·66990
Farthing	43·75000	2·83495

THIRD SCHEDULE.

PART I.

Sections 18, 64.

METRIC EQUIVALENTS.

TABLE of the Values of the Principal Denominations of Measures and Weights on the Metric System expressed by means of Denominations of Imperial Measures and Weights, and of the Values of the Principal Denominations of Measures and Weights of the Imperial system expressed by means of Metric Weights and Measures.

MEASURES OF LENGTH.

Metric Denominations and Values.		Equivalents in Imperial Denominations.			
——	Metres.	Miles.	Yards.	Feet.	Ins. Decimals.
Myriametre	10,000	6 or	376 10,936	0 0	11·9 11·9
Kilometre	1,000		1,093	1	10·79
Hectometre	100		109	1	1·079
Dekametre	10		10	2	9·7079
Metre	1		1	0	3·3708
Decimetre	$\frac{1}{10}$				3·9371
Centimetre	$\frac{1}{100}$				0·3937
Millimetre	$\frac{1}{1000}$				0·0394

MEASURE OF SURFACE.

Metric Denominations and Values.		Equivalents in Imperial Denominations.		
——	Square Metres.	Acres.	Square Yards.	Decimals.
Hectare, *i.e.*, 100 Ares	10,000	2 or	2280·3326 11,960·3326	
Dekare, *i.e.*, 10 Ares	1,000		1196·0333	
Are	100		119·6033	
Centiare, *i.e.*, $\frac{1}{100}$-Are	1		1·1960	

MEASURES OF CAPACITY.

Metric Denominations and Values.		Equivalents in Imperial Denominations.						
——	Cubic Metres.	Quarters.	Bushels.	Pecks.	Gallons.	Quarts.	Pints.	Decimals.
Kilolitre, *i.e.*, 1,000 Litres	1	3	3	2	0	0	0·77	
Hectolitre, *i.e.*, 100 Litres	$\frac{1}{10}$		2	3	0	0	0·077	
Dekalitre, *i.e.*, 10 Litres	$\frac{1}{100}$			1	0	0	1·6077	
Litre	$\frac{1}{1000}$						1·76077	
Decilitre, *i.e.*, $\frac{1}{10}$-Litre	$\frac{1}{10000}$						0·176077	
Centilitre, *i.e.*, $\frac{1}{100}$-Litre	$\frac{1}{100000}$						0·0176077	

Weights.

Metric Denominations and Values.		Equivalents in Imperial Denominations.					
—	Grams.	Cwts.	Stones.	Pounds.	Ounces.	Drams.	Decimals.
Millier	1,000,000	19	5	6	9	15·04	
Quintal	100,000	1	7	10	7	6·304	
Myriagram	10,000		1	8	0	11·8304	
Kilogram	1,000	(or 15432·3487 grains)			2	3	4·3830
Hectogram	100					3	8·4383
Dekagram	10						5·6438
Gram	1						0·56438
Decigram	$\frac{1}{10}$						0·056438
Centigram	$\frac{1}{100}$						0·0056438
Milligram	$\frac{1}{1000}$						0·00056438

Measures of Length.

Imperial Measures.	Equivalents in Metric Measures.			
	Millimetre.	Decimetre.	Metre.	Kilometre.
Inch	= 25·39954			
Foot or 12 inches	..	= 3·04794	= 0·30479	
Yard, or 3 feet, or 36 Inches	..	..	= 0·91438	
Fathom, or 2 yards, or 6 feet	..	..	= 1·82877	
Pole or 5½ yards	..	..	= 5·02911	
Chain, or 4 poles, or 22 yards	..	..	= 20·11644	
Furlong 40 poles, or 220 yards	..	..	= 201·16437	= 0·20116
Mile, 8 furlongs, or 1,760 yards	..	..	= 1,609·31493	= 1·60931

Measures of Surface.

Imperial Measures.	Equivalents in Metric Measures.			
	Square Decimetres.	Square Metres.	Ares.	Hectares.
Square inch	= 0·06451			
Square foot or 144 square inches	= 9·28997	= 0·092900		
Square yard, or 9 square feet, or 1,296 square inches	= 83·60971	= 0·836097		
Pole or perch, or 30¼ square yards	..	= 25·291939		
Rood, or 40 perches, or 1,210 square yards	..	..	= 10·116776	
Acre, or 4 roods, or 4,840 square yards	..	..	..	= 0·40467
Square mile or 640 acres	..	..	..	= 258·98945

MEASURES OF CAPACITY.

Imperial Measures.	Equivalents in Metric Measures.			
	Decilitres.	Litres.	Dekalitres.	Hectolitres.
Gill	= 1·41983	= 0·14198		
Pint or 4 gills	= 5·67932	= 0·56793		
Quart or 2 pints	..	= 1·13587		
GALLON or 4 quarts	..	= 4·54346		
Peck or 2 gallons.....	..	= 9·08692	= 0·90869	
Bushel, or 8 gallons, or 4 pecks	..	..	= 3·63477	
Quarter or 8 bushels	..	..	..	= 2·90781

CUBIC MEASURE.

Imperial Measures.	Equivalents in Metric Measures.		
	Cubic Centimetres.	Cubic Decimetres.	Cubic Metres.
Cubic inch	16·38618		
Cubic foot or 1,728 cubic inches	..	28·31531	
Cubic yard or 27 cubic feet	..	..	0·76451

WEIGHTS.

Imperial Weights.	Equivalents in Metric Weights.			
	Grams.	Dekagrams.	Kilograms.	Millier or Metric Ton.
Grain	= 0·06479895			
Dram	= 1·77185			
Ounce, avoirdupois, or 16 drams, or 437·5 grains	= 28·34954	= 2·83495	.....	..
POUND, or 16 ounces, or 256 drams, or 7,000 grains	=453·59265	=45·35927	= 0·45359	
Hundredweight or 112 lbs.	..	..	= 50·80238	
Ton or 20 cwt.	..	..	=1016·04754	= 1·01605
Ounce, troy, or 480 grains	= 31·103496	= 3·11035		

Sections 38, 64.

PART II.

Metric Standards.

List of metric standards in the custody of the Board of Trade at the passing of this Act:—

Measures of Length.

Double metre or 2 metres.
Metre or 1 metre.
Decimetre or 0·1 ,,
Centimetre or 0·01 ,,
Millimetre or 0·001 ,,

Weights.

20, 10, 5, 2 kilograms.
Kilogram.
500, 200, 100, 50, 20, 10, 5, 2, 1 grams.
5, 2, 1 decigrams.
5, 2, 1, 0·5 milligrams.

Measures of Capacity.

20, 10, 5, 2 litres.
Litre.
0·5 litre or 500 cubic centimetres.
0·2 ,, 200 ,,
0·1 ,, 100 ,,
0·05 ,, 50 ,,
0·02 ,, 20 ,,
0·01 ,, 10 ,,
0·005 ,, 5 ,,
0·002 ,, 2 ,,
0·001 ,, 1 ,,

Sections 40, 50, 64.

FOURTH SCHEDULE.

Local Authorities.

ENGLAND.

Area.	Local Authority.	Local Rate.
County	The justices in general or quarter sessions assembled.	The county rate.
County of the city of London.	The court of the Lord Mayor and aldermen of the city.	The consolidated rate.
Borough	The mayor, aldermen, and burgesses acting by the council.	The borough fund and borough rate.

SCOTLAND.

County	The justices in general or quarter sessions assembled.	The county general assessment.
Burgh	The magistrates	The police assessment.

IRELAND.

Area.	Local Authority.	Local Rate.
County	The grand jury acting at any assizes or presenting term.	The presentments to be made by the grand jury.
Such portion of the police district of Dublin metropolis as is without the municipal boundary of the borough of Dublin.	The Commissioners of the Dublin metropolitan police.	The funds applicable to defray the expenses of the Dublin metropolitan police.
Borough	Town Council.....	Rate to be levied by the council, or if the borough is liable to county cess and no rate is levied in the borough, the county cess of the county in which the borough or the larger part thereof is situate.

NOTES.

For the purposes of this schedule—

The expression "county," as regards England, does not include a county of a city or a county of a town, but includes every riding, division, or parts of a county having a separate court of quarter sessions. The Soke of Peterborough shall be deemed to be a county, but every other liberty of a county not forming part of the City of London shall be deemed to form part of the county in which the same is situate or which it adjoins, and if it adjoins more than one county, then of the county with which it has the longest common boundary.

The expression "borough," as regards England, means any place for the time being subject to the Municipal Corporation Act, 1835, and any Act amending the same, which has a separate commission of the peace.

The expression "county," as regards Ireland, includes a riding and a county of a city and a county of a town.

The county of Dublin shall be deemed not to include any portion of the police district of Dublin metropolis.

The two constabulary districts of the county of Galway shall respectively be deemed to be counties for the purposes of this Act.

The expression "borough," as regards Ireland, means any borough or town corporate.

In the borough of Dublin the rate to be levied by the council shall mean the improvement rate.

[FIFTH SCHEDULE (*a*).

Sections 47, 64.

FEES OF INSPECTORS.

The following fees are the maximum fees which, unless altered as authorised by this Act, may be taken by any inspector of weights and measures appointed under this Act.

For comparing and stamping all brass weights :—	*s.*	*d.*
Each half hundredweight	0	9
Each quarter of a hundredweight	0	6
Each stone	0	4
Each weight under a stone to a pound inclusive	0	1
Each weight under a pound	0	0½
Each set of weights of a pound and under.....	0	2

(*a*) Now repealed: 52 & 53 Vict. c. 21, s. 36.

For comparing and stamping all iron weights, or weights of other descriptions not made of brass:—	s.	d.
Each half hundredweight	0	3
Each quarter of a hundredweight	0	2
Each stone	0	1
Each weight under a stone	0	0½
Each set of weights of a pound and under	0	2

For comparing and stamping all wooden measures:—	s.	d.
Each bushel	0	3
Each half bushel	0	2
Each peck, and all under	0	1
Each yard	0	0½

For comparing and stamping all measures of capacity of liquids made of copper or other metal:—	s.	d.
Each four gallon	0	9
Each two gallon	0	4
Each gallon	0	2
Each half gallon	0	1
Each quart and under	0	0½ (*b*).]

Section 64, 86.

SIXTH SCHEDULE.

First Part.

Enactments repealed.

A description or citation of a portion of an Act is inclusive of the word, section, or other part first or last mentioned, or otherwise referred to as forming the beginning or as forming the end of the portion described in the description or citation.

Portions of Acts which have already been specifically repealed are in some instances included in the repeal in this schedule, in order to preclude henceforth the necessity of looking back to previous Acts.

Session and chapter.	Title or short title of Act.	Extent of repeal.
31 Edw. 3, st. 1 ..	The statute made at Westminster on the Monday next after the feast of Easter, in the thirty-first year, statute the first.	Chapter two.
6 Anne, c. 11..... (5 & 6 Anne, c. 8. in Ruffhead.)	An Act for the union of the two kingdome of England and Scotland.	Article seventeen.
15 Geo. 2, c. 20 ..	An Act to prevent the counterfeiting of gold and silver lace, and for settling and adjusting the proportions of fine silver and silk, and for the better making of gold and silver thread.	Section five.
35 Geo. 3, c. 102 ..	An Act for the more effectual prevention of the use of defective weights, and of false and unequal balances.	The whole Act.

(*b*) This schedule is repealed: 52 & 53 Vict. c. 21, s. 36.

Session and chapter.	Title or short title of Act.	Extent of repeal.
36 Geo. 3, c. 85....	An Act for the better regulation of mills.	Section one from "and any person or persons appointed" down to "with respect to weights and balances," and from "and every miller or other persons as aforesaid, in whose mill shall be found any weight or weights" to the end of the section.
37 Geo. 3, c. 143 ..	An Act to explain and amend an Act made in the thirty-fifth year of the reign of his present Majesty, intituled "An Act for the more effectual prevention of the use of defective weights and of false and unequal balances."	The whole Act.
55 Geo. 3, c. 43 ..	An Act for the more effectual prevention of the use of false and deficient measures.	The whole Act.
5 Geo. 4, c. 74	An Act for ascertaining and establishing uniformity of weights and measures.	The whole Act, except section twenty-five.
6 Geo. 4, c. 12	An Act to prolong the time of the commencement of an Act of the last session of Parliament for ascertaining and establishing uniformity of weights and measures, and to amend the said Act.	The whole Act.
5 & 6 Will. 4, c. 63	An Act to repeal an Act of the fourth and fifth year of his present Majesty relating to weights and measures, and to make other provisions instead thereof.	The whole Act.
16 & 17 Vict. c. 29	An Act for regulating the weights used in sales of bullion.	The whole Act.
16 & 17 Vict. c. 79	An Act for making sundry provisions with respect to municipal corporations in England.	Section five.
18 & 19 Vict. c. 72	An Act for legalizing and preserving the restored standards of weights and measures.	The whole Act.
22 & 23 Vict. c. 56	An Act to amend the Act of the fifth and sixth years of king William the Fourth, chapter sixty-three, relating to weights and measures.	The whole Act.
23 & 24 Vict. c. 119	An Act to amend the law relating to weights and measures in Ireland.	The whole Act.
24 & 25 Vict. c. 75	An Act for amending the Municipal Corporations Act.	Section six.

Session and chapter.	Title or short title of Act.	Extent of repeal.
25 & 26 Vict. c. 76	The Weights and Measures (Ireland) Amendment Act, 1862.	The whole Act except section two, and Part three and so much of Part four as relates to Part three.
25 & 26 Vict. c. 102	The Metropolis Management Amendment Act, 1862.	Section one hundred and one.
27 & 28 Vict. c. 117	The Metric Weights and Measures Act, 1864.	The whole Act.
29 & 30 Vict. c. 82	An Act to amend the Acts relating to the standard weights and measures, and to the standard trial pieces of the coin of the realm.	The whole Act.
30 & 31 Vict. c. 94	An Act to provide for the inspection of weights and measures, and to regulate the law relating thereto, in certain parts of the police district of Dublin metropolis.	The whole Act.
33 & 34 Vict. c. 10	The Coinage Act, 1870	Section seventeen, from the beginning of the section down to "weight of and for weighing such coin," and from "all weights which are not less in weight," to the end of the section.

SECOND PART.

Enactments re-enacted.

5 & 6 Will. 4, c. 63, s. 9.

Sale of coals by weight and not by measure.

[All coals, slack, culm, and cannel of every description shall be sold by weight, and not by measure. Every person who sells any coals, slack, culm, or cannel of any description by measure, and not by weight, shall be liable on summary conviction to a fine not exceeding forty shillings for every such sale (*c*).]

5 & 6 Will. 4, c. 63, s. 26.

Supply of weigh-masters in Ireland with scales, and copies of local standards.

In Ireland, in every city or town, not being a county of itself, every person, persons, or body corporate exercising the privilege of appointing a weigh-master, shall supply him with accurate scales, and with an accurate set of copies of the local standards, and in default shall be liable on summary conviction to a fine of twenty pounds, and the accuracy of such set of copies shall be certified under the hand of some inspector of weights and measures. They shall also, once at least in every five years, cause such copies to be readjusted by comparison with some local standards which have been verified by the Board of Trade, and in default shall be liable on summary conviction to a fine of five pounds.

Such set of copies shall for the purpose of comparison and verification be considered local standards, and shall be used for no other purpose whatever, and if they are so used the person using the same shall be liable on summary conviction to a fine of five pounds.

(*c*) Now repealed: 52 & 53 Vict. c. 21, s. 36, and 5th Sched.

22 & 23 Vict. c. 56, ss. 6, 8, 12.

Owners of markets to provide scales, &c.

The owners or managers of any public market in Great Britain where goods are exposed or kept for sale shall provide proper scales and balances and weights and measures or other machines, for the purpose of weighing or measuring all goods sold, offered, or exposed for sale in any such market, and shall deposit the same at the office of the clerk or toll collector of such market, or some other convenient place, and shall have the accuracy of all such scales and balances and weights and measures or other machines tested at least twice in every year by the inspector of weights and measures of and for the county, borough, or place where the market is situate;

All expenses attending the purchase, adjusting, and testing thereof shall be paid out of the moneys collected for tolls in the market;

Such clerk or toll collector shall at all reasonable times, whenever called upon so to do, weigh or measure all goods which have been sold, offered, or exposed for sale in any such market, upon payment of such reasonable sum as may from time to time be decided upon by the said owners or managers, subject to the approval and revision of the justices in general or quarter sessions assembled if such market be in England, or of the sheriff if it be in Scotland;

For every contravention of this section the offender shall be liable, on summary conviction, to a fine not exceeding five pounds.

22 & 23 Vict. c. 56, ss. 7, 8, 12.

Power to clerks of markets to inspect goods sold, &c. and if weighing found deficient to summon the offender.

Every clerk or toll collector of any public market in Great Britain, at all reasonable times, may weigh or measure all goods sold, offered, or exposed for sale in any such market; and if upon such weighing or measuring any such goods are found deficient in weight or measure or otherwise contrary to the provisions of this Act, such clerk or toll collector shall take the necessary proceedings for recovering any fine, to which the person selling, offering, or exposing for sale, or causing to be sold, offered, or exposed for sale, such goods, is liable, and the court convicting the offender may award out of the fine to such clerk or toll collector such reasonable remuneration as to the court seems fit.

For every offence against or disobedience to this section the offender shall be liable on summary conviction to a fine not exceeding five pounds.

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42 & 43 VICT. C. 72.

An Act to provide for the re-hearing of Investigations into Shipping Casualties, and to amend the Rules as to the mode of holding, and procedure at, such Investigations. [15*th August*, 1879.]

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42 & 43 VICT. C. 76.

An Act to amend the Law with respect to the Liability of Members of Banking and other Joint Stock Companies; and for other purposes. [15*th August*, 1879.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited as the Companies Act, 1879.

Act not to apply to Bank of England.

2. This Act shall not apply to the Bank of England.

Act to be construed with 25 & 26 Vict. c. 89, 30 & 31 Vict. c. 131, and 40 & 41 Vict. c. 26.

3. This Act shall, so far as is consistent with the tenor thereof, be construed as one with the Companies Acts, 1862, 1867, and 1877, and those Acts together with this Act may be referred to as the Companies Acts, 1862 to 1879.

Registration anew of company. 25 & 26 Vict. c. 89. 30 & 31 Vict. c. 131. 40 & 41 Vict. c. 26. 42 & 43 Vict. c. 76. 25 & 26 Vict. c. 89.

4. Subject as in this Act mentioned, any company registered before or after the passing of this Act as an unlimited company may register under the Companies Acts, 1862 to 1879, as a limited company, or any company already registered as a limited company may re-register under the provisions of this Act.

The registration of an unlimited company as a limited company in pursuance of this Act shall not affect or prejudice any debts, liabilities, obligations, or contracts incurred or entered into by, to, with, or on behalf of such company prior to registration, and such debts, liabilities, contracts, and obligations may be enforced in manner provided by Part VII. of the Companies Act, 1862, in the case of a company registering in pursuance of that Part.

Reserve capital of company, how provided. 25 & 26 Vict. c. 89. 30 & 31 Vict. c. 131. 40 & 41 Vict. c. 26. 42 & 43 Vict. c. 76.

5. An unlimited company may, by the resolution passed by the members when assenting to registration as a limited company under the Companies Acts, 1862 to 1879, and for the purpose of such registration or otherwise, increase the nominal amount of its capital by increasing the nominal amount of each of its shares.

Provided always, that no part of such increased capital shall be capable of being called up, except in the event of and for the purposes of the company being wound up.

And, in cases where no such increase of nominal capital may be resolved upon, an unlimited company may, by such resolution as aforesaid, provide that a portion of its uncalled capital shall not be capable of being called up, except in the event of and for the purposes of the company being wound up.

A limited company may by a special resolution declare that any portion of its capital which has not been already called up shall not be capable of being called up, except in the event of and for the purpose of the company being wound up; and thereupon such portion of capital shall not be capable of being called up, except in the event of and for the purposes of the company being wound up.

25 & 26 Vict. c. 89, s. 182, repealed, and liability of bank of issue unlimited in respect of notes.

6. Section one hundred and eighty-two of the Companies Act, 1862, is hereby repealed, and in place thereof it is enacted as follows:—A bank of issue registered as a limited company, either before or after the passing of this Act, shall not be entitled to limited liability in respect of its notes; and the members thereof shall continue liable in respect of its notes in the same manner as if it had been registered as an unlimited company; but in case the general assets of the company are, in the event of the company being wound up, insufficient to satisfy the claims of both the note-holders and the general creditors, then the members, after satisfying the remaining demands of the note-holders, shall be liable to contribute towards payment of the debts of the general creditors a sum equal to the amount received by the note-holders out of the general assets of the company.

For the purposes of this section the expression "the general assets of the company" means the funds available for payment of the general creditor as well as the note-holder.

It shall be lawful for any bank of issue registered as a limited company to make a statement on its notes to the effect that the limited liability does not extend to its notes, and that the members of the company continue liable in respect of its notes in the same manner as if it had been registered as an unlimited company.

Audit of accounts of banking companies.

7. (1.) Once at the least in every year the accounts of every banking company registered after the passing of this Act as a limited company shall be examined by an auditor or auditors, who shall be elected annually by the company in general meeting.

(2.) A director or officer of the company shall not be capable of being elected auditor of such company.

(3.) An auditor on quitting office shall be re-eligible.

(4.) If any casual vacancy occurs in the office of any auditor the surviving auditor or auditors (if any) may act, but if there is no surviving auditor, the directors shall forthwith call an extraordinary general meeting for the purpose of supplying the vacancy or vacancies in the auditorship.

(5.) Every auditor shall have a list delivered to him of all books kept by

the company, and shall at all reasonable times have access to the books and accounts of the company; and any auditor may, in relation to such books and accounts, examine the directors or any other officer of the company: Provided that if a banking company has branch banks beyond the limits of Europe, it shall be sufficient if the auditor is allowed access to such copies of and extracts from the books and accounts of any such branch as may have been transmitted to the head office of the banking company in the United Kingdom.

(6.) The auditor or auditors shall make a report to the members on the accounts examined by him or them, and on every balance sheet laid before the company in general meeting during his or their tenure of office; and in every such report shall state whether, in his or their opinion, the balance sheet referred to in the report is a full and fair balance sheet properly drawn up, so as to exhibit a true and correct view of the state of the company's affairs, as shown by the books of the company; and such report shall be read before the company in general meeting.

(7.) The remuneration of the auditor or auditors shall be fixed by the general meeting appointing such auditor or auditors, and shall be paid by the company.

Signature of balance sheet.

8. Every balance sheet submitted to the annual or other meeting of the members of every banking company registered after the passing of this Act as a limited company shall be signed by the auditor or auditors, and by the secretary or manager (if any), and by the directors of the company, or three of such directors at the least.

Application of 25 & 26 Vict. c. 89, 30 & 31 Vict. c. 131, and 40 & 41 Vict. c. 26.

9. On the registration, in pursuance of this Act, of a company which has been already registered, the registrar shall make provision for closing the former registration of the company, and may dispense with the delivery to him of copies of any documents with copies of which he was furnished on the occasion of the original registration of the company (*b*); but, save as aforesaid, the registration of such a company shall take place in the same manner and have the same effect as if it were the first registration of that company under the Companies Acts, 1862 to 1879, and as if the provisions of the Acts under which the company was previously registered and regulated had been contained in different Acts of Parliament from those under which the company is registered as a limited company.

25 & 26 Vict. c. 89, 30 & 31 Vict. c. 131, 40 & 41 Vict. c. 26, and 42 & 43 Vict. c. 76.

Privileges of Act available notwithstanding constitution of company.

10. A company authorised to register under this Act may register thereunder and avail itself of the privileges conferred by this Act, notwithstanding any provisions contained in any Act of Parliament, royal charter, deed of settlement, contract of copartnery, cost book, regulations, letters patent, or other instrument constituting or regulating the company.

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43 VICT. C. 19.

An Act to amend the Companies Acts of 1862, 1867, 1877, *and* 1879. [24*th March*, 1880.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited for all purposes as the Companies Act, 1880.

Construction of Acts. 25 & 26 Vict. c. 89. 30 & 31 Vict. c. 131. 40 & 41 Vict. c. 26. 42 & 43 Vict. c. 76.

2. This Act shall, so far as is consistent with the tenor thereof, be construed as one with the Companies Acts, 1862, 1867, 1877, and 1879, and the said Acts and this Act may be referred to as the Companies Acts, 1862 to 1880.

Accumulated profits may be returned to shareholders in reduction of paid-up capital.

3. When any company has accumulated a sum of undivided profits, which with the consent of the shareholders may be distributed among the shareholders in the form of a dividend or bonus, it shall be lawful for the company, by special resolution, to return the same, or any part thereof, to the shareholders in reduction of the paid-up capital of the company, the unpaid capital being thereby increased by a similar amount. The powers vested in the directors of making calls upon the shareholders in respect of moneys

(*b*) 25 & 26 Vict. c. 89, s. 184, *supra*.

unpaid upon their shares shall extend to the amount of the unpaid capital as augmented by such reduction.

No resolution to take effect till particulars have been registered.

4. No such special resolution as aforesaid shall take effect until a memorandum, showing the particulars required by law in the case of a reduction of capital by order of the court, shall have been produced to and registered by the Registrar of Joint Stock Companies.

Power to any shareholder within one month after passing of resolution to require company to retain moneys paid upon shares held by such person.

5. Upon any reduction of paid-up capital made in pursuance of this Act, it shall be lawful for any shareholder, or for any one or more of several joint shareholders, within one month after the passing of the special resolution for such reduction, to require the company to retain, and the company shall retain accordingly, the whole of the moneys actually paid upon the shares held by such person, either alone or jointly with any other person or persons, and which, in consequence of such reduction, would otherwise be returned to him or them, and thereupon the shares in respect of which the said moneys shall be so retained shall, in regard to the payment of dividends thereon, be deemed to be paid up to the same extent only as the shares on which payment as aforesaid has been accepted by the shareholders in reduction of their paid-up capital, and the company shall invest and keep invested the moneys so retained in such securities authorised for investment by trustees as the company shall determine, and upon the money so invested, or upon so much thereof as from time to time exceeds the amount of calls subsequently made upon the shares in respect of which such moneys shall have been retained, the company shall pay such interest as shall be received by them from time to time on such securities, and the amount so retained and invested shall be held to represent the future calls which may be made to replace the capital so reduced on those shares, whether the amount obtained on sale of the whole or such proportion thereof as represents the amount of any call when made, produces more or less than the amount of such call.

Company to specify amounts which shareholders have required them to retain under s. 5; also to specify amounts of profits returned to shareholders. 25 & 26 Vict. c. 89.

6. From and after such reduction of capital the company shall specify in the annual lists of members, to be made by them in pursuance of the twenty-sixth section of the Companies Act, 1862, the amounts which any of the shareholders of the company shall have required the company to retain, and the company shall have retained accordingly, in pursuance of the fifth section of this Act, and the company shall also specify in the statements of account laid before any general meeting of the company the amount of the undivided profits of the company which shall have been returned to the shareholders in reduction of the paid-up capital of the company under this Act.

Power of registrar to strike names of defunct companies off register.

7.—(1.) Where the Registrar of Joint Stock Companies has reasonable cause to believe that a company, whether registered before or after the passing of this Act, is not carrying on business or in operation, he shall send to the company by post a letter inquiring whether the company is carrying on business or in operation.

(2.) If the registrar does not within one month of sending the letter receive any answer thereto, he shall within fourteen days after the expiration of the month send to the company by post a registered letter referring to the first letter, and stating that no answer thereto has been received by the registrar, and that if an answer is not received to the second letter within one month from the date thereof, a notice will be published in the Gazette with a view to striking the name of the company off the register.

(3.) If the registrar either receives an answer from the company to the effect that it is not carrying on business or in operation, or does not within one month after sending the second letter receive any answer thereto, the registrar may publish in the Gazette and send to the company a notice that at the expiration of three months from the date of that notice the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved.

(4.) At the expiration of the time mentioned in the notice the registrar may, unless cause to the contrary is previously shown by such company, strike the name of such company off the register, and shall publish notice thereof in the Gazette, and on the publication in the Gazette of such last-mentioned notice the company whose name is so struck off shall be dissolved: Provided that the liability (if any) of every director, managing officer, and member of the company shall continue and may be enforced as if the company had not been dissolved.

(5.) If any company or member thereof feels aggrieved by the name of

such company having been struck off the register in pursuance of this section, the company or member may apply to the superior court in which the company is liable to be wound up; and such court, if satisfied that the company was at the time of the striking off carrying on business or in operation, and that it is just so to do, may order the name of the company to be restored to the register, and thereupon the company shall be deemed to have continued in existence as if the name thereof had never been struck off; and the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had never been struck off.

(6.) A letter or notice authorised or required for the purposes of this section to be sent to a company may be sent by post addressed to the company at its registered office, or, if no office has been registered, addressed to the care of some director or officer of the company, or if there be no director or officer of the company whose name and address are known to the registrar, the letter or notice (in identical form) may be sent to each of the persons who subscribed the memorandum of association, addressed to him at the address mentioned in that memorandum.

(7.) In the execution of his duties under this section the registrar shall conform to any regulations which may be from time to time made by the Board of Trade.

(8.) In this section the Gazette means, as respects companies whose registered office is in England, the London Gazette; as respects companies whose registered office is in Scotland, the Edinburgh Gazette; and as respects companies whose registered office is in Ireland, the Dublin Gazette.

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43 & 44 VICT. c. 16.

An Act to amend the Law relating to the Payment of Wages and Rating of Merchant Seamen. [*2nd August*, 1880.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows; (that is to say,)

Short title and construction.

1. This Act may be cited as the Merchant Seamen (Payment of Wages and Rating) Act, 1880.

17 & 18 Vict. c. 104, &c.

This Act shall be construed as one with the Merchant Shipping Acts, 1854 to 1876, and those Acts and this Act may be cited collectively as the Merchant Shipping Acts, 1854 to 1880.

Conditional advance notes illegal.

2.—[(1.) After the first day of August one thousand eight hundred and eighty-one, any document authorising or promising, or purporting to authorise or promise, the future payment of money on account of a seaman's wages conditionally on his going to sea from any port in the United Kingdom, and made before those wages have been earned, shall be void.

(2.) No money paid in satisfaction or in respect of any such document shall be deducted from a seaman's wages, and no person shall have any right of action, suit, or set-off against the seaman or his assignee in respect of any money so paid or purporting to have been so paid.

(3.) Nothing in this section shall affect any allotment note made under the Merchant Shipping Act, 1854 (*c*).]

17 & 18 Vict. c. 104.

Amendment of 17 & 18 Vict. c. 104, s. 169, as to allotment notes.

3.—(1.) Every agreement with a seaman which is required by the Merchant Shipping Act, 1854, to be made in the form sanctioned by the Board of Trade shall, if the seaman so require, stipulate for the allotment of any part not exceeding one half of the wages of the seaman in favour of one or more of the persons mentioned in section one hundred and sixty-nine of the Merchant Shipping Act, 1854, as amended by this section.

17 & 18 Vict. c. 104.

(2.) The allotment may also be made in favour of a savings bank, and in that case shall be in favour of such persons and carried into effect in such manner as may be for the time being directed by regulations of the Board of Trade, and section one hundred and sixty-nine of the Merchant Shipping Act, 1854, shall be construed as if the said persone were named therein.

17 & 18 Vict. c. 104.

(*c*) Repealed: see 52 & 53 Vict. c. 46, s. 2.

(3.) The sum received in pursuance of such allotment by a savings bank shall be paid out only on an application made, through a superintendent of a mercantile marine office or the Board of Trade, by the seaman himself, or, in case of death, by some person to whom the same might be paid under section one hundred and ninety-nine of the Merchant Shipping Act, 1854.

17 & 18 Vict. c. 104.

(4.) A payment under an allotment note shall begin at the expiration of one month, or, if the allotment is in favour of a savings bank, of three months, from the date of the agreement, or at such later date as may be fixed by the agreement, and shall be paid at the expiration of every subsequent month, or of such other periods as may be fixed by the agreement, and shall be paid only in respect of wages earned before the date of payment.

(5.) For the purposes of this section "savings bank" means a savings bank established under one of the Acts mentioned in the First Schedule to this Act.

Rules as to payment of wages.

4. In the case of foreign-going ships—

(1.) The owner or master of the ship shall pay to each seaman on account, at the time when he lawfully leaves the ship at the end of his engagement, two pounds, or one fourth of the balance due to him, whichever is least; and shall pay him the remainder of his wages within two clear days (exclusive of any Sunday, Fast Day in Scotland, or Bank holiday) after he so leaves the ship.

17 & 18 Vict. c. 104.

(2.) The master of the ship may deliver the account of wages mentioned in section one hundred and seventy-one of the Merchant Shipping Act, 1854, to the seaman himself at or before the time when he leaves the ship instead of delivering it to a superintendent of a mercantile marine office.

(3.) If the seaman consents, the final settlement of his wages may be left to the superintendent of a mercantile marine office under regulations to be made by the Board of Trade, and the receipt of the superintendent shall in that case operate as a release by the seaman under section one hundred and seventy-five of the Merchant Shipping Act, 1854.

17 & 18 Vict. c. 104.

(4.) In the event of the seaman's wages or any part thereof not being paid or settled as in this section mentioned, then, unless the delay is due to the act or default of the seaman, or to any reasonable dispute as to liability, or to any other cause not being the act or default of the owner or master, the seaman's wages shall continue to run and be payable until the time of the final settlement thereof.

(5.) Where a question as to wages is raised before the superintendent of a mercantile marine office between the master or owner of a ship, and a seaman or apprentice, if the amount in question does not exceed five pounds, the superintendent may adjudicate, and the decision of the superintendent in the matter shall be final; but if the superintendent is of opinion that the question is one which ought to be decided by a court of law he may refuse to decide it.

Penalty for being on board ship without permission before seamen leave. See 17 & 18 Vict. c. 104, s. 237.

5. Where a ship is about to arrive, is arriving, or has arrived at the end of her voyage, every person, not being in her Majesty's service or not being duly authorised by law for the purpose, who—

(a) goes on board the ship, without the permission of the master, before the seamen lawfully leave the ship at the end of their engagement, or are discharged (whichever last happens); or,

(b) being on board the ship, remains there after being warned to leave by the master, or by a police officer, or by any officer of the Board of Trade or of the customs,

shall for every such offence be liable on summary conviction to a fine not exceeding twenty pounds, or, at the discretion of the court, to imprisonment for any term not exceeding six months; and the master of the ship or any officer of the Board of Trade may take him into custody, and deliver him up forthwith to a constable to be taken before a court or magistrate capable of taking cognizance of the offence, and dealt with according to law.

Provisions contained in section five to apply to ships belonging to foreign countries in certain cases.

6. Whenever it is made to appear to her Majesty—

(1.) That the government of any foreign country has provided that unauthorised persons going on board of British ships which are about to arrive or have arrived within its territorial jurisdiction shall be subject to provisions similar to the provisions contained in the last preceding section as applicable to persons going on board British ships at the end of their voyages; and

(2.) That the government of such foreign country is desirous that the

provisions of the said section shall apply to unauthorised persons going on board of ships belonging to such foreign country within the limits of British territorial jurisdiction;

her Majesty may, by Order in Council, declare that the provisions of the said last preceding section shall apply to the ships of such country; and thereupon so long as the order remains in force those provisions shall apply and have effect as if the ships of such country were British ships arriving, about to arrive, or which had arrived at the end of their voyage.

Rating of seamen.

7. A seaman shall not be entitled to the rating of A.B., that is to say, of an able-bodied seaman, unless he has served at sea for four years before the mast, but the employment of fishermen in registered decked fishing vessels shall only count as sea service up to the period of three years of such employment; and the rating of A.B. shall only be granted after at least one year's sea service in a trading vessel in addition to three or more years' sea service on board of registered decked fishing vessels.

Such service may be proved by certificates of discharge, by a certificate of service from the Registrar-General of Shipping and Seamen (which certificate the registrar shall grant on payment of a fee not exceeding sixpence), and in which shall be specified whether the service was rendered in whole or in part in steam ship or in sailing ship, or by other satisfactory proof.

Nothing in this section shall affect a seaman who has been rated and has served as A.B. before the passing of this Act.

Power of court to rescind contract between owner or master and seaman or apprentice.

8. Where a proceeding is instituted in or before any court in relation to any dispute between an owner or master of a ship and a seaman or apprentice to the sea service, arising out of or incidental to their relation as such, or is instituted for the purpose of this section, the court, if, having regard to all the circumstances of the case, they think it just so to do, may rescind any contract between the owner or master and the seaman or apprentice, or any contract of apprenticeship, upon such terms as the court may think just, and this power shall be in addition to any other jurisdiction which the court can exercise independently of this section.

For the purposes of this section the term "Court" includes any magistrate or justice having jurisdiction in the matter to which the proceeding relates.

Licensing of seamen's lodging-houses.

9. It shall be lawful for the sanitary authority of any seaport town to pass bye-laws for the licensing of seamen's lodging-houses, for the periodical inspection of the same, for the granting to the persons to whom such licences are given, the authority to designate their houses as seamen's licensed lodging-houses, and for prescribing the penalties for the breach of the provisions of the bye-laws: provided always, that no such bye-laws shall take effect till they have received the approval of the Board of Trade.

Desertion and absence without leave.

10. The following provisions shall from the commencement of this Act have operation within the United Kingdom:—

A seaman or apprentice to the sea service shall not be liable to imprisonment for deserting or for neglecting or refusing without reasonable cause to join his ship or to proceed to sea in his ship, or for absence without leave at any time within twenty-four hours of his ship's sailing from any port, or for absence at any time without leave and without sufficient reason from his ship or from his duty.

Whenever either at the commencement or during the progress of any voyage any seaman or apprentice neglects or refuses to join or deserts from or refuses to proceed to sea in any ship in which he is duly engaged to serve, or is found otherwise absenting himself therefrom without leave, the master or any mate, or the owner, ship's husband, or consignee may, with or without the assistance of the local police officers or constables, who are hereby directed to give the same, if required, convey him on board: Provided that if the seaman or apprentice so requires he shall first be taken before some court capable of taking cognizance of the matters to be dealt with according to law: and that if it appears to the court before which the case is brought that the seaman or apprentice has been conveyed on board or taken before the court on improper or insufficient grounds, the master, mate, owner, ship's husband, or consignee, as the case may be, shall incur a penalty not exceeding twenty pounds, but such penalty, if inflicted, shall be a bar to any action for false imprisonment.

If a seaman or apprentice to the sea service intends to absent himself from his ship or his duty, he may give notice of his intention either to the owner

or to the master of the ship, not less than forty-eight hours before the time at which he ought to be on board his ship; and in the event of such notice being given, the court shall not exercise any of the powers conferred on it by section two hundred and forty seven of the Merchant Shipping Act, 1854.

17 & 18 Vict. c. 104.

Subject to the foregoing provision of this section, the powers conferred by section two hundred and forty-seven of the Merchant Shipping Act, 1854, may be exercised, notwithstanding the abolition of imprisonment for desertion and similar offences, and of apprehension without warrant.

17 & 18 Vict. c. 104.

Nothing in this section shall affect section two hundred and thirty-nine of the Merchant Shipping Act, 1854.

17 & 18 Vict. c. 104.

Extension to seamen of 38 & 39 Vict. c. 90.

11. The thirteenth section of the Employers and Workmen Act, 1875, shall be repealed in so far as it operates to exclude seamen and apprentices to the sea service from the said Act, and the said Act shall apply to seamen and apprentices to the sea service accordingly; but such repeal shall not, in the absence of any enactment to the contrary, extend to or affect any provision contained in any other Act of Parliament passed, or to be passed, whereby workman is defined by reference to the persons to whom the Employers and Workmen Act, 1875, applies.

38 & 39 Vict. c. 90.

Repeal of enactments in Second Schedule.

12. The enactments described in the Second Schedule to this Act shall be repealed as from the commencement of this Act within the United Kingdom.

Provided that this repeal shall not affect—

(1.) Anything duly done or suffered before the commencement of this Act under any enactment hereby repealed; or

(2.) Any right or privilege acquired or any liability incurred before the commencement of this Act, under any enactment hereby repealed; or

(3.) Any imprisonment, fine, or forfeiture, or other punishment incurred or to be incurred, in respect of any offence committed before the commencement of this Act, under any enactment hereby repealed; or

(4.) The institution or prosecution to its termination of any investigation or legal proceeding, or any other remedy for prosecuting any such offence, or ascertaining, enforcing, or recovering any such liability imprisonment, fine, forfeiture, or punishment as aforesaid, and any such investigation, legal proceeding, and remedy may be carried on as if this repeal had not been enacted.

SCHEDULES.

FIRST SCHEDULE.

Chapter.	Savings Banks.
24 & 25 Vict. c. 14	Post Office Savings Banks.
26 & 27 Vict. c. 87	Trustee Savings Banks.
17 & 18 Vict. c. 104, s. 180....	Seamen's Savings Banks.
19 & 20 Vict. c. 41	

SECOND SCHEDULE.

(17 & 18 Vict. c. 104, in part.)

The Merchant Shipping Act, 1854, in part: namely,

In section two hundred and forty-three, sub-section (1), the words "to imprisonment for any period not exceeding twelve weeks with or without hard labour; and also."

In section two hundred and forty-three, sub-section (2), the words "to imprisonment for any period not exceeding ten weeks with or without hard labour, and also at the discretion of the court."

Section two hundred and forty-six.

In section two hundred and forty-seven the words "instead of committing the offender to prison;"

And section two hundred and forty-eight.

43 & 44 VICT. c. 42.

An Act to extend and regulate the Liability of Employers to make Compensation for Personal Injuries suffered by Workmen in their service. [*7th September*, 1880.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Amendment of law.

1. Where after the commencement of this Act personal injury is caused to a workman

(1.) By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer; or

(2.) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence; or

(3.) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed; or

(4.) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or byelaws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or

(5.) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway,

the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.

Exceptions to amendment of law.

2. A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases; that is to say,

(1.) Under sub-section one of section one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.

(2.) Under sub-section four of section one, unless the injury resulted from some impropriety or defect in the rules, byelaws, or instructions therein mentioned; provided that where a rule or byelaw has been approved or has been accepted as a proper rule or byelaw by one of her Majesty's Principal Secretaries of State, or by the Board of Trade or any other department of the Government, under or by virtue of any Act of Parliament, it shall not be deemed for the purposes of this Act to be an improper or defective rule or byelaw.

(3.) In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence.

Limit of sum recoverable as compensation.

3. The amount of compensation recoverable under this Act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment and in the district in which the workman is employed at the time of the injury.

Limit of time for recovery of compensation.

4. An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from

the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death: Provided always, that in case of death the want of such notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for such want of notice.

Money payable under penalty to be deducted from compensation under Act.

5. There shall be deducted from any compensation awarded to any workman, or representatives of a workman, or persons claiming by, under, or through a workman in respect of any cause of action arising under this Act, any penalty or part of a penalty which may have been paid in pursuance of any other Act of Parliament to such workman, representatives, or persons in respect of the same cause of action; and where an action has been brought under this Act by any workman, or the representatives of any workman, or any persons claiming by, under, or through such workman, for compensation in respect of any cause of action arising under this Act, and payment has not previously been made of any penalty or part of a penalty under any other Act of Parliament in respect of the same cause of action, such workman, representatives, or person shall not be entitled thereafter to receive any penalty or part of a penalty under any other Act of Parliament in respect of the same cause of action.

Trial of actions.

6.—(1.) Every action for recovery of compensation under this Act shall be brought in a county court, but may, upon the application of either plaintiff or defendant, be removed into a superior court in like manner and upon the same conditions as an action commenced in a county court may by law be removed.

(2.) Upon the trial of any such action in a county court before the judge without a jury one or more assessors may be appointed for the purpose of ascertaining the amount of compensation.

(3.) For the purpose of regulating the conditions and mode of appointment and remuneration of such assessors, and all matters of procedure relating to their duties, and also for the purpose of consolidating any actions under this Act in a county court, and otherwise preventing multiplicity of such actions, rules and regulations may be made, varied, and repealed from time to time in the same manner as rules and regulations for regulating the practice and procedure in other actions in county courts.

"County Court" shall, with respect to Scotland, mean the "Sheriff's Court," and shall, with respect to Ireland, mean the "Civil Bill Court."

In Scotland any action under this Act may be removed to the Court of Session at the instance of either party, in the manner provided by, and subject to the conditions prescribed by, section nine of the Sheriff Courts (Scotland) Act, 1877.

40 & 41 Vict. c. 50.

In Scotland the sheriff may conjoin actions arising out of the same occurrence or cause of action, though at the instance of different parties and in respect of different injuries.

Mode of serving notice of injury.

7. Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business; and, if served by post, shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post; and, in proving the service of such notice, it shall be sufficient to prove that the notice was properly addressed and registered.

Where the employer is a body of persons corporate or unincorporate, the notice shall be served by delivering the same at or by sending it by post in a registered letter addressed to the office, or, if there be more than one office, any one of the offices of such body.

A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading.

Definitions.

8. For the purposes of this Act, unless the context otherwise requires,—
The expression "person who has superintendence entrusted to him" means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour:
The expression "employer" includes a body of persons corporate or unincorporate:
The expression "workman" means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies.

38 & 39 Vict. c. 90.

Commencement of Act.

9. This Act shall not come into operation until the first day of January one thousand eight hundred and eighty-one, which date is in this Act referred to as the commencement of this Act.

Short title.

10. This Act may be cited as the Employers' Liability Act, 1880, and shall continue in force till the thirty-first day of December one thousand eight hundred and eighty-seven, and to the end of the then next session of Parliament, and no longer, unless Parliament shall otherwise determine, and all actions commenced under this Act before that period shall be continued as if the said Act had not expired.

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43 & 44 VICT. C. 43.

An Act to provide for the safe carriage of Grain Cargoes by Merchant Shipping. [*7th September*, 1880.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title and construction. 17 & 18 Vict. c. 104, &c.

1. This Act may be cited as the Merchant Shipping (Carriage of Grain) Act, 1880, and shall be construed as one with the Merchant Shipping Act, 1854, and the Acts amending the same, and together with those Acts may be cited as the Merchant Shipping Acts, 1854 to 1880.

Commencement of Act.

2. This Act shall come into operation on the first day of January one thousand eight hundred and eighty-one (which day is in this Act referred to as the commencement of this Act).

Obligation to take precautions to prevent grain cargo from shifting.

3. Where a grain cargo is laden on any British ship all necessary and reasonable precautions (whether prescribed by this Act or not) shall be taken in order to prevent the grain cargo from shifting.

If such precautions have not been taken in the case of any such ship, the master of the ship and any agent of the owner who was charged with the loading of the ship or the sending her to sea, shall each be liable to a penalty not exceeding three hundred pounds, and the owner of the ship shall also be liable to the same penalty, unless he shows that he took all reasonable means to enforce the observance of this section, and was not privy to the breach thereof.

Precautions against shifting of grain cargo laden in port in Mediterranean or Black Sea, or on coast of North America.

4. Where a British ship laden with a grain cargo at any port in the Mediterranean or Black Sea is bound to ports outside the Straits of Gibraltar, or where a British ship is laden with a grain cargo on the coast of North America, the following precautions to prevent the grain cargo from shifting shall be adopted; that is to say,

(a) There shall not be carried between the decks, or, if the ship has more than two decks, between the main and upper decks, any grain in bulk, except such as may be necessary for feeding the cargo in the hold, and is carried in properly constructed feeders.

(b) Where grain (except such as may be carried in properly constructed feeders) is carried in bulk in any hold or compartment, and proper provision for filling up the same by feeders is not made, not less than one-fourth of the grain carried in the hold or compartment (as the case may be) shall be in bags supported on suitable platforms laid upon the grain in bulk: Provided that this regulation with respect to bags shall not apply—

(i) To oats, or cotton seed; nor

(ii) To a ship which is a sailing ship of less than four hundred tons registered tonnage, and is not engaged in the Atlantic trade; nor

(iii) To a ship laden at a port in the Mediterranean or Black Sea if the ship is divided into compartments which are formed by substantial transverse partitions, and are fitted with longitudinal bulkheads or such shifting boards as hereafter in this section mentioned, and if the ship does not carry more than one-fourth of the grain cargo, and not more than one thousand five hundred quarters, in any one compartment, bin, or division, and provided that each division of the lower hold is fitted with properly constructed feeders from the between decks; nor

(iv) To a ship in which the grain cargo does not exceed one-half of the whole cargo of the ship, and the rest of the cargo consists of cotton, wool, flax, barrels or sacks of flour, or other suitable cargo so stowed as to prevent the grain in any compartment, bin, or division from shifting.

(c) Where grain is carried in the hold or between the decks, whether in bags or bulk, the hold or the space between the decks shall be divided by a longitudinal bulkhead or by sufficient shifting boards which extend from deck to deck or from the deck to the keelson and are properly secured, and if the grain is in bulk are fitted grain-tight with proper fillings between the beams.

(d) In loading, the grain shall be properly stowed, trimmed, and secured.

In the event of the contravention of this section in the case of any ship, reasonable precautions to prevent the grain cargo of that ship from shifting shall be deemed not to have been taken, and the owner and master of the ship and any agent charged with loading her or sending her to sea shall be liable accordingly to a penalty under this Act.

Provided that nothing in this section shall exempt a person from any liability, civil or criminal, to which he would otherwise be subject for failing to adopt any reasonable precautions which, although not mentioned in this section, are reasonably required to prevent grain cargo from shifting.

Exemption from precautions specified in this Act for ships laden in Mediterranean or Black Sea, or on coast of North America.

5. The precautions required by this Act to be adopted by ships laden with a grain cargo at a port in the Mediterranean or Black Sea, or on the coast of North America, shall not apply to ships loaded in accordance with regulations for the time being approved by the Board of Trade; nor to any ship constructed and loaded in accordance with any plan approved by the Board of Trade.

Notice by master of kind and quantity of grain cargo.

6. Before a British ship laden with grain cargo at any port in the Mediterranean or Black Sea, bound to ports outside the Straits of Gibraltar, or laden with grain cargo on the coast of North America, leaves her final port of loading, or within forty-eight hours after leaving such port, the master shall deliver or cause to be delivered to the British consular officer, or, if it is in her Majesty's dominions, to the principal officer of customs at that port, a notice stating—

34 & 35 Vict. c. 110. 36 & 37 Vict. c. 85.

(1.) The draught of water and clear side, as defined by section five of the Merchant Shipping Act, 1871, and section four of the Merchant Shipping Act, 1873, of the said ship after the loading of her cargo has been completed at the said last port of loading;

(2.) And also stating the following particulars in respect to the grain cargo; namely,

(a) The kind of grain and the quantity thereof, which quantity may be stated in cubic feet, or in quarters, or bushels, or in tons weight; and

(b) The mode in which the grain cargo is stowed; and

(c) The precautions taken against shifting.

The master shall also deliver a similar notice to the principal collector or other proper officer of customs in the United Kingdom, together with the report required to be made by the Customs Consolidation Act, 1876, on the arrival of the ship in the United Kingdom.

39 & 40 Vict. c. 36, ss. 50, 51.

Every such notice shall be sent to the Board of Trade as soon as practicable by the officer receiving the same.

If the master fails to deliver any notice required by this section he shall be liable to a penalty not exceeding one hundred pounds: Provided always, that the Board of Trade may, by notice published in the London Gazette, or in such other way as it may deem expedient, exempt ships laden at any particular port or any class of such ships from the provisions of this section.

Penalty for false

7. Any master of a ship, who in any notice required by this Act wilfully

makes any false statement or wilfully omits any material particular, shall be liable to a penalty not exceeding one hundred pounds. statement in notice.

8. For the purpose of securing the observance of this Act, any officer having authority in that behalf from the Board of Trade, either general or special, shall have the same power as an inspector appointed under the Merchant Shipping Act, 1854, and shall also have power to inspect any grain cargo, and the mode in which the same is stowed. Power of Board of Trade for enforcing of Act. 17 & 18 Vict. c. 104.

9. Every offence punishable under this Act may be prosecuted summarily and every penalty under this Act may be recovered and enforced summarily in like manner as offences and penalties under the Merchant Shipping Act, 1854, and the Acts amending the same. Prosecution of offences and recovery of penalties. 17 & 18 Vict. c. 104.

10. For the purposes of this Act— Definitions.

The expression "grain" means any corn, rice, paddy, pulse, seeds, nuts, or nut kernels.

The expression "ship laden with a grain cargo" means a ship carrying a cargo of which the portion consisting of grain is more than one-third of the registered tonnage of the ship, and such third shall be computed, where the grain is reckoned in measures of capacity, at the rate of one hundred cubic feet for each ton of registered tonnage, and where the grain is reckoned in measures of weight, at the rate of two tons weight for each ton of registered tonnage.

11. Section twenty-two of the Merchant Shipping Act, 1876, is hereby repealed as from the commencement of this Act: Repeal of 39 & 40 Vict. c. 80, s. 22.

Provided that any offence against that section committed before the commencement of this Act may be prosecuted, and the penalty recovered and enforced, in like manner as if the said section had continued to remain in force.

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45 & 46 VICT. c. 43 (*a*).

An Act to amend the Bills of Sale Act, 1878.

[18*th August*, 1882.]

WHEREAS it is expedient to amend the Bills of Sale Act, 1878: 41 & 42 Vict. c. 31.

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as the Bills of Sale Act (1878) Amendment Act, 1882; and this Act and the Bills of Sale Act, 1878, may be cited together as the Bills of Sale Acts, 1878 and 1882. Short title.

2. This Act shall come into operation on the first day of November one thousand eight hundred and eighty-two, which date is hereinafter referred to as the commencement of this Act. Commencement of Act.

3. The Bills of Sale Act, 1878, is hereinafter referred to as "the principal Act," and this Act shall, so far as is consistent with the tenor thereof, be construed as one with the principal Act; but unless the context otherwise requires shall not apply to any bill of sale duly registered before the commencement of this Act so long as the registration thereof is not avoided by non-renewal or otherwise. Construction of Act. 41 & 42 Vict. c. 31.

The expression "bill of sale," and other expressions in this Act, have the same meaning as in the principal Act, except as to bills of sale or other documents mentioned in section four of the principal Act, which may be given otherwise than by way of security for the payment of money, to which last-mentioned bills of sale and other documents this Act shall not apply.

4. Every bill of sale shall have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in the bill of sale; and such bill of sale, save as hereinafter mentioned, shall have effect only in respect of the personal chattels specifically described in the said schedule; and shall be void, except as against the grantor, in respect of any personal chattels not so specifically described. Bill of sale to have schedule of property attached thereto.

(*a*) See, also, the Bills of Sale Act, *supra*, p. 1025.

Bill of sale not to affect after acquired property.

5. Save as hereinafter mentioned, a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto of which the grantor was not the true owner at the time of the execution of the bill of sale.

Exception as to certain things.

6. Nothing contained in the foregoing sections of this Act shall render a bill of sale void in respect of any of the following things; (that is to say),

(1.) Any growing crops separately assigned or charged where such crops were actually growing at the time when the bill of sale was executed.

(2.) Any fixtures separately assigned or charged, and any plant, or trade machinery where such fixtures, plant, or trade machinery are used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place in substitution for any of the like fixtures, plant, or trade machinery specifically described in the schedule to such bill of sale.

Bill of sale with power to seize except in certain events to be void.

7. Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes:—

(1.) If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security;

(2.) If the grantor shall become a bankrupt, or suffer the said goods or any of them to be distrained for rent, rates, or taxes;

(3.) If the grantor shall fraudulently either remove or suffer the said goods, or any of them, to be removed from the premises;

(4.) If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates, and taxes;

(5.) If execution shall have been levied against the goods of the grantor under any judgment at law:

Provided that the grantor may within five days from the seizure or taking possession of any chattels on account of any of the above-mentioned causes, apply to the High Court, or to a judge thereof in chambers, and such court or judge, if satisfied that by payment of money or otherwise the said cause of seizure no longer exists, may restrain the grantee from removing or selling the said chattels, or may make such other order as may seem just.

Bill of sale to be void unless attested and registered.

8. Every bill of sale shall be duly attested, and shall be registered under the principal Act within seven clear days after the execution thereof, or if it is executed in any place out of England, then within seven clear days after the time at which it would in the ordinary course of post arrive in England if posted immediately after the execution thereof; and shall truly set forth the consideration for which it was given; otherwise such bill of sale shall be void in respect of the personal chattels comprised therein.

Form of bill of sale.

9. A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the Schedule to this Act annexed.

Attestation.

10. The execution of every bill of sale by the grantor shall be attested by one or more credible witness or witnesses, not being a party or parties thereto. So much of section 10 of the principal Act as requires that the execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and that the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting witness, is hereby repealed.

Local registration of contents of bills of sale.

32 & 33 Vict. c. 71, s. 60.

11. Where the affidavit (which under section ten of the principal Act is required to accompany a bill of sale when presented for registration) describes the residence of the person making or giving the same, or of the person against whom the process is issued to be in some place outside the London bankruptcy district as defined by the Bankruptcy Act, 1869, or where the bill of sale describes the chattels enumerated therein as being in some place outside the said London bankruptcy district, the registrar under the principal Act shall forthwith and within three clear days after registration in the principal registry, and in accordance with the prescribed directions, transmit an abstract in the prescribed form of the contents of such bill of sale to the county court registrar in whose district such places are

situate, and if such places are in the districts of different registrars to each such registrar.

Every abstract so transmitted shall be filed, kept, and indexed by the registrar of the county court in the prescribed manner, and any person may search, inspect, make extracts from, and obtain copies of the abstract so registered in the like manner and upon the like terms as to payment or otherwise as near as may be as in the case of bills of sale registered by the registrar under the principal Act.

Bill of sale under 30*l.* to be void.

12. Every bill of sale made or given in consideration of any sum under thirty pounds shall be void.

Chattels not to be removed or sold.

13. All personal chattels seized or of which possession is taken after the commencement of this Act, under or by virtue of any bill of sale (whether registered before or after the commencement of this Act), shall remain on the premises where they were so seized or so taken possession of, and shall not be removed or sold until after the expiration of five clear days from the day they were so seized or so taken possession of.

Bill of sale not to protect chattels against poor and parochial rates.

14. A bill of sale to which this Act applies shall be no protection in respect of personal chattels included in such bill of sale which but for such bill of sale would have been liable to distress under a warrant for the recovery of taxes and poor and other parochial rates.

Repeal of part of Bills of Sale Act, 1878.

15. The eighth and the twentieth sections of the principal Act, and also all other enactments contained in the principal Act which are inconsistent with this Act are repealed, but this repeal shall not affect the validity of anything done or suffered under the principal Act before the commencement of this Act.

Inspection of registered bills of sale.

16. So much of the sixteenth section of the principal Act as enacts that any person shall be entitled at all reasonable times to search the register and every registered bill of sale upon payment of one shilling for every copy of a bill of sale inspected is hereby repealed, and from and after the commencement of this Act any person shall be entitled at all reasonable times to search the register, on payment of a fee of one shilling, or such other fee as may be prescribed, and subject to such regulations as may be prescribed, and shall be entitled at all reasonable times to inspect, examine, and make extracts from any and every registered bill of sale without being required to make a written application, or to specify any particulars in reference thereto, upon payment of one shilling for each bill of sale inspected, and such payment shall be made by a judicature stamp: Provided that the said extracts shall be limited to the dates of execution, registration, renewal of registration, and satisfaction, to the names, addresses, and occupations of the parties, to the amount of the consideration, and to any further prescribed particulars.

Debentures to which Act not to apply.

17. Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock or goods, chattels, and effects of such company.

Extent of Act.

18. This Act shall not extend to Scotland or Ireland.

SCHEDULE.

FORM OF BILL OF SALE.

This Indenture made the day of , between *A. B.*, of , of the one part, and *C. D.*, of , of the other part, witnesseth that in consideration of the sum of £ now paid to *A. B.* by *C. D.*, the receipt of which the said *A. B.* hereby acknowledges [*or whatever else the consideration may be*], he the said *A. B.* doth hereby assign unto *C. D.*, his executors, administrators, and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £ , and interest thereon at the rate of per cent. per annum [*or whatever else may be the rate*]. And the said *A. B.* doth further agree and declare that he will duly pay to the said *C. D.* the principal sum aforesaid, together with the interest then due, by equal payments of £ on

the day of [*or whatever else may be the stipulated times or time of payment*]. And the said *A. B.* doth also agree with the said *C. D.* that he will [*here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security*].

Provided always, that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said *C. D.* for any cause other than those specified in section seven of the Bills of Sale Act (1878) Amendment Act, 1882.

In witness, &c.

Signed and sealed by the said *A. B.* in the presence of me *E. F.* [*add witness' name, address, and description*].

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45 & 46 VICT. c. 61.

An Act to codify the law relating to Bills of Exchange, Cheques, and Promissory Notes.

[18*th August*, 1882.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PART I.

PRELIMINARY.

Short title.

1. This Act may be cited as the Bills of Exchange Act, 1882.

Interpretation of terms.

2. In this Act, unless the context otherwise requires,—

"Acceptance" means an acceptance completed by delivery or notification.

"Action" includes counter-claim and set off.

"Banker" includes a body of persons whether incorporated or not who carry on the business of banking.

"Bankrupt" includes any person whose estate is vested in a trustee or assignee under the law for the time being in force relating to bankruptcy.

"Bearer" means the person in possession of a bill or note which is payable to bearer.

"Bill" means bill of exchange, and "note" means promissory note.

"Delivery" means transfer of possession, actual or constructive, from one person to another.

"Holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.

"Indorsement" means an indorsement completed by delivery.

"Issue" means the first delivery of a bill or note, complete in form to a person who takes it as a holder.

"Person" includes a body of persons whether incorporated or not.

"Value" means valuable consideration.

"Written" includes printed, and "writing" includes print.

PART II.

BILLS OF EXCHANGE.

Form and Interpretation.

Bill of exchange defined.

3.—(1.) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the

person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer.

(2.) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.

(3.) An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with (*a*) an indication of a particular fund out of which the drawee is to re-imburse himself or a particular account to be debited with the amount, or (*b*) a statement of the transaction which gives rise to the bill, is unconditional.

(4.) A bill is not invalid by reason—

(*a*.) That it is not dated;

(*b*.) That it does not specify the value given, or that any value has been given therefor;

(*c*.) That it does not specify the place where it is drawn or the place where it is payable.

Inland and foreign bills.

4.—(1.) An inland bill is a bill which is or on the face of it purports to be (*a*) both drawn and payable within the British Islands, or (*b*) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill.

For the purposes of this Act "British Islands" mean any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty.

(2.) Unless the contrary appear on the face of the bill the holder may treat it as an inland bill.

Effect where different parties to bill are the same person.

5.—(1.) A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee.

(2.) Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note.

Address to drawee.

6.—(1.) The drawee must be named or otherwise indicated in a bill with reasonable certainty.

(2.) A bill may be addressed to two or more drawees whether they are partners or not, but an order addressed to two drawees in the alternative or to two or more drawees in succession is not a bill of exchange.

Certainty required as to payee.

7.—(1.) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty.

(2.) A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees. A bill may also be made payable to the holder of an office for the time being.

(3.) Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer.

What bills are negotiable.

8.—(1.) When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable.

(2.) A negotiable bill may be payable either to order or to bearer.

(3.) A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank.

(4.) A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable.

(5.) Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.

Sum payable.

9.—(1.) The sum payable by a bill is a sum certain within the meaning of this Act, although it is required to be paid—

(a) With interest.

(b) By stated instalments.

(c) By stated instalments, with a provision that upon default in payment of any instalment the whole shall become due.

(d) According to an indicated rate of exchange or according to a rate of exchange to be ascertained as directed by the bill.

(2.) Where the sum payable ie expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable.

(3.) Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated from the issue thereof.

Bill payable on demand.

10.—(1.) A bill is payable on demand—

(a) Which is expressed to be payable on demand, or at sight, or on presentation; or

(b) In which no time for payment is expresseed.

(2.) Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand.

Bill payable at a future time.

11. A bill is payable at a determinable future time within the meaning of this Act which is expressed to be payable—

(1.) At a fixed period after date or sight.

(2.) On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain.

An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect.

Omission of date in bill payable after date.

12. Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly.

Provided that (1) where the holder in good faith and by mistake inserts a wrong date, and (2) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date.

Ante-dating and post-dating.

13.—(1.) Where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be.

(2.) A bill is not invalid by reason only that it ie ante-dated or post-dated, or that it bears date on a Sunday.

Computation of time of payment.

14. Where a bill is not payable on demand the day on which it falls due is determined as follows:

(1.) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace: Provided that—

(*a.*) When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by Royal proclamation as a public fast or thanksgiving day, the bill is, except in the case hereinafter provided for, due and payable on the preceding business day;

34 & 35 Vict. c. 17.

(*b.*) When the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under the Bank Holidays Act, 1871, and Acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a Bank Holiday, the bill is due and payable on the succeeding business day.

(2.) Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment.

(3.) Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance, or for non-delivery.

(4.) The term "month" in a bill means calendar month.

Case of need.

15. The drawer of a bill and any indorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment. Such person

is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may think fit.

Optional stipulations by drawer or indorser.

16. The drawer of a bill, and any indorser, may insert therein an express stipulation—

(1.) Negativing or limiting his own liability to the holder:

(2.) Waiving as regards himself some or all of the holder's duties.

Definition and requisites of acceptance.

17.—(1.) The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer.

(2.) An acceptance is invalid unless it complies with the following conditions, namely:

(a.) It must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient.

(b.) It must not express that the drawee will perform his promise by any other means than the payment of money.

Time for acceptance.

18. A bill may be accepted

(1.) Before it has been signed by the drawer, or while otherwise incomplete:

(2.) When it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment:

(3.) When a bill payable after sight is dishonoured by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance.

General and qualified acceptances.

19.—(1.) An acceptance is either (*a*) general or (*b*) qualified.

(2.) A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

In particular an acceptance is qualified which is—

(a.) conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated:

(b.) partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn:

(c.) local, that is to say, an acceptance to pay only at a particular specified place:

An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere:

(d.) qualified as to time:

(e.) the acceptance of some one or more of the drawees, but not of all.

Inchoate instruments.

20.—(1.) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a primâ facie authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner when a bill is wanting in any material particular the person in possession of it has a primâ facie authority to fill up the omission in any way he thinks fit.

(2.) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact.

Provided that if any such instrument after completion is negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.

Delivery.

21.—(1.) Every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto.

Provided that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable.

(2.) As between immediate parties, and as regards a remote party other than a holder in due course, the delivery—

(a) in order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be:

(b) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.

But if the bill be in the hands of a holder in due course a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed.

(3.) Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved.

Capacity and Authority of Parties.

Capacity of parties.

22.—(1.) Capacity to incur liability as a party to a bill is co-extensive with capacity to contract.

Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations.

(2.) Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto.

Signature essential to liability.

23. No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such: provided that

(1.) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name:

(2.) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm.

Forged or unauthorized signature.

24. Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.

Provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery.

Procuration signatures.

25. A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority.

Persons signing as agent or in representative capacity.

26.—(1.) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.

(2.) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted.

The Consideration for a Bill.

Value and holder for value.

27.—(1.) Valuable consideration for a bill may be constituted by,—

(a) Any consideration sufficient to support a simple contract;

(b) An antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

(2.) Where value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time.

(3.) Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.

Accommodation bill or party.

28.—(1.) An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person.

(2.) An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not.

Holder in due course.

29.—(1.) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions; namely,

(a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact:

(b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

(2.) In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

(3.) A holder (whether for value or not), who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

Presumption of value and good faith.

30.—(1.) Every party whose signature appears on a bill is primâ facie deemed to have become a party thereto for value.

(2.) Every holder of a bill is primâ facie deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.

Negotiation of Bills.

Negotiation of bill.

31.—(1.) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.

(2.) A bill payable to bearer is negotiated by delivery.

(3.) A bill payable to order is negotiated by the indorsement of the holder completed by delivery.

(4.) Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor.

(5.) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability.

Requisites of a valid indorsement.

32. An indorsement in order to operate as a negotiation must comply with the following conditions, namely:—

(1.) It must be written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill, without additional words, is sufficient.

An indorsement written on an allonge, or on a "copy" of a bill issued or negotiated in a country where "copies" are recognised, is deemed to be written on the bill itself.

(2.) It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill.

(3.) Where a bill is payable to the order of two or more payees or indorsees who are not partners all must indorse, unless the one indorsing has authority to indorse for the others.

(4.) Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is mis-spelt, he may indorse the bill as therein described, adding, if he think fit, his proper signature.

(5.) Where there are two or more indorsements on a bill, each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved.

(6.) An indorsement may be made in blank or special. It may also contain terms making it restrictive.

Conditional indorsement.

33. Where a bill purports to be indorsed conditionally the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not.

Indorsement in blank and special indorsement.

34.—(1.) An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer.

(2.) A special indorsement specifies the person to whom, or to whose order, the bill is to be payable.

(3.) The provisions of this Act relating to a payee apply with the necessary modifications to an indorsee under a special indorsement.

(4.) When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person.

Restrictive indorsement.

35.—(1.) An indorsement is restrictive which prohibits the further negotiation of the bill or which expresses that it is a mere authority to deal with the bill as thereby directed and not a transfer of the ownership thereof, as, for example, if a bill be indorsed "Pay D. only," or "Pay D. for the account of X.," or "Pay D. or order for collection."

(2.) A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorise him to do so.

(3.) Where a restrictive indorsement authorises further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement.

Negotiation of overdue or dishonoured bill.

36.—(1.) Where a bill is negotiable in its origin it continues to be negotiable until it has been (*a*) restrictively indorsed or (*b*) discharged by payment or otherwise.

(2.) Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had.

(3.) A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact.

(4.) Except where an indorsement bears date after the maturity of the bill, every negotiation is primâ facie deemed to have been effected before the bill was overdue.

(5.) Where a bill which is not overdue has been dishonoured any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this sub-section shall affect the rights of a holder in due course.

Negotiation of bill to party already liable thereon.

37. Where a bill is negotiated back to the drawer, or to a prior indorser or to the acceptor, such party may, subject to the provisions of this Act, re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable.

Rights of the holder.

38. The rights and powers of the holder of a bill are as follows:

(1.) He may sue on the bill in his own name:

(2.) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill:

(3.) Where his title is defective (*a*) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (*b*) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill.

General Duties of the Holder.

When presentment for acceptance is necessary.

39.—(1.) Where a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument.

(2.) Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment.

(3.) In no other case is presentment for acceptance necessary in order to render liable any party to the bill.

(4.) Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers.

Time for presenting bill payable after sight.

40.—(1.) Subject to the provisions of this Act, when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time.

(2.) If he do not do so, the drawer and all indorsers prior to that holder are discharged.

(3.) In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case.

Rules as to presentment for acceptance, and excuses for non-presentment.

41.—(1.) A bill is duly presented for acceptance which is presented in accordance with the following rules:

(a) The presentment must be made by or on behalf of the holder to the drawee or to some person authorised to accept or refuse acceptance on his behalf at a reasonable hour on a business day and before the bill is overdue:

(b) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only:

(c) Where the drawee is dead presentment may be made to his personal representative:

(d) Where the drawee is bankrupt, presentment may be made to him or to his trustee:

(e) Where authorised by agreement or usage, a presentment through the post office is sufficient.

(2.) Presentment in accordance with these rules is excused, and a bill may be treated as dishonoured by non-acceptance—

(a) Where the drawee is dead or bankrupt, or is a fictitious person or a person not having capacity to contract by bill:

(b) Where, after the exercise of reasonable diligence, such presentment cannot be effected:

(c) Where, although the presentment has been irregular, acceptance has been refused on some other ground.

(3.) The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment.

Non-acceptance.

42.—(1.) When a bill is duly presented for acceptance and is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance. If he do not, the holder shall lose his right of recourse against the drawer and indorsers.

Dishonour by non-acceptance and its consequences.

43.—(1.) A bill is dishonoured by non-acceptance—

(a) when it is duly presented for acceptance, and such an acceptance as is prescribed by this Act is refused or cannot be obtained; or

(b) when presentment for acceptance is excused and the bill is not accepted.

(2.) Subject to the provisions of this Act when a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary.

Duties as to qualified acceptances.

44.—(1.) The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance.

(2.) Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorised the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill.

The provisions of this sub-section do not apply to a partial acceptance, whereof due notice has been given. Where a foreign bill has been accepted as to part, it must be protested as to the balance.

(3.) When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder he shall be deemed to have assented thereto.

Rules as to presentment for payment.

45. Subject to the provisions of this Act a bill must be duly presented for payment. If it be not so presented the drawer and indorsers shall be discharged.

A bill is duly presented for payment which is presented in accordance with the following rules:—

(1.) Where the bill is not payable on demand, presentment must be made on the day it falls due.

(2.) Where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable.

In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case.

(3.) Presentment must be made by the holder or by some person authorised to receive payment on his behalf at a reasonable hour on a business day, at the proper place as hereinafter defined, either to the person designated by the bill as payer, or to some person authorised to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found.

(4.) A bill is presented at the proper place—

(a) Where a place of payment is specified in the bill and the bill is there presented.

(b) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented.

(c) Where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business if known, and if not, at his ordinary residence, if known.

(d) In any other case if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence.

(5.) Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorized to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required.

(6.) Where a bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all.

(7.) Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found.

(8.) Where authorized by agreement or usage, a presentment through the post office is sufficient.

Excuses for delay or non-presentment for payment.

46. (1.) Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence.

(2.) Presentment for payment is dispensed with—

(a) Where, after the exercise of reasonable diligence presentment, as required by this Act, cannot be effected.

The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment.

(b) Where the drawee is a fictitious person.

(c) As regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented.

(d) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented.

(e) By waiver of presentment, express or implied.

Dishonour by non-payment.

47.—(1.) A bill is dishonoured by non-payment (a) when it is duly presented for payment and payment is refused or cannot be obtained, or (b) when presentment is excused and the bill is overdue and unpaid.

(2.) Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder.

Notice of dishonour and effect of non-notice.

48. Subject to the provisions of this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged; provided that—

(1.) Where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission, shall not be prejudiced by the omission.

(2.) Where a bill is dishonoured by non-acceptance and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted.

Rules as to notice of dishonour.

49. Notice of dishonour in order to be valid and effectual, must be given in accordance with the following rules:—

(1.) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill.

(2.) Notice of dishonour may be given by an agent either in his own name or in the name of any party entitled to give notice whether that party be his principal or not.

(3.) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given.

(4.) Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of the holder, and all indorsers subsequent to the party to whom notice is given.

(5.) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonoured by non-acceptance or non-payment.

(6.) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour.

(7.) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

(8.) Where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf.

(9.) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative if such there be, and with the exercise of reasonable diligence he can be found.

(10.) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee.

(11.) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others.

(12.) The notice may be given as soon as the bill is dishonoured and must be given within a reasonable time thereafter.

In the absence of special circumstancee notice is not deemed to have been given within a reasonable time, unless—

(a.) where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill.

(b.) where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter.

(13.) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

(14.) Where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour.

(15.) Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office.

Excuses for non-notice and delay.

50.—(1.) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the notice must be given with reasonable diligence.

(2.) Notice of dishonour is dispensed with—

(a.) When, after the exercise of reasonable diligence, notice as required by this Act cannot be given to or does not reach the drawer or indorser sought to be charged:

(b.) By waiver express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice:

(c.) As regards the drawer in the following cases, namely, (1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person or a person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill, (5) where the drawer has countermanded payment:

(d) As regards the indorser in the following cases, namely, (1) where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation.

Noting or protest of bill.

51.—(1.) Where an inland bill has been dishonoured it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be; but it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser.

(2.) Where a foreign bill, appearing on the face of it to be such, has been dishonoured by non-acceptance it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment it must be duly protested for non-payment. If it be not so protested the drawer and indorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonour is unnecessary.

(3.) A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

(4.) Subject to the provisions of this Act, when a bill is noted or protested, it must be noted on the day of its dishonour. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

(5.) Where the acceptor of a bill becomes bankrupt or insolvent or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

(6.) A bill must be protested at the place where it is dishonoured: Provided that—

(a) When a bill is presented through the post office, and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return if received during business hours, and if not received during business hours, then not later than the next business day:

(b) When a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonoured by non-acceptance, it must be protested for non-payment at the place where

it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

(7.) A protest must contain a copy of the bill, and must be signed by the notary making it, and must specify—

(a) The person at whose request the bill is protested:

(b) The place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found.

(8.) Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

(9.) Protest is dispensed with by any circumstance which would dispense with notice of dishonour. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence.

Duties of holder as regards drawee or acceptor.

52.—(1.) When a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable.

(2.) When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures.

(3.) In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonour should be given to him.

(4.) Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it.

Liabilities of Parties.

Funds in hands of drawee.

53.—(1.) A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument. This sub-section shall not extend to Scotland.

(2.) In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee.

Liability of acceptor.

54. The acceptor of a bill, by accepting it—

(1.) Engages that he will pay it according to the tenor of his acceptance:

(2.) Is precluded from denying to a holder in due course:

(a) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill;

(b) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement;

(c) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement.

Liability of drawer or indorser.

55.—(1.) The drawer of a bill by drawing it—

(a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken:

(b) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

(2.) The indorser of a bill by indorsing it—

(a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken;

(b) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements;

(c) Is precluded from denying to his immediate or a subsequent indorsee

that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto.

Stranger signing bill liable as indorser.

56. Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course.

Measure of damages against parties to dishonoured bill.

57. Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:

(1.) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—

(a) The amount of the bill:

(b) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case:

(c) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest.

(2.) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment.

(3.) Where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.

Transferor by delivery and transferee.

58.—(1.) Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a "transferor by delivery."

(2.) A transferor by delivery is not liable on the instrument.

(3.) A transferor by delivery who negotiates a bill thereby warrants to his immediate transferee being a holder for value that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless.

Discharge of Bill.

Payment in due course.

59.—(1.) A bill is discharged by payment in due course by or on behalf of the drawee or acceptor.

"Payment in due course" means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective.

(2.) Subject to the provisions hereinafter contained, when a bill is paid by the drawer or an indorser it is not discharged; but

(a) Where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill.

(b) Where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill.

(3.) Where an accommodation bill is paid in due course by the party accommodated the bill is discharged.

Banker paying demand draft whereon indorsement is forged.

60. When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority.

Acceptor the holder at maturity.

61. When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged.

Express waiver.

62.—(1.) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged.

The renunciation must be in writing, unless the bill is delivered up to the acceptor.

(2.) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation.

Cancellation.

63.—(1.) Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged.

(2.) In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would have had a right of recourse against the party whose signature is cancelled, is also discharged.

(3.) A cancellation made unintentionally, or under a mistake, or without the authority of the holder is inoperative; but where a bill or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority.

Alteration of bill.

64.—(1.) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers.

Provided that,

Where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour.

(2.) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

Acceptance and Payment for Honour.

Acceptance for honour suprà protest.

65.—(1.) Where a bill of exchange has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill suprà protest, for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

(2.) A bill may be accepted for honour for part only of the sum for which it is drawn.

(3.) An acceptance for honour suprà protest in order to be valid must—

(a) be written on the bill, and indicate that it is an acceptance for honour:

(b) be signed by the acceptor for honour.

(4.) Where an acceptance for honour does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer.

(5.) Where a bill payable after sight is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour.

Liability of acceptor for honour.

66.—(1.) The acceptor for honour of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts.

(2.) The acceptor for honour is liable to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted.

Presentment to acceptor for honour.

67.—(1.) Where a dishonoured bill has been accepted for honour suprà protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honour, or referee in case of need.

(2.) Where the address of the acceptor for honour is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity; and where the address of the acceptor for honour is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him.

(3.) Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment.

(4.) When a bill of exchange is dishonoured by the acceptor for honour it must be protested for non-payment by him.

Payment for honour suprà protest.

68.—(1.) Where a bill has been protested for non-payment, any person may intervene and pay it suprà protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

(2.) Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill shall have the preference.

(3.) Payment for honour suprà protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour which may be appended to the protest or form an extension of it.

(4.) The notarial act of honour must be founded on a declaration made by the payer for honour, or his agent in that behalf, declaring his intention to pay the bill for honour, and for whose honour he pays.

(5.) Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are discharged, but the payer for honour is subrogated for, and succeeds to both the rights and duties of, the holder as regards the party for whose honour he pays, and all parties liable to that party.

(6.) The payer for honour on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonour is entitled to receive both the bill itself and the protest. If the holder do not on demand deliver them up he shall be liable to the payer for honour in damages.

(7.) Where the holder of a bill refuses to receive payment suprà protest he shall lose his right of recourse against any party who would have been discharged by such payment.

Lost Instruments.

Holder's right to duplicate of lost bill.

69. Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled to do so.

Action on lost bill.

70. In any action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question.

Bill in a Set.

Rules as to sets.

71.—(1.) Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill.

(2.) Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills.

(3.) Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed the true owner of the bill; but nothing in this sub-section shall affect the rights of a person who in due course accepts or pays the part first presented to him.

(4.) The acceptance may be written on any part, and it must be written on one part only.

If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill.

(5.) When the accepter of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof.

(6.) Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged.

Conflict of Laws.

Rules where laws conflict.

72. Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:

(1.) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance suprà protest, is determined by the law of the place where such contract was made.

Provided that—

(*a.*) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue:

(*b.*) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

(2.) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance suprà protest of a bill, is determined by the law of the place where such contract is made.

Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom.

(3.) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.

(4.) Where a bill is drawn out of but payable in the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.

(5.) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

PART III.

CHEQUES ON A BANKER.

Cheque defined.

73. A cheque is a bill of exchange drawn on a banker payable on demand. Except as otherwise provided in this Part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque.

Presentment of cheque for payment.

74. Subject to the provisions of this Act—

(1.) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid.

(2.) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

(3.) The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such

banker to the extent of such discharge, and entitled to recover the amount from him.

Revocation of banker's authority.

75. The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by—

(1.) Countermand of payment:

(2.) Notice of the customer's death.

Crossed Cheques.

General and special crossings defined.

76.—(1.) Where a cheque bears across its face an addition of—

(*a.*) The words "and company" or any abbreviation thereof between two parallel transverse lines, either with or without the words "not negotiable"; or

(*b.*) Two parallel transverse lines simply, either with or without the words "not negotiable";

that addition constitutes a crossing, and the cheque is crossed generally.

(2.) Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed specially and to that banker.

Crossing by drawer or after issue.

77.—(1.) A cheque may be crossed generally or specially by the drawer.

(2.) Where a cheque is uncrossed, the holder may cross it generally or specially.

(3.) Where a cheque is crossed generally the holder may cross it specially.

(4.) Where a cheque is crossed generally or specially, the holder may add the words "not negotiable."

(5.) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.

(6.) Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself.

Crossing a material part of cheque.

78. A crossing authorized by this Act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorized by this Act, to add to or alter the crossing.

Duties of banker as to crossed cheques.

79.—(1.) Where a cheque is crossed specially to more than one banker except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof.

(2.) Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

Provided that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorized by this Act, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorized by this Act, and of payment having been made otherwise than to a banker, or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be.

Protection to banker and drawer where cheque is crossed.

80. Where the banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.

Effect of crossing on holder.

81. Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

Protection to collecting banker.

82. Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

PART IV.

PROMISSORY NOTES.

Promissory note defined.

83.—(1.) A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.

(2.) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker.

(3.) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof.

(4.) A note which is, or on the face of it purports to be, both made and payable within the British Islands is an inland note. Any other note is a foreign note.

Delivery necessary.

84. A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer.

Joint and several notes.

85.—(1.) A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally according to its tenour.

(2.) Where a note runs "I promise to pay," and is signed by two or more persons, it is deemed to be their joint and several note.

Note payable on demand.

86.—(1.) Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented the indorser is discharged.

(2.) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case.

(3.) Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue.

Presentment of note for payment.

87.—(1.) Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable.

(2.) Presentment for payment is necessary in order to render the indorser of a note liable.

(3.) Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice.

Liability of maker.

88. The maker of a promissory note by making it—

(1.) Engages that he will pay it according to its tenour;

(2.) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

Application of Part II. to notes.

89.—(1.) Subject to the provisions in this part and, except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes.

(2.) In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order.

(3.) The following provisions as to bills do not apply to notes; namely, provisions relating to—

(a) Presentment for acceptance;
(b) Acceptance;
(c) Acceptance supra protest;
(d) Bills in a set.

(4.) Where a foreign note is dishonoured, protest thereof is unnecessary.

PART V.

Supplementary.

Good faith.

90. A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not.

Signature.

91.—(1.) Where, by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person, by or under his authority.

(2.) In the case of a corporation, where, by this Act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal.

But nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal.

Computation of time.

92. Where, by this Act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded.

"Non-business days" for the purposes of this Act mean—

(a) Sunday, Good Friday, Christmas Day:

(b) A bank holiday under the Bank Holidays Act, 1871, or Acts amending it:

(c) A day appointed by Royal proclamation as a public fast or thanksgiving day.

Any other day is a business day.

When noting equivalent to protest.

93. For the purposes of this Act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting.

Protest when notary not accessible.

94. Where a dishonoured bill or note is authorised or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill.

The form given in Schedule 1 to this Act may be used with necessary modifications, and if used shall be sufficient.

Dividend warrants may be crossed.

95. The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend.

Repeal.

96. The enactments mentioned in the second schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

Savings.

97.—(1.) The rules in bankruptcy relating to bills of exchange, promissory notes, and cheques, shall continue to apply thereto notwithstanding anything in this Act contained.

(2.) The rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques.

(3.) Nothing in this Act or in any repeal affected thereby shall affect—

33 & 34 Vict. c. 97.

(a) The provisions of the Stamp Act, 1870, or Acts amending it, or any law or enactment for the time being in force relating to the revenue:

25 & 26 Vict. c. 89.

(b) The provisions of the Companies Act, 1862, or Acts amending it, or any Act relating to joint stock banks or companies:

(c) The provisions of any Act relating to or confirming the privileges of the Bank of England or the Bank of Ireland respectively:

(d) The validity of any usage relating to dividend warrants, or the indorsements thereof.

Saving of summary diligence in Scotland.

98. Nothing in this Act or in any repeal effected thereby shall extend or restrict, or in any way alter or affect the law and practice in Scotland in regard to summary diligence.

99. Where any Act or document refers to any enactment repealed by this Act, the Act or document shall be construed, and shall operate, as if it referred to the corresponding provisions of this Act. Construction with other Acts, &c.

100. In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parole evidence: provided that this enactment shall not in any way affect the existing law and practice whereby the party who is, according to the tenour of any bill of exchange, bank cheque, or promissory note, debtor to the holder in the amount thereof, may be required, as a condition of obtaining a sist of diligence, or suspension of a charge, or threatened charge, to make such consignation, or to find such caution as the Court or judge before whom the cause is depending may require. Parole evidence allowed in certain judicial proceedings in Scotland.

This section shall not apply to any case where the bill of exchange, bank cheque, or promissory note has undergone the sesennial prescription.

SCHEDULES.

FIRST SCHEDULE.

Form of protest which may be used when the services of a notary cannot be obtained. Section 94.

Know all men that I, A. B. [householder], of , in the county of , in the United Kingdom, at the request of C. D., there being no notary public available, did on the day of , 188 , at , demand payment [*or* acceptance] of the bill of exchange hereunder written, from E. F., to which demand he made answer [state answer, if any] wherefore I now, in the presence of G. H. and J. K. do protest the said bill of exchange.

(Signed) A. B.

G. H. } Witnesses.
J. K. }

N.B.—The bill itself should be annexed, or a copy of the bill and all that is written thereon should be underwritten.

SECOND SCHEDULE.

ENACTMENTS REPEALED.

Session and Chapter.	Title of Act and extent of Repeal.
9 Will. 3, c. 17	An Act for the better payment of inland bills of exchange.
3 & 4 Anne, c. 8	An Act for giving like remedy upon promissory notes as is now used upon bills of exchange, and for the better payment of inland bills of exchange.
17 Geo. 3, c. 30.....	An Act for further restraining the negotiation of promissory notes and inland bills of exchange under a limited sum within that part of Great Britain called England.
39 & 40 Geo. 3, c. 42	An Act for the better observance of Good Friday in certain cases therein mentioned.
48 Geo. 3, c. 88.....	An Act to restrain the negotiation of promissory notes and inland bills of exchange under a limited sum in England.

Session and Chapter.	Title of Act and extent of Repeal.
1 & 2 Geo. 4, c. 78	An Act to regulate acceptances of bills of exchange.
7 & 8 Geo. 4, c. 15	An Act for declaring the law in relation to bills of exchange and promissory notes becoming payable on Good Friday or Christmas Day.
9 Geo. 4, c. 24	An Act to repeal certain Acts, and to consolidate and amend the laws relating to bills of exchange and promissory notes in Ireland, in part; that is to say, Sections two, four, seven, eight, nine, ten, eleven.
2 & 3 Will. 4, c. 98	An Act for regulating the protesting for non-payment of bills of exchange drawn payable at a place not being the place of the residence of the drawee or drawees of the same.
6 & 7 Will. 4, c. 58	An Act for declaring the law as to the day on which it is requisite to present for payment to acceptor, or acceptors suprà protest for honour, or to the referee or referees, in case of need, bills of exchange which have been dishonoured.
8 & 9 Vict. c. 37 ..... in part.	An Act to regulate the issue of bank notes in Ireland, and to regulate the repayment of certain sums advanced by the Governor and Company of the Bank of Ireland for the public service, in part; that is to say, Section twenty-four.
19 & 20 Vict. c. 97 ..... in part.	The Mercantile Law Amendment Act, 1856, in part; that is to say, Sections six and seven.
23 & 24 Vict. c. 111 ..... in part.	An Act for granting to her Majesty certain duties of stamps, and to amend the laws relating to the stamp duties, in part; that is to say, Section nineteen.
34 & 35 Vict. c. 74	An Act to abolish days of grace in the case of bills of exchange and promissory notes payable at sight or on presentation.
39 & 40 Vict. c. 81	The Crossed Cheques Act, 1876.
41 & 42 Vict. c. 13	The Bills of Exchange Act, 1878.
	Enactment repealed as to Scotland.
19 & 20 Vict. c. 60 ..... in part.	The Mercantile Law (Scotland) Amendment Act, 1856, in part; that is to say, Sections ten, eleven, twelve, thirteen, fourteen, fifteen, and sixteen.

45 & 46 Vict. c. 76.

An Act to amend the Merchant Shipping Act, 1854, *with respect to Colonial Courts of Inquiry.* [18*th August*, 1882.]

46 & 47 VICT. c. 28.

An Act to amend the Companies Acts, 1862 and 1867.
[20*th August*, 1883.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as the Companies Act, 1883. Short title.

2. This Act shall, so far as is consistent with the terms thereof, be construed as one with the Companies Acts, 1862 and 1867. Construction of Act.

3. This Act shall come into force on the first day of September one thousand eight hundred and eighty-three. Commencement of Act.

4. In the distribution of the assets of any company being wound up under the Companies Acts, 1862 and 1867, there shall be paid in priority to other debts (*a*),— Wages and salary to be preferential claims.

(a) All wages or salary of any clerk or servant in respect of service rendered to the company during four months before the commencement of the winding up not exceeding fifty pounds; and

(b) All wages of any labourer or workman in respect of services rendered to the company during two months before the commencement of the winding up.

5. The foregoing debts shall rank equally among themselves, and shall be paid in full, unless the assets of the company are insufficient to meet them, in which case they shall abate in equal proportions between themselves. Such claims to rank equally.

6. Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, the liquidator or liquidators or official liquidator shall discharge the foregoing debts forthwith, so far as the assets of the company are and will be sufficient to meet them, as and when such assets come into the hands of such liquidator or liquidators or official liquidator. Liquidator to discharge same upon receipt of sufficient assets.

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46 & 47 VICT. c. 31.

An Act to prohibit the Payment of Wages to Workmen in Public-houses and certain other places.
[20*th August*, 1883.]

WHEREAS by the Coal Mines Regulations Act, 1872, and the Metalliferous Mines Regulation Act, 1872, the payment in public-houses, beershops, or other places in the said Acts mentioned of wages to persons employed in or about any mines to which the said Acts apply is prohibited, and it is expedient to extend such prohibition to the payment in public-houses, beershops, and other places in England and Scotland of wages to all workmen as defined by this Act: 35 & 36 Vict. c. 76. 35 & 36 Vict. c. 77.

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as the Payment of Wages in Public-houses Prohibition Act, 1883. Short title.

2. In this Act the expression "workman" means any person who is a labourer, servant in husbandry, journeyman, artificer, handicraftsman, or is otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, but does not include a domestic or menial servant, nor any person employed in or about any mine to which the Coal Mines Regulation Act, 1872, or the Metalliferous Mines Regulation Act, 1872, applies. Definition of workman.

(*a*) See Bankruptcy Act, 1883, s. 40.

No wages to be paid within public-house.

3. From and after the passing of this Act no wages shall be paid to any workman at or within any public-house, beershop, or place for the sale of any spirits, wine, cyder, or other spirituous or fermented liquor, or any office, garden, or place belonging thereto or occupied therewith, save and except such wages as are paid by the resident owner or occupier of such public-house, beershop, or place to any workman bonâ fide employed by him.

Every person who contravenes or fails to comply with or permits any person to contravene or fail to comply with this Act shall be guilty of an offence against this Act.

And in the event of any wages being paid by any person in contravention of the provisions of this Act for or on behalf of any employer, such employer shall himself be guilty of an offence against this Act, unless he prove that he had taken all reasonable means in his power for enforcing the provisions of this Act and to prevent such contravention.

Penalties.

4. Every person who is guilty of an offence against this Act shall be liable to a penalty not exceeding ten pounds for each offence; and all offences against this Act may be prosecuted and all penalties under this Act may be recovered by any person summarily in England in the manner provided by the Summary Jurisdiction Acts, and in Scotland in the manner provided by the Summary Jurisdiction (Scotland) Acts, 1864 and 1881.

Act not to apply to Ireland.

5. This Act shall not apply to Ireland.

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46 & 47 Vict. c. 41.

An Act to amend the Merchant Shipping Acts, 1854 to 1880, with respect to Fishing Vessels and Apprenticeship to the Sea Fishing Service and otherwise.

[25*th August*, 1883.]

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46 & 47 Vict. c. 52.

An Act to amend and consolidate the Law of Bankruptcy.

[25*th August*, 1883.]

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Preliminary.

Short title.

1. This Act may be cited as the Bankruptcy Act, 1883.

Extent of Act.

2. This Act shall not, except so far as is expressly provided, extend to Scotland or Ireland.

Commencement of Act.

3. This Act shall, except as by this Act otherwise provided, commence and come into operation from and immediately after the thirty-first day of December, one thousand eight hundred and eighty-three.

PART I.

Proceedings from Act of Bankruptcy to Discharge.

Acts of Bankruptcy.

Acts of bankruptcy.

4. (1.) A debtor commits an act of bankruptcy in each of the following cases:—

(a) If in England or elsewhere he makes a conveyance or assignment of

his property to a trustee or trustees for the benefit of his creditors generally:

(b) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof:

(c) If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon which would under this or any other Act be void as a fraudulent preference if he were adjudged bankrupt:

(d) If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house:

(e) If execution issued against him has been levied by seizure and sale of his goods under process in an action in any court, or in any civil proceeding in the High Court:

(f) If he files in the Court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself:

(g) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim set off or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained:

(h) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.

(2.) A bankruptcy notice under this Act shall be in the prescribed form, and shall state the consequences of non-compliance therewith, and shall be served in the prescribed manner.

Receiving Order.

Jurisdiction to make receiving order.

5. Subject to the conditions hereinafter specified, if a debtor commits an act of bankruptcy the Court may, on a bankruptcy petition being presented either by a creditor or by the debtor, make an order, in this Act called a receiving order, for the protection of the estate.

Conditions on which creditor may petition.

6. (1.) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless—

(a.) The debt owing by the debtor to the petitioning creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors, amounts to fifty pounds, and

(b.) The debt is a liquidated sum, payable either immediately or at some certain future time, and

(c.) The act of bankruptcy on which the petition is grounded has occurred within three months before the presentation of the petition, and

(d.) The debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England.

(2.) If the petitioning creditor is a secured creditor, he must, in his petition, either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt, or give an estimate of the value of his security. In the latter case, he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him, after deducting the value so estimated in the same manner as if he were an unsecured creditor.

Proceedings and order on creditor's petition.

7. (1.) A creditor's petition shall be verified by affidavit of the creditor, or of some person on his behalf having knowledge of the facts, and served in the prescribed manner.

(2.) At the hearing the Court shall require proof of the debt of the

petitioning creditor of the service of the petition, and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and, if satisfied with the proof, may make a receiving order in pursuance of the petition.

(3.) If the Court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the Court may dismiss the petition.

(4.) When the act of bankruptcy relied on is non-compliance with a bankruptcy notice to pay, secure, or compound for a judgment debt, the Court may, if it thinks fit, stay or dismiss the petition on the ground that an appeal is pending from the judgment.

(5.) Where the debtor appears on the petition, and denies that he is indebted to the petitioner, or that he is indebted to such an amount as would justify the petitioner in presenting a petition against him, the Court, on such security (if any) being given as the Court may require for payment to the petitioner of any debt which may be established against him in due course of law, and of the costs of establishing the debt, may instead of dismissing the petition stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt.

(6.) Where proceedings are stayed, the Court may, if by reason of the delay caused by the stay of proceedings or for any other cause it thinks just, make a receiving order on the petition of some other creditor, and shall thereupon dismiss, on such terms as it thinks just, the petition in which proceedings have been stayed as aforesaid.

(7.) A creditor's petition shall not, after presentment, be withdrawn without the leave of the Court.

Debtor's petition and order thereon.

8. (1.) A debtor's petition shall allege that the debtor is unable to pay his debts, and the presentation thereof shall be deemed an act of bankruptcy without the previous filing by the debtor of any declaration of inability to pay his debts, and the Court shall thereupon make a receiving order.

(2.) A debtor's petition shall not, after presentment, be withdrawn without the leave of the Court.

Effect of receiving order.

9. (1.) On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose.

(2.) But this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.

Discretionary powers as to appointment of receiver and stay of proceedings.

10. (1.) The Court may, if it is shown to be necessary for the protection of the estate, at any time after the presentation of a bankruptcy petition, and before a receiving order is made, appoint the official receiver to be interim receiver of the property of the debtor, or of any part thereof, and direct him to take immediate possession thereof or of any part thereof.

(2.) The Court may at any time after the presentation of a bankruptcy petition stay any action, execution, or other legal process against the property or person of the debtor, and any Court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just.

Service of order staying proceedings.

11. Where the Court makes an order staying any action or proceeding, or staying proceedings generally, the order may be served by sending a copy thereof, under the seal of the Court, by prepaid post letter to the address for service of the plaintiff or other party prosecuting such proceeding.

Power to appoint special manager.

12. (1.) The official receiver of a debtor's estate may, on the application of any creditor or creditors, and if satisfied that the nature of the debtor's estate or business or the interests of the creditors generally require the appointment of a special manager of the estate or business other than the official receiver, appoint a manager thereof accordingly to act until a trustee is appointed, and with such powers (including any of the powers of a receiver) as may be entrusted to him by the official receiver.

(2.) The special manager shall give security and account in such manner as the Board of Trade may direct.

(3.) The special manager shall receive such remuneration as the creditors may, by resolution at an ordinary meeting, determine, or in default of any such resolution, as may be prescribed.

Advertisement of receiving order.

13. Notice of every receiving order, stating the name, address, and description of the debtor, the date of the order, the Court by which the order is made, and the date of the petition, shall be gazetted and advertised in a local paper in the prescribed manner.

Power to Court to annul receiving order in certain cases.

14. If in any case where a receiving order has been made on a bankruptcy petition it shall appear to the Court by which such order was made, upon an application by the official receiver, or any creditor or other person interested, that a majority of the creditors in number and value are resident in Scotland or in Ireland and that from the situation of the property of the debtor, or other causes, his estate and effects ought to be distributed among the creditors under the Bankrupt or Insolvent Laws of Scotland or Ireland, the said Court, after such inquiry as to it shall seem fit, may rescind the receiving order and stay all proceedings on, or dismiss the petition upon such terms, if any, as the Court may think fit.

Proceedings consequent on Order.

First and other meetings of creditors.

15. (1.) As soon as may be after the making of a receiving order against a debtor a general meeting of his creditors (in this Act referred to as the first meeting of creditors) shall be held for the purpose of considering whether a proposal for a composition or scheme of arrangement shall be entertained, or whether it is expedient that the debtor shall be adjudged bankrupt, and generally as to the mode of dealing with the debtor's property.

(2.) With respect to the summoning of and proceedings at the first and other meetings of creditors, the rules in the First Schedule shall be observed.

Debtor's statement of affairs.

16. (1.) Where a receiving order is made against a debtor, he shall make out and submit to the official receiver a statement of and in relation to his affairs in the prescribed form, verified by affidavit, and showing the particulars of the debtor's assets, debts, and liabilities, the names, residences, and occupations of his creditors, the securities held by them respectively, the dates when the securities were respectively given, and such further or other information as may be prescribed or as the official receiver may require.

(2.) The statement shall be so submitted within the following times, namely:

(i.) If the order is made on the petition of the debtor, within three days from the date of the order.

(ii.) If the order is made on the petition of a creditor, within seven days from the date of the order.

But the Court may, in either case, for special reasons, extend the time.

(3.) If the debtor fails without reasonable excuse to comply with the requirements of this section, the Court may, on the application of the official receiver, or of any creditor, adjudge him bankrupt.

(4.) Any person stating himself in writing to be a creditor of the bankrupt may, personally or by agent, inspect this statement at all reasonable times, and take any copy thereof or extract therefrom, but any person untruthfully so stating himself to be a creditor shall be guilty of a contempt of Court, and shall be punishable accordingly on the application of the trustee or official receiver.

Public Examination of Debtor.

Public examination of debtor.

17. (1.) Where the Court makes a receiving order it shall hold a public sitting, on a day to be appointed by the Court, for the examination of the debtor, and the debtor shall attend thereat, and shall be examined as to his conduct, dealings, and property.

(2.) The examination shall be held as soon as conveniently may be after the expiration of the time for the submission of the debtor's statement of affairs.

(3.) The Court may adjourn the examination from time to time.

(4.) Any creditor who has tendered a proof, or his representative authorised in writing, may question the debtor concerning his affairs and the causes of his failure.

(5.) The official receiver shall take part in the examination of the debtor;

and for the purpose thereof, if specially authorised by the Board of Trade, may employ a solicitor with or without counsel.

(6.) If a trustee is appointed before the conclusion of the examination he may take part therein.

(7.) The Court may put such questions to the debtor as it may think expedient.

(8.) The debtor shall be examined upon oath, and it shall be his duty to answer all such questions as the Court may put or allow to be put to him. Such notes of the examination as the Court thinks proper shall be taken down in writing, and shall be read over to and signed by the debtor, and may thereafter be used in evidence against him; they shall also be open to the inspection of any creditor at all reasonable times.

(9.) When the Court is of opinion that the affairs of the debtor have been sufficiently investigated, it shall, by order, declare that his examination is concluded, but such order shall not be made until after the day appointed for the first meeting of creditors.

Composition or Scheme of Arrangement.

Power for creditors to accept and Court to approve composition or arrangement.

18. (1.) The creditors may at the first meeting or any adjournment thereof, by special resolution, resolve to entertain a proposal for a composition in satisfaction of the debts due to them from the debtor, or a proposal for a scheme of arrangement of the debtor's affairs.

(2.) The composition or scheme shall not be binding on the creditors unless it is confirmed by a resolution passed (by a majority in number representing three fourths in value of all the creditors who have proved) at a subsequent meeting of the creditors, and is approved by the Court.

Any creditor who has proved his debt may assent to or dissent from such composition or scheme by a letter addressed to the official receiver in the prescribed form, and attested by a witness, so as to be received by such official receiver not later than the day preceding such subsequent meeting, and such creditor shall be taken as being present and voting at such meeting.

(3.) The subsequent meeting shall be summoned by the official receiver by not less than seven days notice, and shall not be held until after the public examination of the debtor is concluded. The notice shall state generally the terms of the proposal, and shall be accompanied by a report of the official receiver thereon.

(4.) The debtor or the official receiver may, after the composition or scheme is accepted by the creditors, apply to the Court to approve it, and notice of the time appointed for hearing the application shall be given to each creditor who has proved.

(5.) The Court shall, before approving a composition or scheme, hear a report of the official receiver as to the terms of the composition or scheme and as to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor.

(6.) If the Court is of opinion that the terms of the composition or scheme are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the Court is required under this Act where the debtor is adjudged bankrupt to refuse his discharge, the Court shall, or if any such facts are proved as would under this Act justify the Court in refusing, qualifying, or suspending the debtor's discharge, the Court may, in its discretion, refuse to approve the composition or scheme.

(7.) If the Court approves the composition or scheme, the approval may be testified by the seal of the Court being attached to the instrument containing the terms of the composition or scheme, or by the terms being embodied in an order of the Court.

(8.) A composition or scheme accepted and approved in pursuance of this section shall be binding on all the creditors so far as relates to any debts due to them from the debtor and provable in bankruptcy.

(9.) A certificate of the official receiver that a composition or scheme has been duly accepted and approved shall, in the absence of fraud, be conclusive as to its validity.

(10.) The provisions of a composition or scheme under this section may be enforced by the Court on application by any person interested, and any disobedience of an order of the Court made on the application shall be deemed a contempt of Court.

(11.) If default is made in payment of any instalment due in pursuance of the composition or scheme, or if it appears to the Court, on satisfactory evidence, that the composition or scheme cannot in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, on application by any creditor, adjudge the debtor bankrupt, and annul the composition or scheme, but without prejudice to the validity of any sale, disposition, or payment duly made, or thing duly done under or in pursuance of the composition or scheme. Where a debtor is adjudged bankrupt under this sub-section any debt provable in other respects, which has been contracted before the date of the adjudication, shall be provable in the bankruptcy.

(12.) If, under or in pursuance of a composition or scheme, a trustee is appointed to administer the debtor's property or manage his business, Part V. of this Act shall apply to the trustee as if he were a trustee in a bankruptcy, and as if the terms "bankruptcy," "bankrupt," and "order of adjudication" included respectively a composition or scheme of arrangement, a compounding or arranging debtor, and order approving the composition or scheme.

(13.) Part III. of this Act shall, so far as the nature of the case and the terms of the composition or scheme admit, apply thereto, the same interpretation being given to the words "trustee," "bankruptcy," "bankrupt," and "order of adjudication," as in the last preceding sub-section.

(14.) No composition or scheme shall be approved by the Court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of a bankrupt.

(15.) The acceptance by a creditor of a composition or scheme shall not release any person who under this Act would not be released by an order of discharge if the debtor had been adjudged bankrupt.

Effect of composition or scheme.

19. Notwithstanding the acceptance and approval of a composition or scheme, such composition or scheme shall not be binding on any creditor so far as regards a debt or liability from which, under the provisions of this Act, the debtor would not be discharged by an order of discharge in bankruptcy, unless the creditor assents to the composition or scheme.

Adjudication of Bankruptcy.

Adjudication of bankruptcy where composition not accepted or approved.

20. (1.) Where a receiving order is made against a debtor, then, if the creditors at the first meeting or any adjournment thereof by ordinary resolution resolve that the debtor be adjudged bankrupt, or pass no resolution, or if the creditors do not meet, or if a composition or scheme is not accepted or approved in pursuance of this Act within fourteen days after the conclusion of the examination of the debtor or such further time as the Court may allow, the Court shall adjudge the debtor bankrupt; and thereupon the property of the bankrupt shall become divisible among his creditors and shall vest in a trustee.

(2.) Notice of every order adjudging a debtor bankrupt, stating the name, address, and description of the bankrupt, the date of the adjudication, and the Court by which the adjudication is made, shall be gazetted and advertised in a local paper in the prescribed manner, and the date of the order shall for the purposes of this Act be the date of the adjudication.

Appointment of trustee.

21. (1.) Where a debtor is adjudged bankrupt, or the creditors have resolved that he be adjudged bankrupt, the creditors may, by ordinary resolution, appoint some fit person, whether a creditor or not, to fill the office of trustee of the property of the bankrupt; or they may resolve to leave his appointment to the committee of inspection hereinafter mentioned.

(2.) The person so appointed shall give security in manner prescribed to the satisfaction of the Board of Trade, and the Board, if satisfied with the security, shall certify that his appointment has been duly made, unless they object to the appointment on the ground that it has not been made in good faith by a majority in value of the creditors voting, or that the person appointed is not fit to act as trustee, or that his connexion with or relation to the bankrupt or his estate or any particular creditor makes it difficult for him to act with impartiality in the interests of the creditors generally.

(3.) Provided that where the Board make any such objection they shall, if so requested by a majority in value of the creditors, notify the objection to the High Court, and thereupon the High Court may decide on its validity.

(4.) The appointment of a trustee shall take effect as from the date of the certificate.

(5.) The official receiver shall not, save as by this Act provided, be the trustee of the bankrupt's property.

(6.) If a trustee is not appointed by the creditors within four weeks from the date of the adjudication, or, in the event of negotiations for a composition or scheme being pending at the expiration of these four weeks, then within seven days from the close of those negotiations by the refusal of the creditors to accept, or of the Court to approve, the composition or scheme, the official receiver shall report the matter to the Board of Trade, and thereupon the Board of Trade shall appoint some fit person to be trustee of the bankrupt's property, and shall certify the appointment.

(7.) Provided that the creditors or the committee of inspection (if so authorized by resolution of the creditors) may, at any subsequent time, if they think fit, appoint a trustee, and on the appointment being made and certified the person appointed shall become trustee in the place of the person appointed by the Board of Trade.

(8.) When a debtor is adjudged bankrupt after the first meeting of creditors has been held, and a trustee has not been appointed prior to the adjudication, the official receiver shall forthwith summon a meeting of creditors for the purpose of appointing a trustee.

Committee of inspection.

22. (1.) The creditors, qualified to vote, may at their first or any subsequent meeting, by resolution, appoint from among the creditors qualified to vote, or the holders of general proxies or general powers of attorney from such creditors, a committee of inspection for the purpose of superintending the administration of the bankrupt's property by the trustee. The committee of inspection shall consist of not more than five nor less than three persons.

(2.) The committee of inspection shall meet at such times as they shall from time to time appoint, and failing such appointment, at least once a month; and the trustee or any member of the committee may also call a meeting of the committee as and when he thinks necessary.

(3.) The committee may act by a majority of their members present at a meeting, but shall not act unless a majority of the committee are present at the meeting.

(4.) Any member of the committee may resign his office by notice in writing signed by him, and delivered to the trustee.

(5.) If a member of the committee becomes bankrupt, or compounds or arranges with his creditors, or is absent from five consecutive meetings of the committee, his office shall thereupon become vacant.

(6.) Any member of the committee may be removed by an ordinary resolution at any meeting of creditors of which seven days notice has been given, stating the object of the meeting.

(7.) On a vacancy occurring in the office of a member of the committee, the trustee shall forthwith summon a meeting of creditors for the purpose of filling the vacancy, and the meeting may, by resolution, appoint another creditor or other person eligible as above to fill the vacancy.

(8.) The continuing members of the committee, provided there be not less than two such continuing members, may act notwithstanding any vacancy in their body; and where the number of members of the committee of inspection is for the time being less than five, the creditors may increase that number, so that it do not exceed five.

(9.) If there be no committee of inspection, any act or thing or any direction or permission by this Act authorized or required to be done or given by the committee may be done or given by the Board of Trade on the application of the trustee.

Power to accept composition or scheme after bankruptcy adjudication.

23. (1.) Where a debtor is adjudged bankrupt the creditors may, if they think fit, at any time after the adjudication, by special resolution, resolve to entertain a proposal for a composition in satisfaction of the debts due to them under the bankruptcy, or for a scheme of arrangement of the bankrupt's affairs; and thereupon the same proceedings shall be taken and the same consequences shall ensue as in the case of a composition or scheme accepted before adjudication.

(2.) If the Court approves the composition or scheme it may make an order annulling the bankruptcy and vesting the property of the bankrupt in him

or in such other person as the Court may appoint, on such terms, and subject to such conditions, if any, as the Court may declare.

(3.) If default is made in payment of any instalment due in pursuance of the composition or scheme, or if it appears to the Court that the composition or scheme cannot proceed without injustice or undue delay, or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, on application by any person interested, adjudge the debtor bankrupt, and annul the composition or scheme, but without prejudice to the validity of any sale, disposition, or payment duly made, or thing duly done, under or in pursuance of the composition or scheme. Where a debtor is adjudged bankrupt under this sub-section, all debts, provable in other respects, which have been contracted before the date of such adjudication shall be provable in the bankruptcy.

Control over Person and Property of Debtor.

Duties of debtor as to discovery and realization of property.

24. (1.) Every debtor against whom a receiving order is made shall, unless prevented by sickness or other sufficient cause, attend the first meeting of his creditors, and shall submit to such examination and give such information as the meeting may require.

(2.) He shall give such inventory of his property, such list of his creditors and debtors, and of the debts due to and from them respectively, submit to such examination in respect of his property or his creditors, attend such other meetings of his creditors, wait at such times on the official receiver, special manager, or trustee, execute such powers of attorney, conveyances, deeds, and instruments, and generally do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors, as may be reasonably required by the official receiver, special manager, or trustee, or may be prescribed by general rules, or be directed by the Court by any special order or orders made in reference to any particular case, or made on the occasion of any special application by the official receiver, special manager, trustee, or any creditor or person interested.

(3.) He shall, if adjudged bankrupt, aid, to the utmost of his power, in the realisation of his property and the distribution of the proceeds among his creditors.

(4.) If a debtor wilfully fails to perform the duties imposed on him by this section, or to deliver up possession of any part of his property, which is divisible amongst his creditors under this Act, and which is for the time being in his possession or under his control, to the official receiver or to the trustee, or to any person authorized by the Court to take possession of it, he shall, in addition to any other punishment to which he may be subject, be guilty of a contempt of court, and may be punished accordingly.

Arrest of debtor under certain circumstances.

25. (1.) The Court may, by warrant addressed to any constable or prescribed officer of the Court, cause a debtor to be arrested, and any books, papers, money, and goods in his possession to be seized, and him and them to be safely kept as prescribed until such time as the Court may order under the following circumstances:

(*a.*) If after a bankruptcy notice has been issued under this Act, or after presentation of a bankruptcy petition by or against him, it appears to the Court that there is probable reason for believing that he is about to abscond with a view of avoiding payment of the debt in respect of which the bankruptcy notice was issued, or of avoiding service of a bankruptcy petition, or of avoiding appearance to any such petition, or of avoiding examination in respect of his affairs, or of otherwise avoiding, delaying, or embarrassing proceedings in bankruptcy against him.

(*b.*) If, after presentation of a bankruptcy petition by or against him, it appears to the Court that there is probable cause for believing that he is about to remove his goods with a view of preventing or delaying possession being taken of them by the official receiver or trustee, or that there is probable ground for believing that he has concealed or is about to conceal or destroy any of his goods, or any books, documents, or writings, which might be of use to his creditors in the course of his bankruptcy.

(*c.*) If, after service of a bankruptcy petition on him, or after a receiving order is made against him, he removes any goods in his possession

above the value of five pounds, without the leave of the official receiver or trustee.

(*d.*) If, without good cause shown, he fails to attend any examination ordered by the Court.

Provided that no arrest upon a bankruptcy notice shall be valid and protected unless the debtor before or at the time of his arrest shall be served with such bankruptcy notice.

(2.) No payment or composition made or security given after arrest made under this section shall be exempt from the provisions of this Act relating to fraudulent preferences.

Re-direction of debtor's letters.

26. Where a receiving order is made against a debtor, the Court, on the application of the official receiver or trustee, may from time to time order that for such time, not exceeding three months, as the Court thinks fit, post letters addressed to the debtor at any place, or places, mentioned in the order for re-direction shall be re-directed, sent or delivered by the Postmaster-General, or the officers acting under him, to the official receiver, or the trustee, or otherwise as the Court directs, and the same shall be done accordingly.

Discovery of debtor's property.

27. (1.) The Court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the Court may deem capable of giving information respecting the debtor, his dealings or property, and the Court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property.

(2.) If any person so summoned, after having been tendered a reasonable sum, refuses to come before the Court at the time appointed, or refuses to produce any such document, having no lawful impediment made known to the Court at the time of its sitting and allowed by it, the Court may, by warrant, cause him to be apprehended and brought up for examination.

(3.) The Court may examine on oath, either by word of mouth or by written interrogatories, any person so brought before it concerning the debtor, his dealings or property.

(4.) If any person on examination before the Court admits that he is indebted to the debtor, the Court may, on the application of the official receiver or trustee, order him to pay to the receiver or trustee, at such time and in such manner as to the Court seems expedient, the amount admitted, or any part thereof, either in full discharge of the whole amount in question or not, as the Court thinks fit, with or without costs of the examination.

(5.) If any person on examination before the Court admits that he has in his possession any property belonging to the debtor, the Court may, on the application of the official receiver or trustee, order him to deliver to the official receiver or trustee such property, or any part thereof, at such time, and in such manner, and on such terms as to the Court may seem just.

(6.) The Court may, if it think fit, order that any person who if in England would be liable to be brought before it under this section shall be examined in Scotland or Ireland, or in any other place out of England.

Discharge of Bankrupt.

Discharge of bankrupt.

28. (1.) A bankrupt may, at any time after being adjudged bankrupt, apply to the Court for an order of discharge, and the Court shall appoint a day for hearing the application, but the application shall not be heard until the public examination of the bankrupt is concluded. The application shall be heard in open Court.

(2.) On the hearing of the application the Court shall take into consideration a report of the official receiver as to the bankrupt's conduct and affairs, and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property: Provided that the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanor under this Act, or Part II. of the Debtors Act, 1869, or any amendment thereof, and shall, on proof of any of the facts hereinafter mentioned, either refuse the order, or

suspend the operation of the order for a specified time, or grant an order of discharge, subject to such conditions as aforesaid.

(3.) The facts hereinbefore referred to are—

(a) That the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy:

(b) That the bankrupt has continued to trade after knowing himself to be insolvent:

(c) That the bankrupt has contracted any debt provable in the bankruptcy, without having at the time of contracting it any reasonable or probable ground of expectation (proof whereof shall lie on him) of being able to pay it:

(d) That the bankrupt has brought on his bankruptcy by rash and hazardous speculations or unjustifiable extravagance in living:

(e) That the bankrupt has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him:

(f) That the bankrupt has within three months preceding the date of the receiving order, when unable to pay his debts as they become due, given an undue preference to any of his creditors:

(g) That the bankrupt has on any previous occasion been adjudged bankrupt, or made a [statutory] (*a*) composition or arrangement with his creditors:

(h) That the bankrupt has been guilty of any fraud or fraudulent breach of trust:

(4.) For the purposes of this section the report of the official receiver shall be primâ facie evidence of the statements therein contained.

(5.) Notice of the appointment by the Court of the day for hearing the application for discharge shall be published in the prescribed manner and sent fourteen days at least before the day so appointed to each creditor who has proved, and the Court may hear the official receiver and the trustee, and may also hear any creditor. At the hearing the Court may put such questions to the debtor and receive such evidence as it may think fit.

(6.) The Court may, as one of the conditions referred to in this section, require the bankrupt to consent to judgment being entered against him by the official receiver or trustee for any balance of the debts provable under the bankruptcy which is not satisfied at the date of his discharge; but in such case execution shall not be issued on the judgment without leave of the Court, which leave may be given on proof that the bankrupt has since his discharge acquired property or income available for payment of his debts.

(7.) A discharged bankrupt shall, notwithstanding his discharge, give such assistance as the trustee may require in the realization and distribution of such of his property as is vested in the trustee, and if he fails to do so he shall be guilty of a contempt of Court; and the Court may also, if it thinks fit, revoke his discharge, but without prejudice to the validity of any sale, disposition, or payment duly made or thing duly done subsequent to the discharge, but before its revocation.

Fraudulent settlements.

29. In either of the following cases; that is to say,

(1.) In the case of a settlement made before and in consideration of marriage where the settlor is not at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement; or

(2.) In the case of any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest (not being money or property of or in right of his wife);

If the settlor is adjudged bankrupt or compounds or arranges with his creditors, and it appears to the Court that such settlement, covenant, or contract was made in order to defeat or delay creditors, or was unjustifiable having regard to the state of the settlor's affairs at the time when it was made, the Court may refuse or suspend an order of discharge, or grant an

(*a*) See 50 & 51 Vict. c. 57, s. 16.

order subject to conditions, or refuse to approve a composition or arrangement, as the case may be, in like manner as in cases where the debtor has been guilty of fraud.

Effect of order of discharge.

30. (1.) An order of discharge shall not release the bankrupt from any debt on a recognizance nor from any debt with which the bankrupt may be chargeable at the suit of the Crown or of any person for any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff or other public officer on a bail bond entered into for the appearance of any person prosecuted for any such offence: and he shall not be discharged from such excepted debts unless the Treasury certify in writing their consent to his being discharged therefrom. An order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party, nor from any debt or liability whereof he has obtained forbearance by any fraud to which he was a party.

(2.) An order of discharge shall release the bankrupt from all other debts provable in bankruptcy.

(3.) An order of discharge shall be conclusive evidence of the bankruptcy, and of the validity of the proceedings therein, and in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by the order, the bankrupt may plead that the cause of action occurred before his discharge, and may give this Act and the special matter in evidence.

(4.) An order of discharge shall not release any person who at the date of the receiving order was a partner or co-trustee with the bankrupt or was jointly bound or had made any joint contract with him, or any person who was surety or in the nature of a surety for him.

Undischarged bankrupt obtaining credit to extent of 20*l.* to be guilty of misdemeanor.

31. Where an undischarged bankrupt who has been adjudged bankrupt under this Act obtains credit to the extent of twenty pounds or upwards from any person without informing such person that he is an undischarged bankrupt, he shall be guilty of a misdemeanor, and may be dealt with and punished as if he had been guilty of a misdemeanor under the Debtors Act, 1869, and the provisions of that Act shall apply to proceedings under this section.

PART II.

Disqualifications of Bankrupt.

Disqualifications of bankrupt.

32. (1.) Where a debtor is adjudged bankrupt he shall, subject to the provisions of this Act, be disqualified for—

(a) Sitting or voting in the House of Lords, or on any committee thereof, or being elected as a peer of Scotland or Ireland to sit and vote in the House of Lords;

(b) Being elected to, or sitting or voting in, the House of Commons, or on any committee thereof;

(c) Being appointed or acting as a justice of the peace;

(d) Being elected to or holding or exercising the office of mayor, alderman, or councillor;

(e) Being elected to or holding or exercising the office of guardian of the poor, overseer of the poor, member of a sanitary authority, or member of a school board, highway board, burial board, or select vestry.

(2.) The disqualifications to which a bankrupt is subject under this section shall be removed and cease if and when,—

(a) the adjudication of bankruptcy against him is annulled; or

(b) he obtains from the Court his discharge with a certificate to the effect that his bankruptcy was caused by misfortune without any misconduct on his part.

The Court may grant or withhold such certificate as it thinks fit, but any refusal of such certificate shall be subject to appeal.

(3.) The disqualifications imposed by this section shall extend to all parts of the United Kingdom.

Vacating of seat in House of Commons.

33. (1.) If a member of the House of Commons is adjudged bankrupt, and the disqualifications arising therefrom under this Act are not removed within six months from the date of the order, the Court shall, immediately after the expiration of that time, certify the same to the Speaker of the House of Commons, and thereupon the seat of the member shall be vacant.

(2.) Where the seat of a member so becomes vacant, the Speaker, during a recess of the House, whether by prorogation or by adjournment, shall forthwith, after receiving the certificate, cause notice thereof to be published in the London Gazette; and after the expiration of six days after the publication shall (unless the House has met before that day, or will meet on the day of the issue), issue his warrant to the clerk of the Crown to make out a new writ for electing another member in the room of the member whose seat has so become vacant.

(3.) The powers of the act of the twenty-fourth year of the reign of King George the Third, chapter twenty-six, "to repeal so much of two Acts made in the tenth and fifteenth years of the reign of his present Majesty as authorises the Speaker of the House of Commons to issue his warrant to the clerk of the Crown for making out writs for the election of members to serve in Parliament in the manner therein mentioned; and for substituting other provisions for the like purposes," so far as those powers enable the Speaker to nominate and appoint other persons, being members of the House of Commons, to issue warrants for the making out of new writs during the vacancy of the office of Speaker, or during his absence out of the realm, shall extend to enable him to make the like nomination and appointment for issuing warrants, under the like circumstances and conditions, for the election of a member in the room of any member whose seat becomes vacant under this Act.

Vacating of municipal and other offices.

34. If a person is adjudged bankrupt whilst holding the office of mayor, alderman, councillor, guardian, overseer, or member of a sanitary authority, school board, highway board, burial board, or select vestry, his office shall thereupon become vacant.

Power for court to annul adjudication in certain cases.

35. (1.) Where in the opinion of the Court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full, the Court may, on the application of any person interested, by order, annul the adjudication.

(2.) Where an adjudication is annulled under this section all sales and dispositions of property and payments duly made, and all acts theretofore done, by the official receiver, trustee, or other person acting under their authority, or by the Court, shall be valid, but the property of the debtor who was adjudged bankrupt shall vest in such person as the Court may appoint, or in default of any such appointment revert to the debtor for all his estate or interest therein on such terms and subject to such conditions, if any, as the Court may declare by order.

(3.) Notice of the order annulling an adjudication shall be forthwith gazetted and published in a local paper.

Meaning of payment of debts in full.

36. For the purposes of this part of this Act, any debt disputed by a debtor shall be considered as paid in full, if the debtor enters into a bond, in such sum and with such sureties as the Court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt, with costs, and any debt due to a creditor who cannot be found or cannot be identified shall be considered as paid in full if paid into Court.

PART III.

ADMINISTRATION OF PROPERTY.

Proof of Debts.

Description of debts provable in bankruptcy.

37. (1.) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable in bankruptcy.

(2.) A person having notice of any act of bankruptcy available against the

debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice.

(3.) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy.

(4.) An estimate shall be made by the trustee of the value of any debt or liability provable as aforesaid, which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value.

(5.) Any person aggrieved by any estimate made by the trustee as aforesaid may appeal to the Court.

(6.) If, in the opinion of the Court, the value of the debt or liability is incapable of being fairly estimated, the Court may make an order to that effect, and thereupon the debt or liability shall, for the purposes of this Act, be deemed to be a debt not provable in bankruptcy.

(7.) If, in the opinion of the Court, the value of the debt or liability is capable of being fairly estimated, the Court may direct the value to be assessed, before the Court itself without the intervention of a jury, and may give all necessary directions for this purpose, and the amount of the value when assessed shall be deemed to be a debt provable in bankruptcy.

(8.) "Liability" shall for the purposes of this Act include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring before the discharge of the debtor, and generally it shall include any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of money, or money's worth, whether the payment is, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or as matter of opinion.

Mutual credit and set-off.

38. Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall be made under this Act, and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor, and available against him.

Rules as to proof of debts.

39. With respect to the mode of proving debts, the right of proof by secured and other creditors, the admission and rejection of proofs, and the other matters referred to in the Second Schedule, the rules in that schedule shall be observed.

Priority of debts.

40. (1.) In the distribution of the property of a bankrupt there shall be paid in priority to all other debts,—

(a) All parochial or other local rates due from the bankrupt at the date of the receiving order, and having become due and payable within twelve months next before such time, and all assessed taxes, land tax, property or income tax, assessed on him up to the fifth day of April next before the date of the receiving order, and not exceeding in the whole one year's assessment;

(b) All wages or salary of any clerk or servant in respect of services rendered to the bankrupt during four months before the date of the receiving order, not exceeding fifty pounds; and

(c) All wages of any labourer or workman, not exceeding fifty pounds, whether payable for time or piece-work, in respect of services rendered to the bankrupt during four months before the date of the receiving order.

(2.) The foregoing debts shall rank equally between themselves, and shall be paid in full, unless the property of the bankrupt is insufficient to meet

them, in which case they shall abate in equal proportions between themselves.

(3.) In the case of partners the joint estate shall be applicable in the first instance in payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts. If there is a surplus of the separate estates it shall be dealt with as part of the joint estate. If there is a surplus of the joint estate it shall be dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estate.

(4.) Subject to the provisions of this Act all debts proved in the bankruptcy shall be paid pari passu.

(5.) If there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date of the receiving order at the rate of four pounds per centum per annum on all debts proved in the bankruptcy.

(6.) Nothing in this section shall alter the effect of section five of the Act twenty-eight and twenty-nine Victoria, chapter eighty-six, "to amend the Law of Partnership," or shall prejudice the provisions of the Friendly Societies Act, 1875. 38 & 39 Vict. c. 60.

Preferential claim in case of apprenticeship.

41. (1.) Where at the time of the presentation of the bankruptcy petition any person is apprenticed or is an articled clerk to the bankrupt, the adjudication of bankruptcy shall, if either the bankrupt or apprentice or clerk gives notice in writing to the trustee to that effect, be a complete discharge of the indenture of apprenticeship or articles of agreement; and if any money has been paid by or on behalf of the apprentice or clerk to the bankrupt as a fee, the trustee may, on the application of the apprentice or clerk, or of some person on his behalf, pay such sum as the trustee, subject to an appeal to the Court, thinks reasonable, out of the bankrupt's property, to or for the use of the apprentice or clerk, regard being had to the amount paid by him or on his behalf, and to the time during which he served with the bankrupt under the indenture or articles before the commencement of the bankruptcy, and to the other circumstances of the case.

(2.) Where it appears expedient to a trustee, he may, on the application of any apprentice or articled clerk to the bankrupt, or any person acting on behalf of such apprentice or articled clerk, instead of acting under the preceding provisions of this section, transfer the indenture of apprenticeship or articles of agreement to some other person.

Power to landlord to distrain for rent.

42. (1.) The landlord or other person to whom any rent is due from the bankrupt may at any time either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation, that if such distress for rent be levied after the commencement of the bankruptcy it shall be available only for one year's rent accrued due prior to the date of the order of adjudication, but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the surplus due for which the distress may not have been available.

(2.) For the purposes of this section the term "order of adjudication" shall be deemed to include an order for the administration of the estate of a debtor whose debts do not exceed fifty pounds, or of a deceased person who dies insolvent.

Property available for Payment of Debts.

Relation back of trustee's title.

43. The bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition; but no bankruptcy petition, receiving order, or adjudication shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor.

Description of

44. The property of the bankrupt divisible amongst his creditors, and in this

bankrupt's property divisible amongst creditors.

Act referred to as the property of the bankrupt, shall not comprise the following particulars:

(1.) Property held by the bankrupt on trust for any other person:

(2.) The tools (if any) of his trade and the necessary wearing apparel and bedding of himself, his wife and children, to a value, inclusive of tools and apparel and bedding, not exceeding twenty pounds in the whole:

But it shall comprise the following particulars:

(i.) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge; and

(ii.) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice; and,

(iii.) All goods being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section.

Effect of Bankruptcy on antecedent Transactions.

Restriction of rights of creditor under execution or attachment.

45. (1.) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.

(2.) For the purposes of this Act, an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver.

Duties of sheriff as to goods taken in execution.

46. (1.) Where the goods of a debtor are taken in execution, and before the sale thereof notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods to the official receiver or trustee under the order, but the costs of the execution shall be a charge on the goods so delivered, and the official receiver or trustee may sell the goods or an adequate part thereof for the purpose of satisfying the charge.

(2.) Where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding twenty pounds, the sheriff shall deduct the costs of the execution from the proceeds of sale, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and the debtor is adjudged bankrupt thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the trustee in the bankruptcy, who shall be entitled to retain the same as against the execution creditor, but otherwise he shall deal with it as if no notice of the presentation of a bankruptcy petition had been served on him.

(3.) An execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases the goods in good faith under a sale by the sheriff shall in all cases acquire a good title to them against the trustee in bankruptcy.

Avoidance of voluntary settlements.

47. (1.) Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void

against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settler in such property had passed to the trustee of such settlement on the execution thereof.

(2.) Any covenant or contract made in consideration of marriage, for the future settlement on or for the settler's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent in possession or remainder and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy.

(3.) "Settlement" shall for the purposes of this section include any conveyance or transfer of property.

Avoidance of preferences in certain cases.

48. (1.) Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy.

(2.) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt.

Protection of bonâ fide transactions without notice.

49. Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing in this Act shall invalidate, in the case of a bankruptcy—

(a) Any payment by the bankrupt to any of his creditors,

(b) Any payment or delivery to the bankrupt,

(c) Any conveyance or assignment by the bankrupt for valuable consideration,

(d) Any contract, dealing, or transaction by or with the bankrupt for valuable consideration,

Provided that both the following conditions are complied with, namely—

(1.) The payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case may be, takes place before the date of the receiving order; and

(2.) The person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing, or transaction was made, executed, or entered into, has not at the time of the payment, delivery, conveyance, assignment, contract, dealing, or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time.

Realisation of Property.

Possession of property by trustee.

50. (1.) The trustee shall, as soon as may be, take possession of the deeds, books, and documents of the bankrupt, and all other parts of his property capable of manual delivery.

(2.) The trustee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the bankrupt, be in the same position as if he were a receiver of the property appointed by the High Court, and the Court may on his application, enforce such acquisition or retention accordingly.

(3.) Where any part of the property of the bankrupt consists of stock, shares in ships, shares, or any other property transferable in the books of any company, office, or person, the trustee may exercise the right to transfer the property to the same extent as the bankrupt might have exercised it if he had not become bankrupt.

(4.) Where any part of the property of the bankrupt is of copyhold or customary tenure, or is any like property passing by surrender and admittance or in any similar manner, the trustee shall not be compellable to

be admitted to the property, but may deal with it in the same manner as if it had been capable of being and had been duly surrendered or otherwise conveyed to such uses as the trustee may appoint; and any appointee of the trustee shall be admitted to or otherwise invested with the property accordingly.

(5.) Where any part of the property of the bankrupt consists of things in action, such things shall be deemed to have been duly assigned to the trustee.

(6.) Any treasurer or other officer, or any banker, attorney, or agent of a bankrupt, shall pay and deliver to the trustee all money and securities in his possession or power, as such officer, banker, attorney, or agent, which he is not by law entitled to retain as against the bankrupt or the trustee. If he does not he shall be guilty of a contempt of court, and may be punished accordingly on the application of the trustee.

Seizure of property of bankrupt.

51. Any person acting under warrant of the Court may seize any part of the property of a bankrupt in the custody or possession of the bankrupt, or of any other person, and with a view to such seizure may break open any house, building, or room of the bankrupt where the bankrupt is supposed to be, or any building or receptacle of the bankrupt where any of his property is supposed to be; and where the Court is satisfied that there is reason to believe that property of the bankrupt is concealed in a house or place not belonging to him, the Court may, if it thinks fit, grant a search warrant to any constable or officer of the Court, who may execute it according to its tenor.

Sequestration of ecclesiastical benefice.

52. (1.) Where a bankrupt is a beneficed clergyman, the trustee may apply for a sequestration of the profits of the benefice, and the certificate of the appointment of the trustee shall be sufficient authority for the granting of sequestration without any writ or other proceeding, and the same shall accordingly be issued as on a writ of levari facias founded on a judgment against the bankrupt, and shall have priority over any other sequestration issued after the commencement of the bankruptcy in respect of a debt provable in the bankruptcy, except a sequestration issued before the date of the receiving order by or on behalf of a person who at the time of the issue thereof had not notice of an act of bankruptcy committed by the bankrupt, and available for grounding a receiving order against him.

(2.) The bishop of the diocese in which the benefice is situate may, if he thinks fit, appoint to the bankrupt such or the like stipend as he might by law have appointed to a curate duly licensed to serve the benefice in case the bankrupt had been non-resident, and the sequestrator shall pay the sum so appointed out of the profits of the benefice to the bankrupt, by quarterly instalments while he performs the duties of the benefice.

(3.) The sequestrator shall also pay out of the profits of the benefice the salary payable to any duly licensed curate of the church of the benefice in respect of duties performed by him as such during four months before the date of the receiving order not exceeding fifty pounds.

34 & 35 Vict. c. 43. 34 & 35 Vict. c. 45.

(4.) Nothing in this section shall prejudice the operation of the Ecclesiastical Dilapidations Act, 1871, or the Sequestration Act, 1871, or any mortgage or charge duly created under any Act of Parliament before the commencement of the bankruptcy on the profits of the benefice.

Appropriation of portion of pay or salary to creditors.

53. (1.) Where a bankrupt is an officer of the army or navy, or an officer or clerk or otherwise employed or engaged in the civil service of the Crown, the trustee shall receive for distribution amongst the creditors so much of the bankrupt's pay or salary as the Court, on the application of the trustee, with the consent of the chief officer of the department under which the pay or salary is enjoyed, may direct. Before making any order under this subsection the Court shall communicate with the chief officer of the department as to the amount, time, and manner of the payment to the trustee, and shall obtain the written consent of the chief officer to the terms of such payment.

(2.) Where a bankrupt is in the receipt of a salary or income other than as aforesaid, or is entitled to any half pay, or pension, or to any compensation granted by the Treasury, the Court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary, income, half pay, pension, or compensation, or of any part thereof, to the trustee to be applied by him in such manner as the Court may direct.

(3.) Nothing in this section shall take away or abridge any power of the chief officer of any public department to dismiss a bankrupt, or to declare the pension, half pay, or compensation of any bankrupt to be forfeited.

Vesting and transfer of property.

54. (1.) Until a trustee is appointed the official receiver shall be the trustee for the purposes of this Act, and immediately on a debtor being adjudged bankrupt, the property of the bankrupt shall vest in the trustee.

(2.) On the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed.

(3.) The property of the bankrupt shall pass from trustee to trustee, including under that term the official receiver when he fills the office of trustee, and shall vest in the trustee for the time being during his continuance in office, without any conveyance, assignment, or transfer whatever.

(4.) The certificate of appointment of a trustee shall, for all purposes of any law in force in any part of the British dominions requiring registration, enrolment, or recording of conveyances or assignments of property, be deemed to be a conveyance or assignment of property, and may be registered, enrolled, and recorded accordingly.

Disclaimer of onerous property.

55. (1.) Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him, at any time within three months after the first appointment of a trustee, disclaim the property.

Provided that where any such property shall not have come to the knowledge of the trustee within one month after such appointment, he may disclaim such property at any time within two months after he first became aware thereof.

(2.) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person.

(3.) A trustee shall not be entitled to disclaim a lease without the leave of the Court, except in any cases which may be prescribed by general rules, and the Court may, before or on granting such leave, require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures, tenant's improvements, and other matters arising out of the tenancy as the Court thinks just.

(4.) The trustee shall not be entitled to disclaim any property in pursuance of this section in any case where an application in writing has been made to the trustee by any person interested in the property requiring him to decide whether he will disclaim or not, and the trustee has for a period of twenty-eight days after the receipt of the application, or such extended period as may be allowed by the Court, declined or neglected to give notice whether he disclaims the property or not; and, in the case of a contract, if the trustee, after such application as aforesaid, does not within the said period or extended period disclaim the contract, he shall be deemed to have adopted it.

(5.) The Court may, on the application of any person who is, as against the trustee, entitled to the benefit or subject to the burden of a contract made with the bankrupt, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as to the Court may seem equitable, and any damages payable under the order to any such person may be proved by him as a debt under the bankruptcy.

(6.) The Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as afore-

said, or a trustee for him, and on such terms as the Court thinks just; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose.

Provided always, that where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as under-lessee or as mortgagee by demise except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there shall be no person claiming under the bankrupt who is willing to accept an order upon such terms, the Court shall have power to vest the bankrupt's estate and interest in the property in any person liable either personally or in a representative character, and either alone or jointly with the bankrupt to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt.

(7.) Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt under the bankruptcy.

Powers of trustee to deal with property.

56. Subject to the provisions of this Act, the trustee may do all or any of the following things:—

(1.) Sell all or any part of the property of the bankrupt (including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt), by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels:

(2.) Give receipts for any money received by him, which receipts shall effectually discharge the person paying the money from all responsibility in respect of the application thereof:

(3.) Prove, rank, claim, and draw a dividend in respect of any debt due to the bankrupt:

(4.) Exercise any powers the capacity to exercise which is vested in the trustee under this Act, and execute any powers of attorney, deeds, and other instruments, for the purpose of carrying into effect the provisions of this Act:

(5.) Deal with any property to which the bankrupt is beneficially entitled as tenant in tail in the same manner as the bankrupt might have dealt with it; and sections fifty-six to seventy-three (both inclusive) of the Act of the session of the third and fourth years of the reign of King William the Fourth (chapter seventy-four), "for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance," shall extend and apply to proceedings under this Act, as if those sections were here re-enacted and made applicable in terms to those proceedings.

Powers exerciseable by trustee with permission of committee of inspection.

57. The trustee may, with the permission of the committee of inspection, do all or any of the following things:

(1.) Carry on the business of the bankrupt, so far as may be necessary for the beneficial winding up of the same:

(2.) Bring, institute, or defend any action or other legal proceeding relating to the property of the bankrupt:

(3.) Employ a solicitor or other agent to take any proceedings or do any business which may be sanctioned by the committee of inspection:

(4.) Accept as the consideration for the sale of any property of the bankrupt a sum of money payable at a future time subject to such stipulations as to security and otherwise as the committee think fit:

(5.) Mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts:

(6.) Refer any dispute to arbitration, compromise all debts, claims, and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between the bankrupt and any person who may have incurred any liability

to the bankrupt, on the receipt of such sums, payable at such times, and generally on such terms as may be agreed on:

(7.) Make such compromise or other arrangement as may be thought expedient with creditors, or persons claiming to be creditors, in respect of any debts provable under the bankruptcy:

(8.) Make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt, made or capable of being made on the trustee by any person or by the trustee on any person:

(9.) Divide in its existing form amongst the creditors, according to its estimated value, any property which from its peculiar nature or other special circumstances cannot be readily or advantageously sold.

The permission given for the purposes of this section shall not be a general permission to do all or any of the above-mentioned things, but shall only be a permission to do the particular thing or things for which permission is sought in the specified case or cases.

Distribution of Property.

Declaration and distribution of dividends.

58. (1.) Subject to the retention of such sums as may be necessary for the costs of administration, or otherwise, the trustee shall, with all convenient speed, declare and distribute dividends amongst the creditors who have proved their debts.

(2.) The first dividend, if any, shall be declared and distributed within four months after the conclusion of the first meeting of creditors, unless the trustee satisfies the committee of inspection that there is sufficient reason for postponing the declaration to a later date.

(3.) Subsequent dividends shall, in the absence of sufficient reason to the contrary, be declared and distributed at intervals of not more than six months.

(4.) Before declaring a dividend the trustee shall cause notice of his intention to do so to be gazetted in the prescribed manner, and shall also send reasonable notice thereof to each creditor mentioned in the bankrupt's statement who has not proved his debt.

(5.) When the trustee has declared a dividend he shall send to each creditor who has proved a notice showing the amount of the dividend and when and how it is payable, and a statement in the prescribed form as to the particulars of the estate.

Joint and separate dividends.

59. (1.) Where one partner of a firm is adjudged bankrupt, a creditor to whom the bankrupt is indebted jointly with the other partners of the firm, or any of them, shall not receive any dividend out of the separate property of the bankrupt until all the separate creditors have received the full amount of their respective debts.

(2.) Where joint and separate properties are being administered, dividends of the joint and separate properties shall, subject to any order to the contrary that may be made by the Court on the application of any person interested, be declared together: and the expenses of and incident to such dividends shall be fairly apportioned by the trustee between the joint and separate properties, regard being had to the work done for and the benefit received by each property.

Provision for creditors residing at a distance, &c.

60. In the calculation and distribution of a dividend the trustee shall make provision for debts provable in bankruptcy appearing from the bankrupt's statements, or otherwise, to be due to persons resident in places so distant from the place where the trustee is acting that in the ordinary course of communication they have not had sufficient time to tender their proofs, or to establish them if disputed, and also for debts provable in bankruptcy, the subject of claims not yet determined. He shall also make provision for any disputed proofs or claims, and for the expenses necessary for the administration of the estate or otherwise, and, subject to the foregoing provisions, he shall distribute as dividend all money in hand.

Right of creditor who has not proved debt before declaration of a dividend.

61. Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid out of any money for the time being in the hands of the trustee any dividend or dividends he may have failed to receive before that money is applied to the payment of any future dividend or dividends, but he shall not be entitled to disturb the

distribution of any dividend declared before his debt was proved by reason that he has not participated therein.

Final dividend.

62. When the trustee has realised all the property of the bankrupt, or so much thereof as can, in the joint opinion of himself and of the committee of inspection, be realised without needlessly protracting the trusteeship, he shall declare a final dividend, but before so doing he shall give notice in manner prescribed to the persons whose claims to be creditors have been notified to him, but not established to his satisfaction, that if they do not establish their claims to the satisfaction of the Court within a time limited by the notice, he will proceed to make a final dividend, without regard to their claims. After the expiration of the time so limited, or, if the Court on application by any such claimant grant him further time for establishing his claim, then on the expiration of such further time, the property of the bankrupt shall be divided among the creditors who have proved their debts, without regard to the claims of any other persons.

No action for dividend.

63. No action for a dividend shall lie against the trustee, but if the trustee refuses to pay any dividend the Court may, if it thinks fit, order him to pay it, and also to pay out of his own money interest thereon for the time that it is withheld, and the costs of the application.

Power to allow bankrupt to manage property.

64. (1.) The trustee, with the permission of the committee of inspection, may appoint the bankrupt himself to superintend the management of the property of the bankrupt or of any part thereof, or to carry on the trade (if any) of the bankrupt for the benefit of his creditors, and in any other respect to aid in administering the property in such manner and on such terms as the trustee may direct.

Allowance to bankrupt for maintenance or service.

(2.) The trustee may from time to time, with the permission of the committee of inspection, make such allowance as he may think just to the bankrupt out of his property for the support of the bankrupt and his family, or in consideration of his services if he is engaged in winding up his estate, but any such allowance may be reduced by the Court.

Right of bankrupt to surplus.

65. The bankrupt shall be entitled to any surplus remaining after payment in full of his creditors, with interest, as by this Act provided, and of the costs, charges, and expenses of the proceedings under the bankruptcy petition.

PART IV.

Official Receivers and Staff of Board of Trade.

Appointment by Board of Trade of official receivers of debtors' estates.

66. (1.) The Board of Trade may, at any time after the passing of this Act, and from time to time, appoint such persons as they think fit to be official receivers of debtors' estates, and may remove any person so appointed from such office. The official receivers of debtors' estates shall act under the general authority and directions of the Board of Trade, but shall also be officers of the courts to which they are respectively attached.

(2.) The number of official receivers so to be appointed, and the districts to be assigned to them, shall be fixed by the Board of Trade, with the concurrence of the Treasury. One person only shall be appointed for each district unless the Board of Trade, with the concurrence of the Treasury, shall otherwise direct; but the same person may, with the like concurrence, be appointed to act for more than one district.

(3.) Where more than one official receiver is attached to the Court, such one of them as is for the time being appointed by the Court for any particular estate shall be the official receiver for the purposes of that estate. The Court shall distribute the receiverships of the particular estates among the official receivers in the prescribed manner.

Deputy for official receiver.

67. (1.) The Board of Trade may from time to time, by order direct that any of its officers mentioned in the order shall be capable of discharging the duties of any official receiver during any temporary vacancy in the office, or during the temporary absence of any official receiver through illness or otherwise.

(2.) The Board of Trade may, on the application of an official receiver, at any time by order nominate some fit person to be his deputy, and to act

for him for such time not exceeding two months as the order may fix, and under such conditions as to remuneration and otherwise as may be prescribed.

Status of official receiver.

68. (1.) The duties of the official receiver shall have relation both to the conduct of the debtor and to the administration of his estate.

(2.) An official receiver may, for the purpose of affidavits verifying proofs, petitions, or other proceedings under this Act, administer oaths.

(3.) All expressions referring to the trustee under a bankruptcy shall, unless the context otherwise requires, or the Act otherwise provides, include the official receiver when acting as trustee.

(4.) The trustee shall supply the official receiver with such information, and give him such access to, and facilities for inspecting the bankrupt's books and documents and generally shall give him such aid, as may be requisite for enabling the official receiver to perform his duties under this Act.

Duties of official receiver as regards the debtor's conduct.

69. As regards the debtor, it shall be the duty of the official receiver—

(1.) To investigate the conduct of the debtor and to report to the Court, stating whether there is reason to believe that the debtor has committed any act which constitutes a misdemeanor under the Debtors Act, 1869, or any amendment thereof, or under this Act, or which would justify the Court in refusing, suspending or qualifying an order for his discharge.

(2.) To make such other reports concerning the conduct of the debtor as the Board of Trade may direct.

(3.) To take such part as may be directed by the Board of Trade in the public examination of the debtor.

(4.) To take such part, and give such assistance, in relation to the prosecution of any fraudulent debtor as the Board of Trade may direct.

Duties of official receiver as to debtor's estate.

70. (1.) As regards the estate of a debtor it shall be the duty of the official receiver—

(a.) Pending the appointment of a trustee, to act as interim receiver of the debtor's estate, and, where a special manager is not appointed, as manager thereof:

(b.) To authorise the special manager to raise money or make advances for the purposes of the estate in any case where, in the interests of the creditors, it appears necessary so to do:

(c.) To summon and preside at the first meeting of creditors:

(d.) To issue forms of proxy for use at the meetings of creditors:

(e.) To report to the creditors as to any proposal which the debtor may have made with respect to the mode of liquidating his affairs:

(f.) To advertise the receiving order, the date of the creditors first meeting and of the debtor's public examination, and such other matters as it may be necessary to advertise:

(g.) To act as trustee during any vacancy in the office of trustee.

(2.) For the purpose of his duties as interim receiver or manager the official receiver shall have the same powers as if he were a receiver and manager appointed by the High Court, but shall, as far as practicable, consult the wishes of the creditors with respect to the management of the debtor's property, and may for that purpose, if he thinks it advisable, summon meetings of the persons claiming to be creditors, and shall not, unless the Board of Trade otherwise order, incur any expense beyond such as is requisite for the protection of the debtor's property or the disposing of perishable goods.

Provided that when the debtor cannot himself prepare a proper statement of affairs, the official receiver may, subject to any prescribed conditions, and at the expense of the estate, employ some person or persons to assist in the preparation of the statement of affairs.

(3.) Every official receiver shall account to the Board of Trade and pay over all moneys and deal with all securities in such manner as the Board from time to time direct.

Power for Board of Trade to appoint officers.

71. The Board of Trade may, at any time after the passing of this Act, and from time to time, with the approval of the Treasury, appoint such additional officers, including official receivers, clerks, and servants (if any) as may be required by the Board for the execution of this Act, and may dismiss any person so appointed.

PART V.

Trustees in Bankruptcy.

Remuneration of Trustee.

Remuneration of trustee.

72. (1.) Where the creditors appoint any person to be trustee of a debtor's estate, his remuneration (if any) shall be fixed by an ordinary resolution of the creditors or if the creditors so resolve by the Committee of Inspection, and shall be in the nature of a commission or percentage, of which one part shall be payable on the amount realised, after deducting any sums paid to secured creditors out of the proceeds of their securities, and the other part on the amount distributed in dividend.

(2.) If one fourth in number or value of the creditors dissent from the resolution, or the bankrupt satisfies the Board of Trade that the remuneration is unnecessarily large, the Board of Trade shall fix the amount of the remuneration.

(3.) The resolution shall express what expenses the remuneration is to cover, and no liability shall attach to the bankrupt's estate, or to the creditors, in respect of any expenses which the remuneration is expressed to cover.

(4.) Where no remuneration has been voted to a trustee he shall be allowed out of the bankrupt's estate such proper costs and expenses incurred by him in or about the proceedings of the bankruptcy as the taxing officer may allow.

(5.) A trustee shall not, under any circumstances whatever, make any arrangement for or accept from the bankrupt, or any solicitor, auctioneer, or any other person that may be employed about a bankruptcy, any gift, remuneration, or pecuniary or other consideration or benefit whatever beyond the remuneration fixed by the creditors and payable out of the estate, nor shall he make any arrangement for giving up, or give up, any part of his remuneration, either as receiver, manager, or trustee to the bankrupt, or any solicitor or other person that may be employed about a bankruptcy.

Costs.

Allowance and taxation of costs.

73. (1.) Where a trustee or manager receives remuneration for his services as such no payment shall be allowed in his accounts in respect of the performance by any other person of the ordinary duties which are required by statute or rules to be performed by himself.

(2.) Where the trustee is a solicitor he may contract that the remuneration for his services as trustee shall include all professional services.

(3.) All bills and charges of solicitors, managers, accountants, auctioneers, brokers, and other persons, not being trustees, shall be taxed by the prescribed officer, and no payments in respect thereof shall be allowed in the trustee's accounts without proof of such taxation having been made. The taxing master shall satisfy himself before passing such bills and charges that the employment of such solicitors and other persons, in respect of the particular matters out of which such charges arise, has been duly sanctioned.

(4.) Every such person shall, on request by the trustee (which request the trustee shall make a sufficient time before declaring a dividend), deliver his bill of costs or charges to the proper officer for taxation, and if he fails to do so within seven days after receipt of the request, or such further time as the Court, on application, may grant, the trustee shall declare and distribute the dividend without regard to any claim by him, and thereupon any such claim shall be forfeited as well against the trustee personally as against the estate.

Receipts, Payments, Accounts, Audit.

Payment of money into Bank of England.

74. (1.) An account called the Bankruptcy Estates Account shall be kept by the Board of Trade with the Bank of England, and all moneys received by the Board of Trade in respect of proceedings under this Act shall be paid to that account.

(2.) The account of the Accountant in Bankruptcy at the Bank of England shall be transferred to the Bankruptcy Estates Account.

(3.) Every trustee in bankruptcy shall, in such manner and at such times

as the Board of Trade with the concurrence of the Treasury direct, pay the money received by him to the Bankruptcy Estates Account at the Bank of England, and the Board of Trade shall furnish him with a certificate of receipt of the money so paid.

(4.) Provided that if it appears to the committee of inspection that for the purpose of carrying on the debtor's business, or of obtaining advances, or because of the probable amount of the cash balance, or if the committee shall satisfy the Board of Trade that for any other reason it is for the advantage of the creditors that the trustee should have an account with a local bank, the Board of Trade shall, on the application of the committee of inspection, authorise the trustee to make his payments into and out of such local bank as the committee may select.

Such account shall be opened and kept by the trustee in the name of the debtor's estate; and any interest receivable in respect of the account shall be part of the assets of the estate.

The trustee shall make his payments into and out of such local bank in the prescribed manner.

(5.) Subject to any general rules relating to small bankruptcies under Part VII. of this Act, where the debtor at the date of the receiving order has an account at a bank, such account shall not be withdrawn until the expiration of seven days from the day appointed for the first meeting of creditors, unless the Board of Trade, for the safety of the account, or other sufficient cause, order the withdrawal of the account.

(6.) If a trustee at any time retains for more than ten days a sum exceeding fifty pounds, or such other amount as the Board of Trade in any particular case authorise him to retain, then, unless he explains the retention to the satisfaction of the Board of Trade, he shall pay interest on the amount so retained in excess at the rate of twenty pounds per centum per annum, and shall have no claim for remuneration, and may be removed from his office by the Board of Trade, and shall be liable to pay any expenses occasioned by reason of his default.

(7.) All payments out of money standing to the credit of the Board of Trade in the Bankruptcy Estates Account shall be made by the Bank of England in the prescribed manner.

Trustee not to pay into private account.

75. No trustee in a bankruptcy or under any composition or scheme of arrangement shall pay any sums received by him as trustee into his private banking account.

Investment of surplus funds.

76. (1.) Whenever the cash balance standing to the credit of the Bankruptcy Estates Account is in excess of the amount which in the opinion of the Board of Trade is required for the time being to answer demands in respect of bankrupts' estates, the Board of Trade shall notify the same to the Treasury, and shall pay over the same or any part thereof as the Treasury may require to the Treasury, to such account as the Treasury may direct, and the Treasury may invest the said sums or any part thereof in Government securities to be placed to the credit of the said account.

(2.) Whenever any part of the money so invested is, in the opinion of the Board of Trade, required to answer any demands in respect of bankrupts' estates, the Board of Trade shall notify to the Treasury the amount so required, and the Treasury shall thereupon repay to the Board of Trade such sum as may be required to the credit of the Bankruptcy Estates Account, and for that purpose may direct the sale of such part of the said securities as may be necessary.

(3.) The dividends on the investments under this section shall be paid to such account as the Treasury may direct, and regard shall be had to the amount thus derived in fixing the fees payable in respect of bankruptcy proceedings.

Certain receipts and fees to be applied in aid of expenditure.

77. The Treasury may from time to time issue to the Board of Trade in aid of the votes of Parliament, out of the receipts arising from fees, fee stamps, and dividends on investments under this Act, any sums which may be necessary to meet the charges estimated by the Board of Trade in respect of salaries and expenses under this Act.

Audit of trustee's accounts.

78. (1.) Every trustee shall, at such times as may be prescribed, but not less than twice in each year during his tenure of office, send to the Board of Trade, or as they direct, an account of his receipts and payments as such trustee.

(2.) The account shall be in a prescribed form, shall be made in dupli-

cate, and shall be verified by a statutory declaration in the prescribed form.

(3.) The Board of Trade shall cause the accounts so sent to be audited, and for the purposes of the audit the trustee shall furnish the Board with such vouchers and information as the Board may require, and the Board may at any time require the production of and inspect any books or accounts kept by the trustee.

(4.) When any such account has been audited one copy thereof shall be filed and kept by the Board, and the other copy shall be filed with the Court, and each copy shall be open to the inspection of any creditor, or of the bankrupt, or of any person interested.

The trustee to furnish list of creditors.

79. The trustee shall, whenever required by any creditor so to do, and on payment by such creditor of the prescribed fee, furnish and transmit to such creditor by post a list of the creditors, showing in such list the amount of the debt due to each of such creditors.

Books to be kept by trustee.

80. The trustee shall keep, in manner prescribed, proper books, in which he shall from time to time cause to be made entries or minutes of proceedings at meetings, and of such other matters as may be prescribed, and any creditor of the bankrupt may, subject to the control of the Court, personally or by his agent inspect any such books.

Annual statement of proceedings.

81. (1.) Every trustee in a bankruptcy shall from time to time, as may be prescribed, and not less than once in every year during the continuance of the bankruptcy, transmit to the Board of Trade a statement showing the proceedings in the bankruptcy up to the date of the statement, containing the prescribed particulars, and made out in the prescribed form.

(2.) The Board of Trade shall cause the statements so transmitted to be examined, and shall call the trustee to account for any misfeasance, neglect, or omission which may appear on the said statements or in his accounts or otherwise, and may require the trustee to make good any loss which the estate of the bankrupt may have sustained by the misfeasance, neglect, or omission.

Release of Trustee.

Release of trustee.

82. (1.) When the trustee has realised all the property of the bankrupt, or so much thereof as can, in his opinion, be realised without needlessly protracting the trusteeship, and distributed a final dividend, if any, or has ceased to act by reason of a composition having been approved, or has resigned, or has been removed from his office, the Board of Trade shall, on his application, cause a report on his accounts to be prepared, and, on his complying with all the requirements of the Board, shall take into consideration the report, and any objection which may be urged by any creditor or person interested against the release of the trustee, and shall either grant or withhold the release accordingly, subject nevertheless to an appeal to the High Court.

(2.) Where the release of a trustee is withheld the Court may, on the application of any creditor or person interested, make such order as it thinks just, charging the trustee with the consequences of any act or default he may have done or made contrary to his duty.

(3.) An order of the Board releasing the trustee shall discharge him from all liability in respect of any act done or default made by him in the administration of the affairs of the bankrupt, or otherwise in relation to his conduct as trustee, but any such order may be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact.

(4.) Where the trustee has not previously resigned or been removed, his release shall operate as a removal of him from his office, and thereupon the official receiver shall be the trustee.

Official Name.

Official name of trustee.

83. The trustee may sue and be sued by the official name of "the trustee of the property of a bankrupt," inserting the name of the bankrupt, and by that name may in any part of the British dominions or elsewhere hold property of every description, make contracts, sue and be sued, enter into any engagements binding on himself and his successors in office, and do all other acts necessary or expedient to be done in the execution of his office.

Appointment and Removal.

Power to appoint joint or successive trustees.

84. (1.) The creditors may, if they think fit, appoint more persons than one to the office of trustee, and when more persons than one are appointed they shall declare whether any act required or authorized to be done by the trustee is to be done by all or any one or more of such persons, but all such persons are in this Act included under the term "trustee," and shall be joint tenants of the property of the bankrupt.

(2.) The creditors may also appoint persons to act as trustees in succession in the event of one or more of the persons first named declining to accept the office of trustee, or failing to give security, or not being approved of by the Board of Trade.

Office of trustee vacated by insolvency.

85. If a receiving order is made against a trustee, he shall thereby vacate his office of trustee.

Removal of trustee.

86. (1.) The creditors may, by ordinary resolution, at a meeting specially called for that purpose, of which seven days notice has been given, remove a trustee appointed by them, and may at the same or any subsequent meeting appoint another person to fill the vacancy as hereinafter provided in case of a vacancy in the office of trustee.

(2.) If the Board of Trade are of opinion that a trustee appointed by the creditors is guilty of misconduct, or fails to perform his duties under this Act, the Board may remove him from his office, but if the creditors, by ordinary resolution, disapprove of his removal, he or they may appeal against it to the High Court.

Proceedings in case of vacancy in office of trustee.

87. (1.) If a vacancy occurs in the office of a trustee the creditors in general meeting may appoint a person to fill the vacancy, and thereupon the same proceedings shall be taken as in the case of a first appointment.

(2.) The official receiver shall, on the requisition of any creditor, summon a meeting for the purpose of filling any such vacancy.

(3.) If the creditors do not within three weeks after the occurrence of a vacancy appoint a person to fill the vacancy, the official receiver shall report the matter to the Board of Trade, and the Board may appoint a trustee; but in such case the creditors or committee of inspection shall have the same power of appointing a trustee as in the case of a first appointment.

(4.) During any vacancy in the office of trustee the official receiver shall act as trustee.

Voting powers of Trustee.

Limitation of voting powers of trustee.

88. The vote of the trustee, or of his partner, clerk, solicitor, or solicitor's clerk, either as creditor or as proxy for a creditor, shall not be reckoned in the majority required for passing any resolution affecting the remuneration or conduct of the trustee.

Control over Trustee.

Discretionary powers of trustee and control thereof.

89. (1.) Subject to the provisions of this Act the trustee shall, in the administration of the property of the bankrupt and in the distribution thereof amongst his creditors, have regard to any directions that may be given by resolution of the creditors at any general meeting, or by the committee of inspection, and any directions so given by the creditors at any general meeting shall in case of conflict be deemed to override any directions given by the committee of inspection.

(2.) The trustee may from time to time summon general meetings of the creditors for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors, by resolution, either at the meeting appointing the trustee or otherwise may direct, or whenever requested in writing to do so by one-fourth in value of the creditors.

(3.) The trustee may apply to the Court in manner prescribed for directions in relation to any particular matter arising under the bankruptcy.

(4.) Subject to the provisions of this Act the trustee shall use his own discretion in the management of the estate and its distribution among the creditors.

Appeal to Court against trustee.

90. If the bankrupt or any of the creditors, or any other person, is aggrieved by any act or decision of the trustee, he may apply to the Court, and the Court may confirm, reverse, or modify the act or decision complained of, and make such order in the premises as it thinks just.

Control of Board of Trade over trustees.

91. (1.) The Board of Trade shall take cognizance of the conduct of trustees, and in the event of any trustee not faithfully performing his duties, and duly observing all the requirements imposed on him by statute, rules or otherwise, with respect to the performance of his duties, or in the event of any complaint being made to the Board by any creditor in regard thereto, the Board shall inquire into the matter and take such action thereon as may be deemed expedient.

(2.) The Board may at any time require any trustee to answer any inquiry made by them in relation to any bankruptcy in which the trustee is engaged, and may, if the Board think fit, apply to the Court to examine on oath the trustee or any other person concerning the bankruptcy.

(3.) The Board may also direct a local investigation to be made of the books and vouchers of the trustee.

PART VI.

Constitution, Procedure, and Powers of Court.

Jurisdiction.

Jurisdiction to be exercised by High Court and county courts.

92. (1.) The Courts having jurisdiction in bankruptcy shall be the High Court and the county courts.

(2.) But the Lord Chancellor may from time to time, by order under his hand, exclude any county court from having jurisdiction in bankruptcy, and for the purposes of bankruptcy jurisdiction may attach its district or any part thereof to the High Court, or to any other county court or courts, and may from time to time revoke or vary any order so made. The Lord Chancellor may, in like manner and subject to the like conditions, detach the district of any county court or any part thereof from the district and jurisdiction of the High Court.

(3.) The term "district," when used in this Act with reference to a county court, means the district of the court for the purposes of bankruptcy jurisdiction.

(4.) A county court which, at the commencement of this Act, is excluded from having bankruptcy jurisdiction, shall continue to be so excluded until the Lord Chancellor otherwise orders.

(5.) Periodical sittings for the transaction of bankruptcy business by county courts having jurisdiction in bankruptcy shall be holden at such times and at such intervals as the Lord Chancellor shall prescribe for each such court.

Consolidation of London Bankruptcy Court with Supreme Court of Judicature.

93. (1.) From and after the commencement of this Act the London Bankruptcy Court shall be united and consolidated with and form part of the Supreme Court of Judicature, and the jurisdiction of the London Bankruptcy Court shall be transferred to the High Court.

(2.) For the purposes of this union, consolidation, and transfer, and of all matters incidental thereto and consequential thereon, the Supreme Court of Judicature Act, 1873, as amended by subsequent Acts, shall, subject to the provisions of this Act, have effect as if the union, consolidation, and transfer had been effected by that Act, except that all expressions referring to the time appointed for the commencement of that Act shall be construed as referring to the commencement of this Act, and, subject as aforesaid, this Act and the said above-mentioned Acts shall be read and construed together.

Transaction of bankruptcy business by special judge of High Court.

94. (1.) Subject to general rules, and to orders of transfer made under the authority of the Supreme Court of Judicature Act, 1873, and Acts amending it,—

(a) All matters pending in the London Bankruptcy Court at the commencement of this Act; and

(b) All matters which would have been within the exclusive jurisdiction of the London Bankruptcy Court, if this Act had not passed; and

(c) All matters in respect of which jurisdiction is given to the High Court by this Act,

shall be assigned to such Division of the High Court as the Lord Chancellor may from time to time direct.

(2.) All such matters shall, subject as aforesaid, be ordinarily transacted and disposed of by or under the direction of one of the judges of the High Court, and the Lord Chancellor shall from time to time assign a judge for that purpose.

(3.) Provided that during vacation, or during the illness of the judge so assigned, or during his absence or for any other reasonable cause such matters, or any part thereof, may be transacted and disposed of by or under the directions of any judge of the High Court named for that purpose by the Lord Chancellor.

(4.) Subject to the provisions of this Act, the officers, clerks, and subordinate persons who are, at the commencement of this Act, attached to the London Bankruptcy Court, and their successors, shall be officers of the Supreme Court of Judicature, and shall be attached to the High Court.

(5.) Subject to general rules, all bankruptcy matters shall be entitled, "In bankruptcy."

Petition, where to be presented.

95. (1.) If the debtor against or by whom a bankruptcy petition is presented has resided or carried on business within the London bankruptcy district as defined by this Act for the greater part of the six months immediately preceding the presentation of the petition, or for a longer period during those six months than in the district of any county court, or is not resident in England, or if the petitioning creditor is unable to ascertain the residence of the debtor, the petition shall be presented to the High Court.

(2.) In any other case the petition shall be presented to the county court for the district in which the debtor has resided or carried on business for the longest period during the six months immediately preceding the presentation of the petition.

(3.) Nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong court.

Definition of the London Bankruptcy District.

96. The London Bankruptcy District shall, for the purposes of this Act, comprise the city of London and the liberties thereof, and all such parts of the metropolis and other places as are situated within the district of any county court described as a metropolitan county court in the list contained in the Third Schedule.

Transfer of proceedings from court to court.

97. (1.) Subject to the provisions of this Act, every court having orignal jurisdiction in bankruptcy shall have jurisdiction throughout England.

(2.) Any proceedings in bankruptcy may at any time, and at any stage thereof, and either with or without application from any of the parties thereto, be transferred by any prescribed authority and in the prescribed manner from one court to another court, or may by the like authority be retained in the court in which the proceedings were commenced, although it may not be the court in which the proceedings ought to have been commenced.

(3.) If any question of law arises in any bankruptcy proceeding in a county court which all the parties to the proceeding desire, or which one of them and the judge of the county court may desire, to have determined in the first instance in the High Court, the judge shall state the facts, in the form of a special case, for the opinion of the High Court. The special case and the proceedings, or such of them as may be required, shall be transmitted to the High Court for the purposes of the determination.

Exercise in chambers of High Court jurisdiction.

98. Subject to the provisions of this Act and to general rules the judge of the High Court exercising jurisdiction in bankruptcy may exercise in chambers the whole or any part of his jurisdiction.

Jurisdiction in bankruptcy of registrar.

99. (1.) The registrars in bankruptcy of the High Court, and the registrars of a county court having jurisdiction in bankruptcy, shall have the powers and jurisdiction in this section mentioned, and any order made or act done by such registrars in the exercise of the said powers and jurisdiction shall be deemed the order or act of the Court.

(2.) Subject to general rules limiting the powers conferred by this section, a registrar shall have power—

(a) To hear bankruptcy petitions, and to make receiving orders and adjudications thereon:
(b) To hold the public examination of debtors:
(c) To grant orders of discharge where the application is not opposed:
(d) To approve compositions or schemes of arrangement when they are not opposed:
(e) To make interim orders in any case of urgency:

(f) To make any order or exercise any jurisdiction which by any rule in that behalf is prescribed as proper to be made or exercised in chambers:

(g) To hear and determine any unopposed or ex parte application:

(h) To summon and examine any person known or suspected to have in his possession effects of the debtor or to be indebted to him, or capable of giving information respecting the debtor, his dealings or property.

(3.) The registrars in bankruptcy of the High Court shall also have power to grant orders of discharge and certificates of removal of disqualifications, and to approve compositions and schemes of arrangement.

(4.) A registrar shall not have power to commit for contempt of Court.

(5.) The Lord Chancellor may from time to time by order direct that any specified registrar of a county court shall have and exercise all the powers of a bankruptcy registrar of the High Court.

Powers of county court.

100. A county court shall, for the purposes of its bankruptcy jurisdiction, in addition to the ordinary powers of the Court, have all the powers and jurisdiction of the High Court, and the orders of the Court may be enforced accordingly in manner prescribed.

Board of Trade to make payments in accordance with directions of Court.

101. Where any moneys or funds have been received by an official receiver or by the Board of Trade, and the Court makes an order declaring that any person is entitled to such moneys or funds the Board of Trade shall make an order for the payment thereof to the person so entitled as aforesaid.

General power of bankruptcy courts.

102. (1.) Subject to the provisions of this Act, every Court having jurisdiction in bankruptcy under this Act shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

Provided that the jurisdiction hereby given shall not be exercised by the county court for the purpose of adjudicating upon any claim, not arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court, unless all parties to the proceeding consent thereto, or the money, money's worth, or right in dispute does not in the opinion of the judge exceed in value two hundred pounds.

(2.) A Court having jurisdiction in bankruptcy under this Act shall not be subject to be restrained in the execution of its powers under this Act by the order of any other Court, nor shall any appeal lie from its decisions, except in manner directed by this Act.

(3.) If in any proceeding in bankruptcy there arises any question of fact which either of the parties desire to be tried before a jury instead of by the Court itself, or which the Court thinks ought to be tried by a jury, the Court may if it thinks fit direct the trial to be had with a jury, and the trial may be had accordingly, in the High Court in the same manner as if it were the trial of an issue of fact in an action, and in the county court in the manner in which jury trials in ordinary cases are by law held in that Court.

(4.) Where a receiving order has been made in the High Court under this Act, the judge by whom such order was made shall have power, if he sees fit, without any further consent, to order the transfer to such judge of any action pending in any other division, brought or continued by or against the bankrupt.

(5.) Where default is made by a trustee, debtor, or other person in obeying any order or direction given by the Board of Trade or by an official receiver or any other officer of the Board of Trade under any power conferred by this Act, the Court may, on the application of the Board of Trade or an official receiver or other duly authorised person order such defaulting trustee, debtor, or person to comply with the order or direction so given; and the Court may also, if it shall think fit, upon any such application make an immediate order for the committal of such defaulting trustee, debtor, or other person; provided that the power given by this subsection shall be deemed to be in addition to and not in substitution for any other right or remedy in respect of such default.

Judgment Debtors.

Judgment debtor's summons to be bankruptcy business.

103. (1.) It shall be lawful for the Lord Chancellor by order to direct that the jurisdiction and powers under section five of the Debtors Act, 1869, now vested in the High Court, shall be assigned to and exercised by the judge to whom bankruptcy business is assigned.

(2.) It shall be lawful also for the Lord Chancellor in like manner to direct that the whole or any part of the said jurisdiction and powers shall be delegated to and exercised by the bankruptcy registrars of the High Court.

(3.) Any order made under this section may, at any time, in like manner, be rescinded or varied.

(4.) Every county court within the jurisdiction of which a judgment debtor is or resides shall have jurisdiction under section five of the Debtors Act, 1869, although the amount of the judgment debt may exceed fifty pounds.

(5.) Where, under section five of the Debtors Act, 1869, application is made by a judgment creditor to a Court, having bankruptcy jurisdiction, for the committal of a judgment debtor, the Court may, if it thinks fit, decline to commit, and in lieu thereof, with the consent of the judgment creditor, and on payment by him of the prescribed fee, make a receiving order against the debtor. In such case the judgment debtor shall be deemed to have committed an act of bankruptcy at the time the order is made.

(6.) General rules under this Act may be made for the purpose of carrying into effect the provisions of the Debtors Act, 1869.

Appeals.

Appeals in bankruptcy.

104. (1.) Every Court having jurisdiction in bankruptcy under this Act may review, rescind, or vary any order made by it under its bankruptcy jurisdiction.

(2.) Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal as follows:

(*a.*) An appeal shall lie from the order of a county court to Her Majesty's Court of Appeal:

(*b.*) An appeal shall lie from the order of the High Court to Her Majesty's Court of Appeal:

(*c.*) An appeal shall, with the leave of Her Majesty's Court of Appeal, but not otherwise, lie from the order of that Court to the House of Lords:

(*d.*) No appeal shall be entertained except in conformity with such general rules as may for the time being be in force in relation to the appeal.

Procedure.

Discretionary powers of the Court.

105. (1.) Subject to the provisions of this Act and to general rules, the costs of and incidental to any proceeding in Court under this Act shall be in the discretion of the Court: Provided that where any issue is tried by a jury the costs shall follow the event, unless, upon application made at the trial, for good cause shown, the judge before whom such issue is tried shall otherwise order.

(2.) The Court may at any time adjourn any proceedings before it upon such terms, if any, as it may think fit to impose.

(3.) The Court may at any time amend any written process or proceeding under this Act upon such terms, if any, as it may think fit to impose.

(4.) Where by this Act or by general rules, the time for doing any act or thing is limited, the Court may extend the time either before or after the expiration thereof, upon such terms, if any, as the Court may think fit to impose.

(5.) Subject to general rules, the Court may in any matter take the whole or any part of the evidence either vivâ voce, or by interrogatories, or upon affidavit, or by commission abroad.

(6.) For the purpose of approving a composition or scheme by joint debtors, the Court may, if it thinks fit, and on the report of the official receiver that it is expedient so to do, dispense with the public examination of one of such joint debtors if he is unavoidably prevented from attending the examination by illness or absence abroad.

Consolidation of petitions.

106. Where two or more bankruptcy petitions are presented against the same debtor or against joint debtors, the court may consolidate the proceedings, or any of them, on such terms as the court thinks fit.

Power to change carriage of proceedings.

107. Where the petitioner does not proceed with due diligence on his petition, the court may substitute as petitioner any other creditor to whom the debtor may be indebted in the amount required by this Act in the case of the petitioning creditor.

Continuance of proceedings on death of debtor.

108. If a debtor by or against whom a bankruptcy petition has been presented dies, the proceedings in the matter shall, unless the court otherwise orders, be continued as if he were alive.

Power to stay proceedings.

109. The court may at any time, for sufficient reason, make an order staying the proceedings under a bankruptcy petition, either altogether or for a limited time, on such terms and subject to such conditions as the court may think just.

Power to present petition against one partner.

110. Any creditor whose debt is sufficient to entitle him to present a bankruptcy petition against all the partners of a firm may present a petition against any one or more partners of the firm without including the others.

Power to dismiss petition against some respondents only.

111. Where there are more respondents than one to a petition the court may dismiss the petition as to one or more of them, without prejudice to the effect of the petition as against the other or others of them.

Property of partners to be vested in same trustee.

112. Where a receiving order has been made on a bankruptcy petition against or by one member of a partnership, any other bankruptcy petition against or by a member of the same partnership shall be filed in or transferred to the court in which the first-mentioned petition is in course of prosecution, and, unless the court otherwise directs, the same trustee or receiver shall be appointed as may have been appointed in respect of the property of the first-mentioned member of the partnership, and the court may give such directions for consolidating the proceedings under the petitions as it thinks just.

Actions by trustee and bankrupt's partners.

113. Where a member of a partnership is adjudged bankrupt, the court may authorise the trustee to commence and prosecute any action in the names of the trustee and of the bankrupt's partner; and any release by such partner of the debt or demand to which the action relates shall be void; but notice of the application for authority to commence the action shall be given to him, and he may show cause against it, and on his application the court may, if it thinks fit, direct that he shall receive his proper share of the proceeds of the action, and if he does not claim any benefit therefrom he shall be indemnified against costs in respect thereof as the court directs.

Actions on joint contracts.

114. Where a bankrupt is a contractor in respect of any contract jointly with any person or persons, such person or persons may sue or be sued in respect of the contract without the joinder of the bankrupt.

Proceedings in partnership name.

115. Any two or more persons, being partners, or any person carrying on business under a partnership name, may take proceedings or be proceeded against under this Act in the name of the firm, but in such case the court may, on application by any person interested, order the names of the persons who are partners in such firm, or the name of such person to be disclosed in such manner, and verified on oath, or otherwise as the court may direct.

Officers.

Disabilities of officers.

116. (1.) No registrar or other officer attached to any court having jurisdiction in bankruptcy shall, during his continuance in office, be capable of being elected or sitting as a member of the House of Commons.

(2.) No registrar or official receiver or other officer attached to any such court shall, during his continuance in office, either directly or indirectly, by himself, his clerk, or partner, act as solicitor in any proceeding in bankruptcy or in any prosecution of a debtor by order of the court, and if he does so act he shall be liable to be dismissed from office.

Provided that nothing in this section shall affect the right of any registrar or officer appointed before the passing of this Act to act as solicitor by himself, his clerk, or partner to the extent permitted by section sixty-nine of the Bankruptcy Act, 1869.

Orders and Warrants of Court.

Enforcement of orders of courts throughout the United Kingdom.

117. Any order made by a court having jurisdiction in bankruptcy in England under this Act shall be enforced in Scotland and Ireland in the courts having jurisdiction in bankruptcy in those parts of the United Kingdom respectively, in the same manner in all respects as if the order had

been made by the court hereby required to enforce it; and in like manner any order made by a court having jurisdiction in bankruptcy in Scotland shall be enforced in England and Ireland, and any order made by a court having jurisdiction in bankruptcy in Ireland shall be enforced in England and Scotland by the courts respectively having jurisdiction in bankruptcy in the part of the United Kingdom where the orders may require to be enforced, and in the same manner in all respects as if the order had been made by the court required to enforce it in a case of bankruptcy within its own jurisdiction.

Courts to be auxiliary to each other.

118. The High Court, the county courts, the courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the court seeking aid, with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court which made the request, or the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions.

Warrants of Bankruptcy Courts.

119. (1.) Any warrant of a court having jurisdiction in bankruptcy in England may be enforced in Scotland, Ireland, the Isle of Man, the Channel Islands, and elsewhere in Her Majesty's dominions, in the same manner and subject to the same privileges in and subject to which a warrant issued by any justice of the peace against a person for an indictable offence against the laws of England may be executed in those parts of Her Majesty's dominions respectively in pursuance of the Acts of Parliament in that behalf.

(2.) A search warrant issued by a court having jurisdiction in bankruptcy for the discovery of any property of a debtor may be executed in manner prescribed or in the same manner and subject to the same privileges in and subject to which a search warrant for property supposed to be stolen may be executed according to law.

Commitment to prison.

120. Where the court commits any person to prison, the commitment may be to such convenient prison as the court thinks expedient, and if the gaoler of any prison refuses to receive any prisoner so committed he shall be liable for every such refusal to a fine not exceeding one hundred pounds.

PART VII.

SMALL BANKRUPTCIES.

Summary administration in small cases.

121. When a petition is presented by or against a debtor, if the court is satisfied by affidavit or otherwise, or the official receiver reports to the court that the property of the debtor is not likely to exceed in value three hundred pounds, the court may make an order that the debtor's estate be administered in a summary manner, and thereupon the provisions of this Act shall be subject to the following modifications:

(1.) If the debtor is adjudged bankrupt the official receiver shall be the trustee in the bankruptcy:

(2.) There shall be no committee of inspection, but the official receiver may do with the permission of the Board of Trade all things which may be done by the trustee with the permission of the committee of inspection:

(3.) Such other modifications may be made in the provisions of this Act as may be prescribed by general rules (*a*) with the view of saving expense and simplifying procedure; but nothing in this section shall permit the modification of the provisions of this Act relating to the examination or discharge of the debtor.

Provided that the creditors may at any time, by special resolution, resolve that some person other than the official receiver be appointed trustee in the bankruptcy, and thereupon the bankruptcy shall proceed as if an order for summary administration had not been made.

(*a*) Rules of Dec. 1, 1883, have been made.

Power for county court to make administration order instead of order for payment by instalments.

122. (1.) Where a judgment has been obtained in a county court and the debtor is unable to pay the amount forthwith, and alleges that his whole indebtedness amounts to a sum not exceeding fifty pounds, inclusive of the debt for which the judgment is obtained, the county court may make an order providing for the administration of his estate, and for the payment of his debts by instalments or otherwise, and either in full or to such extent as to the county court under the circumstances of the case appears practicable, and subject to any conditions as to his future earnings or income which the court may think just.

(2.) The order shall not be invalid by reason only that the total amount of the debts is found at any time to exceed fifty pounds, but in such case the county court may, if it thinks fit, set aside the order.

(3.) Where, in the opinion of the county court in which the judgment is obtained, it would be convenient that that court should administer the estate, it shall cause a certificate of the judgment to be forwarded to the county court in the district of which the debtor or the majority of the creditors resides or reside, and thereupon the latter county court shall have all the powers which it would have under this section, had the judgment been obtained in it.

(4.) Where it appears to the registrar of the county court that property of the debtor exceeds in value ten pounds, he shall, at the request of any creditor, and without fee, issue execution against the debtor's goods, but the household goods, wearing apparel, and bedding of the debtor or his family, and the tools and implements of his trade to the value in the aggregate of twenty pounds, shall to that extent be protected from seizure.

(5.) When the order is made no creditor shall have any remedy against the person or property of the debtor in respect of any debt which the debtor has notified to a county court, except with the leave of that county court, and on such terms as that court may impose; and any county court or inferior court in which proceedings are pending against the debtor in respect of any such debt shall, on receiving notice of the order, stay the proceedings, but may allow costs already incurred by the creditor, and such costs may, on application, be added to the debt notified.

(6.) If the debtor makes default in payment of any instalment payable in pursuance of any order under this section, he shall, unless the contrary is proved, be deemed to have had since the date of the order the means to pay the sum in respect of which he has made default and to have refused or neglected to pay the same.

(7.) The order shall be carried into effect in such manner as may be prescribed by general rules.

(8.) Money paid into court under the order shall be appropriated first in satisfaction of the costs of the plaintiff in the action, next in satisfaction of the costs of administration (which shall not exceed two shillings in the pound on the total amount of the debts) and then in liquidation of debts in accordance with the order.

(9.) Notice of the order shall be sent to the registrar of county court judgments, and be posted in the office of the county court of the district in which the debtor resides, and sent to every creditor notified by the debtor, or who has proved.

(10.) Any creditor of the debtor, on proof of his debt before the registrar, shall be entitled to be scheduled as a creditor of the debtor for the amount of his proof.

(11.) Any creditor may in the prescribed manner object to any debt scheduled, or to the manner in which payment is directed to be made by instalments.

(12.) Any person who after the date of the order becomes a creditor of the debtor, shall, on proof of his debt before the registrar, be scheduled as a creditor of the debtor for the amount of his proof, but shall not be entitled to any dividend under the order until those creditors who are scheduled as having been creditors before the date of the order have been paid to the extent provided by the order.

(13.) When the amount received under the order is sufficient to pay each creditor scheduled to the extent thereby provided, and the costs of the plaintiff and of the administration, the order shall be superseded, and the debtor shall be discharged from his debts to the scheduled creditors.

(14.) In computing the salary of a registrar under the County Courts Acts every creditor scheduled, not being a judgment creditor, shall count as a plaint.

PART VIII.

SUPPLEMENTAL PROVISIONS.

Application of Act.

Exclusion of partnerships and companies.

123. A receiving order shall not be made against any corporation, or against any partnership or association, or company registered under the Companies Act, 1862.

Privilege of Parliament.

124. If a person having privilege of Parliament commits an act of bankruptcy, he may be dealt with under this Act in like manner as if he had not such privilege.

Administration in bankruptcy of estate of person dying insolvent.

125. (1.) Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against such debtor, had he been alive, may present to the court a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor, according to the Law of Bankruptcy.

(2.) Upon the prescribed notice being given to the legal personal representative of the deceased debtor, the court may, in the prescribed manner, upon proof of the petitioner's debt, unless the court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the administration in bankruptcy of the deceased debtor's estate, or may upon cause shown dismiss such petition with or without costs.

(3.) An order of administration under this section shall not be made until the expiration of two months from the date of the grant of probate or letters of administration, unless with the concurrence of the legal personal representative of the deceased debtor, or unless the petitioner proves to the satisfaction of the court that the debtor committed an act of bankruptcy within three months prior to his decease.

(4.) A petition for administration under this section shall not be presented to the court after proceedings have been commenced in any court of justice for the administration of the deceased debtor's estate, but that court may in such case, on the application of any creditor, and on proof that the estate is insufficient to pay its debts, transfer the proceedings to the court exercising jurisdiction in bankruptcy, and thereupon such last-mentioned court may, in the prescribed manner, make an order for the administration of the estate of the deceased debtor, and the like consequences shall ensue as under an administration order made on the petition of a creditor.

(5.) Upon an order being made for the administration of a deceased debtor's estate, the property of the debtor shall vest in the official receiver of the court, as trustee thereof, and he shall forthwith proceed to realise and distribute the same in accordance with the provisions of this Act.

(6.) With the modifications hereinafter mentioned, all the provisions of Part III. of this Act, relating to the administration of the property of a bankrupt, shall, so far as the same are applicable, apply to the case of an administration order under this section in like manner as to an order of adjudication under this Act.

(7.) In the administration of the property of the deceased debtor under an order of administration, the official receiver shall have regard to any claim by the legal personal representative of the deceased debtor to payment of the proper funeral and testamentary expenses incurred by him in and about the debtor's estate, and such claims shall be deemed a preferential debt under the order, and be payable in full, out of the debtor's estate, in priority to all other debts.

(8.) If, on the administration of a deceased debtor's estate, any surplus remains in the hands of the official receiver, after payment in full of all the debts due from the debtor, together with the costs of the administration and interest as provided by this Act in case of bankruptcy, such surplus shall be paid over to the legal personal representative of the deceased debtor's estate, or dealt with in such other manner as may be prescribed.

(9.) Notice to the legal personal representative of a deceased debtor of the presentation by a creditor of a petition under this section shall, in the event of an order for administration being made thereon, be deemed to be equivalent to notice of an act of bankruptcy, and after such notice no payment or transfer of property made by the legal personal representative shall operate as a discharge to him as between himself and the official receiver; save as aforesaid nothing in this section shall invalidate any payment made or any act or thing done in good faith by the legal personal representative before the date of the order for administration.

(10.) Unless the context otherwise requires, "court," in this section, means the court within the jurisdiction of which the debtor resided or carried on business for the greater part of the six months immediately prior to his decease; "creditor" means one or more creditors qualified to present a bankruptcy petition, as in this Act provided.

(11.) General rules, for carrying into effect the provisions of this section, may be made in the same manner and to the like effect and extent as in bankruptcy.

Saving as to debts contracted before Act of 1861.

126. No person, not being a trader within the meaning of the Bankruptcy Act, 1861, shall be adjudged bankrupt in respect of a debt contracted before the passing of that Act.

General Rules.

Power to make general rules.

127. (1.) The Lord Chancellor may from time to time, with the concurrence of the President of the Board of Trade, make, revoke, and alter general rules for carrying into effect the objects of this Act (*a*).

(2.) All general rules made under the foregoing provisions of this section shall be laid before Parliament within three weeks after they are made if Parliament is then sitting, and if Parliament is not then sitting, within three weeks after the beginning of the then next session of Parliament, and shall be judicially noticed, and shall have effect as if enacted by this Act.

(3.) Such general rules as may be required for purposes of this Act may be made at any time after the passing of this Act.

(4.) Provided always, that the said general rules, so made, revoked, or altered, shall not extend the jurisdiction of the court.

(5.) After the commencement of this Act no general rule under the provisions of this section shall come into operation until the expiration of one month after the same has been made and issued.

Fees, Salaries, Expenditure, and Returns.

Fees and remuneration.

128. (1.) The Lord Chancellor may, with the sanction of the Treasury, from time to time prescribe a scale of fees and percentages to be charged for or in respect of proceedings under this Act; and the Treasury shall direct by whom and in what manner the same are to be collected, accounted for, and to what account they shall be paid. The Board of Trade, with the concurrence of the Treasury, shall direct whether any and what remuneration is to be allowed to any officer of, or person attached to, the Board of Trade, performing any duties under this Act, and may from time to time vary, increase, or diminish such remuneration as they may see fit.

(2.) This section shall come into operation on the passing of this Act.

Judicial salaries, &c.

129. (1.) The Lord Chancellor, with the concurrence of the Treasury, shall direct whether any and what remuneration is to be allowed to any person (other than an officer of the Board of Trade) performing any duties under this Act, and may from time to time vary, increase, or diminish such remuneration as he may think fit.

(2.) This section shall come into operation on the passing of this Act.

Annual accounts of receipts and expenditure in respect of bankruptcy proceedings.

130. (1.) The Treasury shall annually cause to be prepared and laid before both houses of Parliament an account for the year ending with the thirty-first day of March, showing the receipts and expenditure during that year in respect of bankruptcy proceedings, whether commenced under this or any previous Act, and the provisions of section twenty-eight of the Supreme Court of Judicature Act, 1875, shall apply to the account as if the account had been required by that section.

(2.) The accounts of the Board of Trade, under this Act, shall be audited

(*a*) Under this section the Bankruptcy Rules, 1886, have been made. They are divided into five parts:—Part I. (rr. 6—134) deals with "Court Procedure"; Part II. (rr. 135—271) with "Proceedings from Act of Bankruptcy to Discharge"; Part III. (rr. 271—279) with "Special Procedures:" viz., (a) small bankruptcies, under sect. 121, *supra;* and (b) administration of estate of persons dying intestate, under sect. 125, *supra;* Part IV. (rr. 280—346) with "Officers, Trustees, Audit, &c.;" and Part V. (rr. 347—362) with "Miscellaneous Matters."

Non-compliance with the rules does not render any proceeding void unless the court so directs, but such proceeding may be set aside, or amended, or otherwise dealt with in such manner and upon such terms as the court may think fit: rule 350.

Rules as to Administration Orders, under sect. 122, *supra*, have also been made. They are dated Dec. 1, 1883.

in such manner as the Treasury from time to time direct, and, for the purpose of the account to be laid before Parliament, the Board of Trade shall make such returns, and give such information as the Treasury may from time to time direct.

Returns by bankruptcy officers.

131. The registrars and other officers of the courts acting in bankruptcy shall make to the Board of Trade such returns of the business of their respective courts and offices, at such times and in such manner and form as may be prescribed, and from such returns the Board of Trade shall cause books to be prepared which shall, under the regulations of the Board, be open for public information and searches.

The Board of Trade shall also cause a general annual report of all matters, judicial and financial, within this Act, to be prepared and laid before both houses of Parliament.

Evidence.

Gazette to be evidence.

132. (1.) A copy of the London Gazette containing any notice inserted therein in pursuance of this Act shall be evidence of the facts stated in the notice.

(2.) The production of a copy of the London Gazette containing any notice of a receiving order, or of an order adjudging a debtor bankrupt, shall be conclusive evidence in all legal proceedings of the order having been duly made, and of its date.

Evidence of proceedings at meetings of creditors.

133. (1.) A minute of proceedings at a meeting of creditors under this Act, signed at the same or the next ensuing meeting, by a person describing himself as, or appearing to be, chairman of the meeting at which the minute is signed, shall be received in evidence without further proof.

(2.) Until the contrary is proved, every meeting of creditors in respect of the proceedings whereof a minute has been so signed shall be deemed to have been duly convened and held, and all resolutions passed or proceedings had thereat to have been duly passed or had.

Evidence of proceedings in bankruptcy.

134. Any petition or copy of a petition in bankruptcy, any order or certificate or copy of an order or certificate made by any Court having jurisdiction in bankruptcy, any instrument or copy of an instrument, affidavit, or document made or used in the course of any bankruptcy proceedings, or other proceedings had under this Act, shall, if it appears to be sealed with the seal of any court having jurisdiction in bankruptcy, or purports to be signed by any judge thereof, or is certified as a true copy by any registrar thereof, be receivable in evidence in all legal proceedings whatever.

Swearing of affidavits.

135. Subject to general rules, any affidavit to be used in a bankruptcy court may be sworn before any person authorised to administer oaths in the High Court, or in the Court of Chancery of the county palatine of Lancaster, or before any registrar of a bankruptcy court, or before any officer of a bankruptcy court authorised in writing on that behalf by the judge of the court, or, in the case of a person residing in Scotland or in Ireland, before a judge ordinary, magistrate, or justice of the peace, or, in the case of a person who is out of the Kingdom of Great Britain and Ireland, before a magistrate or justice of the peace or other person qualified to administer oaths in the country where he resides (he being certified to be a magistrate or justice of the peace, or qualified as aforesaid by a British minister or British consul, or by a notary public).

Death of witness.

136. In case of the death of the debtor or his wife, or of a witness whose evidence has been received by any court in any proceeding under this Act, the deposition of the person so deceased, purporting to be sealed with the seal of the court, or a copy thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to.

Bankruptcy Courts to have seals.

137. Every court have jurisdiction in bankruptcy under this Act shall have a seal describing the court in such manner as may be directed by order of the Lord Chancellor, and judicial notice shall be taken of the seal, and of the signature of the judge or registrar of any such court, in all legal proceedings.

Certificate of appointment of trustee.

138. A certificate of the Board of Trade that a person has been appointed trustee under this Act, shall be conclusive evidence of his appointment.

Appeal from Board of Trade to High Court.

139. Where by this Act an appeal to the High Court is given against any decision of the Board of Trade, or of the official receiver, the appeal shall be brought within twenty-one days from the time when the decision appealed against is pronounced or made.

Proceedings of Board of Trade.

140. (1.) All documents purporting to be orders or certificates made or

issued by the Board of Trade, and to be sealed with the seal of the Board, or to be signed by a secretary or assistant secretary of the Board, or any person authorised in that behalf by the President of the Board, shall be received in evidence, and deemed to be such orders or certificates without further proof unless the contrary is shown.

(2.) A certificate signed by the President of the Board of Trade that any order made, certificate issued, or act done, is the order, certificate, or act of the Board of Trade shall be conclusive evidence of the fact so certified.

Time.

Computation of time.

141. (1.) Where by this Act any limited time from or after any date or event is appointed or allowed for the doing of any act or the taking of any proceeding, then in the computation of that limited time the same shall be taken as exclusive of the day of that date or of the happening of that event, and as commencing at the beginning of the next following day; and the act or proceeding shall be done or taken at latest on the last day of that limited time as so computed, unless the last day is a Sunday, Christmas Day, Good Friday, or Monday or Tuesday in Easter Week, or a day appointed for public fast, humiliation, or thanksgiving, or a day on which the court does not sit, in which case any act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, which shall not be one of the days in this section specified.

(2.) Where by this Act any act or proceeding is directed to be done or taken on a certain day, then if that day happens to be one of the days in this section specified, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, which shall not be one of the days in this section specified.

Notices.

Service of notices.

142. All notices and other documents for the service of which no special mode is directed may be sent by prepaid post letter to the last known address of the person to be served therewith.

Formal Defects.

Formal defect not to invalidate proceedings.

143. (1.) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that court.

(2.) No defect or irregularity in the appointment or election of a receiver, trustee, or member of a committee of inspection shall vitiate any act done by him in good faith.

Stamp Duty.

Exemption of deeds, &c. from stamp duty.

144. Every deed, conveyance, assignment, surrender, admission, or other assurance relating solely to freehold, leasehold, copyhold, or customary property, or to any mortgage, charge, or other incumbrance on, or any estate, right, or interest in any real or personal property which is part of the estate of any bankrupt, and which, after the execution of the deed, conveyance, assignment, surrender, admission, or other assurance, either at law or in equity, is or remains the estate of the bankrupt or of the trustee under the bankruptcy, and every power of attorney, proxy paper, writ, order, certificate, affidavit, bond, or other instrument or writing relating solely to the property of any bankrupt, or to any proceeding under any bankruptcy, shall be exempt from stamp duty, except in respect of fees under this Act.

Executions.

Sales under executions to be public.

145. Where the sheriff sells the goods of a debtor under an execution for a sum exceeding twenty pounds (including legal incidental expenses), the sale shall, unless the court from which the process issued otherwise orders, be made by public auction, and not by bill of sale or private contract, and shall be publicly advertised by the sheriff on and during three days next preceding the day of sale.

Writ of elegit not to extend to goods.

146. (1.) The sheriff shall not under a writ of elegit deliver the goods of a debtor, nor shall a writ of elegit extend to goods.

(2.) No writ of levari facias shall hereafter be issued in any civil proceeding.

Bankrupt Trustee.

Application of Trustee Act to bankruptcy of trustee.

147. Where a bankrupt is a trustee within the Trustee Act, 1850, section thirty-two of that Act shall have effect so as to authorise the appointment of a new trustee in substitution for the bankrupt (whether voluntarily resigning or not), if it appears expedient to do so, and all provisions of that Act, and of any other Act relative thereto, shall have effect accordingly.

Corporations, &c.

Acting of corporations, partners, &c.

148. For all or any of the purposes of this Act a corporation may act by any of its officers authorised in that behalf under the seal of the corporation, a firm may act by any of its members, and a lunatic may act by his committee or curator bonis.

Construction of former Acts, &c.

Construction of Acts mentioning commission of bankruptcy, &c.

149. (1.) Where in any Act of Parliament, instrument, or proceeding passed, executed, or taken before the commencement of this Act mention is made of a commission of bankruptcy or fiat in bankruptcy, the same shall be construed, with reference to the proceedings under a bankruptcy petition, as if a commission of or a fiat in bankruptcy had been actually issued at the time of the presentation of such petition.

(2.) Where by any Act or instrument, reference is made to the Bankruptcy Act, 1869, the Act or instrument shall be construed and have effect as if reference were made therein to the corresponding provisions of this Act.

Certain provisions to bind the Crown.

150. Save as herein provided the provisions of this Act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge shall bind the Crown.

Saving for existing rights of audience.

151. Nothing in this Act, or in any transfer of jurisdiction effected thereby shall take away or affect any right of audience that any person may have had at the commencement of this Act, and all solicitors or other persons who had the right of audience before the Chief Judge in Bankruptcy shall have the like right of audience in bankruptcy matters in the High Court.

Married women.

152. Nothing in this Act shall affect the provisions of the Married Women's Property Act, 1882.

Transitory Provisions.

Comptroller of bankruptcy, &c. and their staff.

153. (1.) The existing comptroller in bankruptcy and his officers, clerks, and servants shall not be attached to the Supreme Court, but shall in all respects act under the directions of the Board of Trade.

(2.) The existing official assignee, provisional and official assignee of the estates and effects of insolvent debtors, and receiver of the Insolvent Debtors' Court, together with his staff, the official solicitors and the messenger in bankruptcy, together with his staff, and the accountant in bankruptcy and his staff, and also such other officers and clerks of the London Bankruptcy Court as the Lord Chancellor, with the concurrence of the Board of Trade, may at any time select, shall be transferred to and become officers of the Board of Trade; provided that the Board of Trade, with the concurrence of the Lord Chancellor, may at any time transfer any such officer or clerk from the Board of Trade to the Supreme Court.

(3.) Subject to the provisions of this Act they shall hold their offices by the same tenure and on the same terms and conditions, and be entitled to the same rights in respect of salary and pension as heretofore, and their duties shall, except so far as altered with their own consent, be such as in the opinion of the Board of Trade are analogous to those performed by them at the commencement of this Act.

(4.) On the occurrence, at any time after the passing of this Act, of any vacancy in the office of any of the said persons the Board of Trade may, with the approval of the Treasury, make such arrangement as they think fit, either for the abolition of the office, or for its continuance under modified conditions, and may appoint a fit person to perform the remaining duties thereof, and the person so appointed shall have all the powers and authorities of the person who is at the passing of this Act the holder of such office;

and all estates, rights, and effects vested at the time of the vacancy in any such officer shall by virtue of such appointment become vested in the person so appointed, and the like appointment on a vacancy shall be made, and the like vesting shall have effect from time to time as occasion requires: Provided that any person so appointed shall be an officer of the Board of Trade, and shall in all respects act under the directions of the Board of Trade.

(5.) The Board of Trade may, with the approval of the Lord Chancellor, from time to time direct that any duties or functions, not of a judicial character, relating to any bankruptcies, insolvencies, or other proceedings under any Act prior to the Bankruptcy Act, 1869, which were, at the time of the passing of this Act, performed or exercised by registrars of county courts, shall devolve on and be performed by the official receiver, and thereupon all powers and authorities of the registrar, and all estates, rights, and effects vested in the registrar shall become vested in the official receiver.

Power to abolish existing offices.

154. (1.) If the Lord Chancellor is of opinion that any office attached to the London Bankruptcy Court at the passing of this Act is unnecessary, he may, with the concurrence of the Treasury, at any time after the passing of this Act, abolish the office.

(2.) The Treasury may, on the petition of any person whose office or employment is abolished by or under this Act, on the commencement of this Act or on any other event, inquire whether any, and if any, what compensation ought to be made to the petitioner, regard being had to the conditions on which his appointment was made, the nature of his office or employment, and the duration of his service; and if they think that his claim to compensation is established, may award to him, out of moneys to be provided by Parliament, such compensation, by annuity or otherwise, as under the circumstances of the case they think just and reasonable.

(3.) The Board of Trade may, under the like conditions and on the like terms, abolish any of the offices in the last preceding section mentioned.

Performance of new duties by persons whose offices are abolished.

155. (1.) The Lord Chancellor or Board of Trade may, at any time after the passing of this Act appoint any person whose office is abolished under this Act to some other office under this Act, the duties of which he is in the opinion of the Lord Chancellor or Board competent to perform. Provided that the person so appointed shall during his tenure of the new office receive an amount of annual remuneration which, together with the compensation for the loss of the abolished office, is not less than the emoluments of the abolished office.

(2.) When, after the commencement of this Act, any officer is continued in the performance of any duties relating to bankruptcy or insolvency, under any previous Act, the Lord Chancellor, or, as the case may be, the Board of Trade may order that such officer may, in addition to such duties, perform any analogous duties under this Act, without being entitled to receive any additional remuneration.

Selection of persons from holders of abolished offices.

156. Every person appointed to any office or employment under this Act shall in the first instance be selected from the persons (if any) whose office or employment is abolished under this Act, unless in the opinion of the Lord Chancellor, or in the case of persons to be appointed by the Board of Trade, of that Board, none of such persons are fit for such office or employment: Provided that the person so appointed or employed shall during his tenure of the new office be entitled to receive an amount of remuneration which, together with the compensation (if any) for loss of the abolished office, shall be not less than the emolument of the abolished office.

Acceptance of public employment by annuitants.

157. If any person to whom a compensation annuity is granted under this Act accepts any public employment, he shall, during the continuance of that employment, receive only so much (if any) of that annuity as, with the remuneration of that employment, will amount to a sum not exceeding the salary or emoluments in respect of the loss whereof the annuity was awarded, and if the remuneration of that employment is equal to or greater than such salary or emoluments the annuity shall be suspended so long as he receives that remuneration.

Superannuation of registrars, &c.

158. The registrars, clerks, and other persons holding their offices at the passing of this Act who may be continued in their offices, shall, on their retirement therefrom, be allowed such superannuation as they would have been entitled to receive if this Act had not been passed, and they had continued in their offices under the existing Acts.

Transfer of estates on

159. In every liquidation by arrangement under the Bankruptcy Act,

1869, pending at the commencement of this Act, if at any time after the commencement of this Act there is no trustee acting in the liquidation by reason of death, or for any other cause, such of the official receivers of bankrupts estates as is appointed by the Board of Trade for that purpose shall become and be the trustee in the liquidation, and the property of the liquidating debtor shall pass to and vest in him accordingly (*a*); but this provision shall not prejudice the right of the creditors in the liquidation to appoint a new trustee, in manner directed by the Bankruptcy Act, 1869, or the rules thereunder; and on such appointment the property of the liquidating debtor shall pass to and vest in the new trustee.

vacancy of office of trustee in liquidation under the Bankruptcy Act, 1869.

The provisions of this Act with respect to the duties and responsibilities of and accounting by a trustee in a bankruptcy under this Act shall apply, as nearly as may be, to a trustee acting under the provisions of this section.

160. Where a bankruptcy or liquidation by arrangement under the Bankruptcy Act, 1869, has been or is hereafter closed, any property of the bankrupt or liquidating debtor which vested in the trustee and has not been realised or distributed shall vest (*a*) in such person as may be appointed by the Board of Trade for that purpose, and he shall thereupon proceed to get in, realise, and distribute the property in like manner and with and subject to the like powers and obligations as far as applicable, as if the bankruptcy or liquidation were continuing, and he were acting as trustee thereunder.

Transfer of outstanding property on close of bankruptcy or liquidation.

161. In every bankruptcy under the Bankruptcy Act, 1869, pending at the commencement of this Act, where a registrar of the London Bankruptcy Court, or of any county court, is or would hereafter but for this enactment become the trustee under the bankruptcy, such of the official receivers of bankrupts estates as may be appointed by the Board of Trade for that purpose shall from and after the commencement of this Act be the trustee in the place of the registrar, and the property of the bankrupt shall pass to and vest (*a*) in the official receiver accordingly.

Transfer of estates from registrars of London Court to official receiver.

Unclaimed Funds or Dividends.

162. (1.) Where the trustee, under any bankruptcy, composition or scheme pursuant to this Act, shall have under his control any unclaimed dividend which has remained unclaimed for more than six months, or where, after making a final dividend, such trustee shall have in his hands or under his control any unclaimed or undistributed moneys arising from the property of the debtor, he shall forthwith pay the same to the Bankruptcy Estates Account at the Bank of England. The Board of Trade shall furnish him with a certificate of receipt of the money so paid, which shall be an effectual discharge to him in respect thereof.

Unclaimed and undistributed dividends or funds under this and former Acts.

(2.) (*a.*) Where, after the passing of this Act, any unclaimed or undistributed funds or dividends in the hands or under the control of any trustee or other person empowered to collect, receive, or distribute any funds or dividends under any Act of Parliament mentioned in the Fourth Schedule, or any petition, resolution, deed, or other proceeding under or in pursuance of any such Act, have remained or remain unclaimed or undistributed for six months after the same became claimable or distributable, or in any other case for two years after the receipt thereof by such trustee or other person, it shall be the duty of such trustee or other person forthwith to pay the same to the Bankruptcy Estates Account at the Bank of England. The Board of Trade shall furnish such trustee or other person with a certificate of receipt of the money so paid, which shall be an effectual discharge to him in respect thereof.

(*b.*) The Board of Trade may at any time order any such trustee or other person to submit to them an account verified by affidavit of the sums received and paid by him under or in pursuance of any such petition, resolution, deed, or other proceeding as aforesaid, and may direct and enforce an audit of the account.

(*c.*) The Board of Trade, with the concurrence of the Treasury, may from time to time appoint a person to collect and get in all such unclaimed or undistributed funds or dividends, and for the purposes of this section any court having jurisdiction in bankruptcy shall have and at the instance of the

(*a*) See 50 & 51 Vict. c. 66, s. 6 (1).

person so appointed, or of the Board of Trade, may exercise all the powers conferred by this Act with respect to the discovery and realisation of the property of a debtor, and the provisions of Part I. of this Act with respect thereto shall, with any necessary modifications, apply to proceedings under this section.

(3.) The provisions of this section shall not, except as expressly declared herein, deprive any person of any larger or other right or remedy to which he may be entitled against such trustee or other person.

(4.) Any person claiming to be entitled to any moneys paid in to the Bankruptcy Estates Account pursuant to this section may apply to the Board of Trade for payment to him of the same, and the Board of Trade, if satisfied that the person claiming is entitled, shall make an order for the payment to such person of the sum due.

Any person dissatisfied with the decision of the Board of Trade in respect of his claim may appeal to the High Court.

(5.) The Board of Trade may at any time after the passing of this Act open the account at the Bank of England referred to in this Act as the Bankruptcy Estates Account.

Punishment of Fraudulent Debtors.

Extension of penal provisions of 32 & 33 Vict. c. 62, to petitioning debtors, &c.

163. (1.) Sections eleven and twelve of the Debtors Act, 1869, relating to the punishment of fraudulent debtors and imposing a penalty for absconding with property, shall have effect as if there were substituted therein for the words "if after the presentation of a bankruptcy petition against him," the words, "if after the presentation of a bankruptcy petition by or against him."

(2.) The provisions of the Debtors Act, 1869, as to offences by bankrupts shall apply to any person whether a trader or not in respect of whose estate a receiving order has been made as if the term "bankrupt" in that Act included a person in respect of whose estate a receiving order had been made.

Power for Court to order prosecution on report of official receiver.

164. Section sixteen of the Debtors Act, 1869, shall be construed and have effect as if the term "a trustee in any bankruptcy" included the official receiver of a bankrupt's estate, and shall apply to offences under this Act as well as to offences under the Debtors Act, 1869.

Power for Court to commit for trial.

165. (1.) Where there is, in the opinion of the court, ground to believe that the bankrupt or any other person has been guilty of any offence which is by statute made a misdemeanor in cases of bankruptcy, the court may commit the bankrupt or such other person for trial.

(2.) For the purpose of committing the bankrupt or such other person for trial the court shall have all the powers of a stipendiary magistrate as to taking depositions, binding over witnesses to appear, admitting the accused to bail, or otherwise.

Nothing in this sub-section shall be construed as derogating from the powers or jurisdiction of the High Court.

Public Prosecutor to act in certain cases.

166. Where the court orders the prosecution of any person for any offence under the Debtors Act, 1869, or Acts amending it, or for any offence arising out of or connected with any bankruptcy proceedings, it shall be the duty of the Director of Public Prosecutions to institute and carry on the prosecution.

Criminal liability after discharge or composition.

167. Where a debtor has been guilty of any criminal offence he shall not be exempt from being proceeded against therefor by reason that he has obtained his discharge or that a composition or scheme of arrangement has been accepted or approved.

Interpretation.

Interpretation of terms.

168. (1.) In this Act, unless the context otherwise requires—

"The court" means the court having jurisdiction in bankruptcy under this Act:

"Affidavit" includes statutory declarations, affirmations, and attestations on honour:

"Available act of bankruptcy" means any act of bankruptcy available for a bankruptcy petition at the date of the presentation of the petition on which the receiving order is made:

"Debt provable in bankruptcy" or "provable debt" includes any debt or liability by this Act made provable in bankruptcy:
"Gazetted" means published in the London Gazette:
"General rules" include forms:
"Goods" includes all chattels personal:
"High Court" means Her Majesty's High Court of Justice:
"Local bank" means any bank in or in the neighbourhood of the bankruptcy district in which the proceedings are taken:
"Oath" includes affirmation, statutory declaration, and attestation on honour:
"Ordinary resolution" means a resolution decided by a majority in value of the creditors present, personally or by proxy, at a meeting of creditors and voting on the resolution:
"Person" includes a body of persons corporate or unincorporate:
"Prescribed" means prescribed by general rules within the meaning of this Act:
"Property" includes money, goods, things in action, land, and every description of property, whether real or personal, and whether situate in England or elsewhere; also, obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined:
"Resolution" means ordinary resolution:
"Secured creditor" means a person holding a mortgage charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor:
"Schedule" means schedule to this Act:
"Sheriff" includes any officer charged with the execution of a writ or other process:
"Special resolution" means a resolution decided by a majority in number and three fourths in value of the creditors present, personally or by proxy, at a meeting of creditors and voting on the resolution:
"Treasury" means the Commissioners of Her Majesty's Treasury:
"Trustee" means the trustee in bankruptcy of a debtor's estate.

(2.) The schedules to this Act shall be construed and have effect as part of this Act.

Repeal.

Repeal of enactments.

169. (1.) The enactments described in the Fifth Schedule are hereby repealed as from the commencement of this Act to the extent mentioned in that Schedule.

(2.) The repeal effected by this Act shall not affect—

(a) anything done or suffered before the commencement of this Act under any enactment repealed by this Act; nor

(b) any right or privilege acquired, or duty imposed, or liability, or disqualification incurred, under any enactment so repealed; nor

(c) any fine, forfeiture, or other punishment incurred or to be incurred in respect of any offence committed or to be committed against any enactment so repealed; nor

(d) the institution or continuance of any proceeding or other remedy, whether under any enactment so repealed, or otherwise, for ascertaining any such liability or disqualification, or enforcing or recovering any such fine, forfeiture, or punishment, as aforesaid.

(3.) Notwithstanding the repeal effected by this Act, the proceedings under any bankruptcy petition, liquidation by arrangement, or composition with creditors under the Bankruptcy Act, 1869, pending at the commencement of this Act shall, except so far as any provision of this Act is expressly applied to pending proceedings, continue, and all the provisions of the Bankruptcy Act, 1869, shall, except as aforesaid, apply thereto, as if this Act had not passed.

Proceedings under 32 & 33 Vict. c. 71, ss. 125, 126 (*a*).

170. After the passing of this Act no composition or liquidation by arrangement under sections 125 and 126 of the Bankruptcy Act, 1869, shall be entered into or allowed without the sanction of the court or registrar having jurisdiction in the matter; such sanction shall not be granted unless the composition or liquidation appears to the court or registrar to be reasonable and calculated to benefit the general body of creditors.

(*a*) See 50 & 51 Vict. c. 66.

SCHEDULES.

Section 15.

THE FIRST SCHEDULE.

Meetings of Creditors.

1. The first meeting of creditors shall be summoned for a day not later than fourteen days after the date of the receiving order, unless the court for any special reason deem it expedient that the meeting be summoned for a later day.

2. The official receiver shall summon the meeting by giving not less than seven days notice of the time and place thereof in the London Gazette and in a local paper.

3. The official receiver shall also, as soon as practicable, send to each creditor mentioned in the debtor's statement of affairs, a notice of the time and place of the first meeting of creditors, accompanied by a summary of the debtor's statement of affairs, including the causes of his failure, and any observations thereon which the official receiver may think fit to make; but the proceedings at the first meeting shall not be invalidated by reason of any such notice or summary not having been sent or received before the meeting.

4. The meeting shall be held at such place as is in the opinion of the official receiver most convenient for the majority of the creditors.

5. The official receiver or the trustee may at any time summon a meeting of creditors, and shall do so whenever so directed by the court, or so requested in writing by one-fourth in value of the creditors.

6. Meetings subsequent to the first meeting shall be summoned by sending notice of the time and place thereof to each creditor at the address given in his proof, or if he has not proved, at the address given in the debtor's statement of affairs, or at such other address as may be known to the person summoning the meeting.

7. The official receiver, or some person nominated by him, shall be the chairman at the first meeting. The chairman at subsequent meetings shall be such person as the meeting by resolution appoint.

8. A person shall not be entitled to vote as a creditor at the first or any other meeting of creditor unless he has duly proved a debt provable in bankruptcy to be due to him from the debtor, and the proof has been duly lodged before the time appointed for the meeting.

9. A creditor shall not vote at any such meeting in respect of any unliquidated or contingent debt, or any debt the value of which is not ascertained.

10. For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him, after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security unless the court on application is satisfied that the omission to value the security has arisen from inadvertence.

11. A creditor shall not vote in respect of any debt on or secured by a current bill of exchange or promissory note held by him unless he is willing to treat the liability to him thereon of every person who is liable thereon antecedently to the debtor, and against whom a receiving order has not been made, as a security in his hands, and to estimate the value thereof, and for the purposes of voting, but not for the purposes of dividend, to deduct it from his proof.

12. It shall be competent to the trustee or to the official receiver, within twenty-eight days after a proof estimating the value of a security as aforesaid has been made use of in voting at any meeting, to require the creditor to give up the security for the benefit of the creditors generally on payment of the value so estimated, with an addition thereto of twenty per centum. Provided, that where a creditor has put a value on such security, he may, at any time before he has been required to give up such security as aforesaid, correct such valuation by a new proof, and

deduct such new value from his debt, but in that case such addition of twenty per centum shall not be made if the trustee requires the security to be given up.

13. If a receiving order is made against one partner of a firm, any creditor to whom that partner is indebted jointly with the other partners of the firm, or any of them, may prove his debt for the purpose of voting at any meeting of creditors, and shall be entitled to vote thereat.

14. The chairman of a meeting shall have power to admit or reject a proof for the purpose of voting, but his decision shall be subject to appeal to the court. If he is in doubt whether the proof of a creditor should be admitted or rejected he shall mark the proof as objected to and shall allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained.

15. A creditor may vote either in person or by proxy.

16. Every instrument of proxy shall be in the prescribed form, and shall be issued by the official receiver, or, after the appointment of a trustee, by the trustee, and every insertion therein shall be in the handwriting of the person giving the proxy.

17. A creditor may give a general proxy to his manager or clerk, or any other person in his regular employment. In such case the instrument of proxy shall state the relation in which the person to act thereunder stands to the creditor.

18. A creditor may give a special proxy to any person to vote at any specified meeting, or adjournment thereof, for or against any specific resolution, or for or against any specified person as trustee, or member of a committee of inspection.

19. A proxy shall not be used unless it is deposited with the official receiver or trustee before the meeting at which it is to be used.

20. Where it appears to the satisfaction of the court that any solicitation has been used by or on behalf of a trustee or receiver in obtaining proxies or in procuring the trusteeship or receivership, except by the direction of a meeting of creditors, the court shall have power, if it think fit, to order that no remuneration shall be allowed to the person by whom or on whose behalf such solicitation may have been exercised, notwithstanding any resolution of the committee of inspection or of the creditors to the contrary.

21. A creditor may appoint the official receiver of the debtor's estate to act in manner prescribed as his general or special proxy.

22. The chairman of a meeting may, with the consent of the meeting, adjourn the meeting from time to time, and from place to place.

23. A meeting shall not be competent to act for any purpose, except the election of a chairman, the proving of debts, and the adjournment of the meeting, unless there are present, or represented thereat, at least three creditors, or all the creditors if their number does not exceed three.

24. If within half an hour from the time appointed for the meeting a quorum of creditors is not present or represented, the meeting shall be adjourned to the same day in the following week at the same time and place, or to such other day as the chairman may appoint, not being less than seven or more than twenty-one days.

25. The chairman of every meeting shall cause minutes of the proceedings at the meeting to be drawn up, and fairly entered in a book kept for that purpose, and the minutes shall be signed by him or by the chairman of the next ensuing meeting.

26. No person acting either under a general or special proxy shall vote in favour of any resolution which would directly or indirectly place himself, his partner or employer, in a position to receive any remuneration out of the estate of the debtor otherwise than as a creditor rateably with the other creditors of the debtor. Provided that where any person holds special proxies to vote for the appointment of himself as trustee he may use the said proxies and vote accordingly.

Section 39.

THE SECOND SCHEDULE.

Proof of Debts.

Proof in ordinary Cases.

1. Every creditor shall prove his debt as soon as may be after the making of a receiving order.

2. A debt may be proved by delivering or sending through the post in a prepaid letter to the official receiver, or, if a trustee has been appointed, to the trustee, an affidavit verifying the debt.

3. The affidavit may be made by the creditor himself, or by some person authorised by or on behalf of the creditor. If made by a person so authorised it shall state his authority and means of knowledge.

4. The affidavit shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the vouchers, if any, by which the same can be substantiated. The official receiver or trustee may at any time call for the production of the vouchers.

5. The affidavit shall state whether the creditor is or is not a secured creditor.

6. A creditor shall bear the cost of proving his debt, unless the court otherwise specially orders.

7. Every creditor who has lodged a proof shall be entitled to see and examine the proofs of other creditors before the first meeting, and at all reasonable times.

8. A creditor proving his debt shall deduct therefrom all trade discounts, but he shall not be compelled to deduct any discount, not exceeding five per centum on the net amount of his claim, which he may have agreed to allow for payment in cash.

Proof by secured Creditors.

9. If a secured creditor realises his security, he may prove for the balance due to him, after deducting the net amount realised.

10. If a secured creditor surrenders his security to the official receiver or trustee for the general benefit of the creditors, he may prove for his whole debt.

11. If a secured creditor does not either realise or surrender his security, he shall, before ranking for dividend, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.

12. (a.) Where a security is so valued, the trustee may at any time redeem it on payment to the creditor of the assessed value.

(b.) If the trustee is dissatisfied with the value at which a security is assessed, he may require that the property comprised in any security so valued be offered for sale at such times and on such terms and conditions as may be agreed on between the creditor and the trustee, or as, in default of such agreement, the court may direct. If the sale be by public auction the creditor, or the trustee on behalf of the estate, may bid or purchase.

(c.) Provided that the creditor may at any time, by notice in writing, require the trustee to elect whether he will or will not exercise his power of redeeming the security or requiring it to be realised, and if the trustee does not, within six months after receiving the notice, signify in writing to the creditor his election to exercise the power, he shall not be entitled to exercise it; and the equity of redemption, or any other interest in the property comprised in the security which is vested in the trustee, shall vest in the creditor, and the amount of his debt shall be reduced by the amount at which the security has been valued.

13. Where a creditor has so valued his security, he may at any time amend the valuation and proof on showing to the satisfaction of the trustee, or the court, that the valuation and proof were made bonâ fide on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation; but every such amendment shall be made at the cost of the creditor, and upon such terms as the court shall order, unless the trustee shall allow the amendment without application to the court.

14. Where a valuation has been amended in accordance with the foregoing rule, the creditor shall forthwith repay any surplus dividend which he may have received in excess of that to which he would have been entitled on the amended valuation, or, as the case may be, shall be entitled to be paid out of any money for the time being available for dividend any dividend or share of dividend which he may have failed to receive by reason of the inaccuracy of the original valuation, before that money is made applicable to the payment of any future dividend, but he shall not be entitled to disturb the distribution of any dividend declared before the date of the amendment.

15. If a creditor after having valued his security subsequently realises it, or if it is realised under the provisions of Rule 12, the net amount realised shall be substituted for the amount of any valuation previously made by the creditor, and shall be treated in all respects as an amended valuation made by the creditor.

16. If a secured creditor does not comply with the foregoing rules he shall be excluded from all share in any dividend.

17. Subject to the provisions of Rule 12, a creditor shall in no case receive more than twenty shillings in the pound, and interest as provided by this Act.

Proof in respect of Distinct Contracts.

18. If a debtor was at the date of the receiving order liable in respect of distinct contracts as a member of two or more distinct firms, or as a sole contractor, and also as member of a firm, the circumstance that the firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of the contracts, against the properties respectively liable on the contracts.

Periodical Payments.

19. When any rent or other payment falls due at stated periods, and the receiving order is made at any time other than one of those periods, the person entitled to the rent or payment may prove for a proportionate part thereof up to the date of the order, as if the rent or payment grew due from day to day.

Interest.

20. On any debt or sum certain, payable at a certain time or otherwise, whereon interest is not reserved or agreed for, and which is overdue at the date of the receiving order and provable in bankruptcy, the creditor may prove for interest at a rate not exceeding four per centum per annum to the date of the order from the time when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at a certain time, and if payable otherwise, then from the time when a demand in writing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment.

Debt payable at a future time.

21. A creditor may prove for a debt not payable when the debtor committed an act of bankruptcy as if it were payable presently, and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five pounds per centum per annum computed from the declaration of a dividend to the time when the debt would have become payable, according to the terms on which it was contracted.

Admission or Rejection of Proofs.

22. The trustee shall examine every proof and the grounds of the debt, and in writing admit or reject it, in whole or in part, or require further evidence in support of it. If he rejects a proof he shall state in writing to the creditor the grounds of the rejection.

23. If the trustee thinks that a proof has been improperly admitted, the court may, on the application of the trustee, after notice to the creditor who made the proof, expunge the proof or reduce its amount.

24. If a creditor is dissatisfied with the decision of the trustee in respect of a proof, the court may, on the application of the creditor, reverse or vary the decision.

25. The court may also expunge or reduce a proof upon the application of

a creditor if the trustee declines to interfere in the matter, or, in the case of a composition or scheme, upon the application of the debtor.

26. For the purpose of any of his duties in relation to proofs, the trustee may administer oaths and take affidavits.

27. The official receiver, before the appointment of a trustee, shall have all the powers of a trustee with respect to the examination, admission, and rejection of proofs, and any act or decision of his in relation thereto shall be subject to the like appeal.

Section 96.

THE THIRD SCHEDULE.

List of Metropolitan County Courts.

The Bloomsbury County Court of Middlesex.
The Bow County Court of Middlesex.
The Brompton County Court of Middlesex.
The Clerkenwell County Court of Middlesex.
The Lambeth County Court of Surrey.
The Marylebone County Court of Middlesex.
The Shoreditch County Court of Middlesex.
The Southwark County Court of Surrey.
The Westminster County Court of Middlesex.
The Whitechapel County Court of Middlesex.

Section 162.

THE FOURTH SCHEDULE.

Statutes relating to Unclaimed Dividends.

Session and Chapter.	Title of Act.
7 & 8 Vict. c. 70 .	An Act for facilitating arrangements between debtors and creditors.
12 & 13 Vict. c. 106 .	The Bankruptcy Law Consolidation Act, 1849.
24 & 25 Vict. c. 134 .	The Bankruptcy Act, 1861.
32 & 33 Vict. c. 71 .	The Bankruptcy Act, 1869.

Section 169.

THE FIFTH SCHEDULE.

Enactments Repealed as to England.

13 Edw 1 c. 18. in part.	The statutes of Westminster the second, chapter eighteen, Execution either by levying of the lands and goods, or by delivery of goods and half the land; at the choice of the creditor; in part; namely, the words "all the chattels of the debtor saving only his oxen and beasts of the plough, and"
32 & 33 Vict. c. 62. in part.	The Debtors Act, 1869. in part; namely, Sub-section (*b*) of section five, and Sections twenty-one and twenty-two.
32 & 33 Vict. c. 71.	The Bankruptcy Act, 1869.
32 & 33 Vict. c. 83. in part.	The Bankruptcy Repeal and Insolvent Court Act, 1869. in part; namely, Section nineteen.
33 & 34 Vict. c. 76.	The Absconding Debtors Act, 1870.
34 & 35 Vict. c. 50.	The Bankruptcy Disqualification Act, 1871. Except sections six, seven, and eight.
38 & 39 Vict. c. 77. in part.	The Supreme Court of Judicature Act, 1875. in part; namely, Sections nine and thirty-two.

46 & 47 VICT. c. 57.

An Act to amend and consolidate the Law relating to Patents for Inventions, Registration of Designs, and of Trade Marks.
[*25th August*, 1883.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PART I.

PRELIMINARY.

Short title. **1.** This Act may be cited as the Patents, Designs, and Trade Marks Act, 1883.

Division of Act into parts. **2.** This Act is divided into parts, as follows:—

Part I.—PRELIMINARY.
Part II.—PATENTS.
Part III.—DESIGNS.
Part IV.—TRADE MARKS.
Part V.—GENERAL.

Commencement of Act. **3.** This Act, except where it is otherwise expressed, shall commence from and immediately after the thirty-first day of December one thousand eight hundred and eighty-three.

PART II.

PATENTS.

Application for and Grant of Patent.

Persons entitled to apply for patent. **4.**—(1.) Any person, whether a British subject or not, may make an application for a patent.

(2.) Two or more persons may make a joint application for a patent, and a patent may be granted to them jointly.

Application and specification. **5.**—(1.) An application for a patent must be made in the form set forth in the First Schedule to this Act, or in such other form as may be from time to time prescribed; and must be left at, or sent by post to, the patent office in the prescribed manner.

(2.) An application must contain a declaration (*a*) to the effect that the applicant is in possession of an invention, whereof he, or in the case of a joint application, one or more of the applicants, claims or claim to be the true and first inventor or inventors, and for which he or they desires or desire to obtain a patent; and must be accompanied by either a provisional or complete specification.

(3.) A provisional specification must describe the nature of the invention, and be accompanied by drawings, if required.

(4.) A complete specification, whether left on application or subsequently, must particularly describe and ascertain the nature of the invention, and in what manner it is to be performed, and must be accompanied by drawings, if required (*b*).

(5.) A specification, whether provisional or complete, must commence with the title, and in the case of a complete specification must end with a distinct statement of the invention claimed.

Reference of application to examiner. **6.** The comptroller shall refer every application to an examiner, who shall ascertain and report to the comptroller whether the nature of the invention has been fairly described, and the application, specification, and draw-

(*a*) See 48 & 49 Vict. c. 63, s. 2. (*b*) See 49 & 50 Vict. c. 37, s. 2.

ings (if any) have been prepared in the prescribed manner, and the title sufficiently indicates the subject-matter of the invention.

Power for comptroller to refuse application or require amendment.

7.—(1.) If the examiner reports that the nature of the invention is not fairly described, or that the application, specification or drawings has not or have not been prepared in the prescribed manner, or that the title does not sufficiently indicate the subject-matter of the invention, the comptroller may require that the application, specification or drawings be amended before he proceeds with the application.

(2.) Where the comptroller requires an amendment, the applicant may appeal from his decision to the law officer.

(3.) The law officer shall, if required, hear the applicant and the comptroller, and may make an order determining whether and subject to what conditions, if any, the application shall be accepted.

(4.) The comptroller shall, when an application has been accepted, give notice thereof to the applicant.

(5.) If after an application has been made, but before a patent has been sealed, an application is made, accompanied by a specification bearing the same or a similar title, it shall be the duty of the examiner to report to the comptroller whether the specification appears to him to comprise the same invention; and, if he reports in the affirmative, the comptroller shall give notice to the applicants that he has so reported.

(6.) Where the examiner reports in the affirmative, the comptroller may determine, subject to an appeal to the law officer, whether the invention comprised in both applications is the same, and if so he may refuse to seal a patent on the application of the second applicant.

Time for leaving complete specification.

8.—(1.) If the applicant does not leave a complete specification with his application, he may leave it at any subsequent time within nine months (*a*) from the date of application.

(2.) Unless a complete specification is left within that time the application shall be deemed to be abandoned.

Comparison of provisional and complete specification.

9.—(1.) Where a complete specification is left after a provisional specification, the comptroller shall refer both specifications to an examiner for the purpose of ascertaining whether the complete specification has been prepared in the prescribed manner, and whether the invention particularly described in the complete specification is substantially the same as that which is described in the provisional specification.

(2.) If the examiner reports that the conditions hereinbefore contained have not been complied with, the comptroller may refuse to accept the complete specification unless and until the same shall have been amended to his satisfaction; but any such refusal shall be subject to appeal to the law officer.

(3.) The law officer shall, if required, hear the applicant and the comptroller, and may make an order determining whether and subject to what conditions, if any, the complete specification shall be accepted.

(4.) Unless a complete specification is accepted within twelve months (*a*) from the date of application, then (save in the case of an appeal having been lodged against the refusal to accept) the application shall, at the expiration of those twelve months, become void.

(5.) Reports of examiners shall not in any case be published or be open to public inspection, and shall not be liable to production or inspection in any legal proceeding, other than an appeal to the law officer under this Act, unless the court or officer having power to order discovery in such legal proceeding shall certify that such production or inspection is desirable in the interests of justice, and ought to be allowed.

Advertisement on acceptance of complete specification.

10. On the acceptance of the complete specification the comptroller shall advertise the acceptance; and the application and specification or specifications with the drawings (if any) shall be open to public inspection.

Opposition to grant of patent.

11.—(1.) Any person may at any time within two months from the date of the advertisement of the acceptance of a complete specification give notice at the patent office of opposition to the grant of the patent on the ground of the applicant having obtained the invention from him, or from a person of whom he is the legal representative, or on the ground that the invention has been patented in this country on an application of prior date, or on the

(*a*) See 48 & 49 Vict. c. 63, s. 3.

ground of an examiner having reported to the comptroller that the specification appears to him to comprise the same invention as is comprised in a specification bearing the same or a similar title and accompanying a previous application, but on no other ground.

(2.) Where such notice is given the comptroller shall give notice of the opposition to the applicant, and shall, on the expiration of those two months, after hearing the applicant and the person so giving notice, if desirous of being heard, decide on the case, but subject to appeal to the law officer.

(3.) The law officer shall, if required, hear the applicant and any person so giving notice and being, in the opinion of the law officer, entitled to be heard in opposition to the grant, and shall determine whether the grant ought or ought not to be made.

(4.) The law officer may, if he thinks fit, obtain the assistance of an expert, who shall be paid such remuneration as the law officer, with the consent of the Treasury, shall appoint.

Sealing of patent.

12.—(1.) If there is no opposition, or, in case of opposition, if the determination is in favour of the grant of a patent, the comptroller shall cause a patent to be sealed with the seal of the patent office.

(2.) A patent so sealed shall have the same effect as if it were sealed with the Great Seal of the United Kingdom.

(3.) A patent shall be sealed as soon as may be, and not after the expiration of fifteen months (*a*) from the date of application, except in the cases hereinafter mentioned, that is to say—

(a) Where the sealing is delayed by an appeal to the law officer, or by opposition to the grant of the patent, the patent may be sealed at such time as the law officer may direct.

(b) If the person making the application dies before the expiration of the fifteen months aforesaid, the patent may be granted to his legal representative and sealed at any time within twelve months after the death of the applicant.

Date of patent.

13. Every patent shall be dated and sealed as of the day of the application: Provided that no proceedings shall be taken in respect of an infringement committed before the publication of the complete specification: Provided also, that in case of more than one application for a patent for the same invention, the sealing of a patent on one of those applications shall not prevent the sealing of a patent on an earlier application.

Provisional Protection.

Provisional protection.

14. Where an application for a patent in respect of an invention has been accepted, the invention may during the period between the date of the application and the date of sealing such patent be used and published without prejudice to the patent to be granted for the same: and such protection from the consequences of use and publication is in this Act referred to as provisional protection.

Protection by Complete Specification.

Effect of acceptance of complete specification.

15. After the acceptance of a complete specification and until the date of sealing a patent in respect thereof, or the expiration of the time for sealing, the applicant shall have the like privileges and rights as if a patent for the invention had been sealed on the date of the acceptance of the complete specification: Provided that an applicant shall not be entitled to institute any proceeding for infringement unless and until a patent for the invention has been granted to him.

Patent.

Extent of patent.

16. Every patent when sealed shall have effect throughout the United Kingdom and the Isle of Man.

Term of patent.

17.—(1.) The term limited in every patent for the duration thereof shall be fourteen years from its date.

(2.) But every patent shall, notwithstanding anything therein or in this Act, cease if the patentee fails to make the prescribed payments within the prescribed times.

(*a*) 48 & 49 Vict. c. 63, s. 3.

(3.) If, nevertheless, in any case, by accident, mistake or inadvertence, a patentee fails to make any prescribed payment within the prescribed time, he may apply to the comptroller for an enlargement of the time for making that payment.

(4.) Thereupon the comptroller shall, if satisfied that the failure has arisen from any of the above-mentioned causes, on receipt of the prescribed fee for enlargement, not exceeding ten pounds, enlarge the time accordingly, subject to the following conditions:—

(a) The time for making any payment shall not in any case be enlarged for more than three months.

(b) If any proceeding shall be taken in respect of an infringement of the patent committed after a failure to make any payment within the prescribed time, and before the enlargement thereof, the court before which the proceeding is proposed to be taken may, if it shall think fit, refuse to award or give any damages in respect of such infringement.

Amendment of Specification.

Amendment of specification.

18.—(1.) An applicant or a patentee may, from time to time, by request in writing left at the patent office, seek leave to amend his specification, including drawings forming part thereof, by way of disclaimer, correction, or explanation, stating the nature of such amendment and his reasons for the same.

(2.) The request and the nature of such proposed amendment shall be advertised in the prescribed manner, and at any time within one month from its first advertisement any person may give notice at the patent office of opposition to the amendment.

(3.) Where such notice is given the comptroller shall give notice of the opposition to the person making the request, and shall hear and decide the case subject to an appeal to the law officer.

(4.) The law officer shall, if required, hear the person making the request and the person so giving notice, and being in the opinion of the law officer entitled to be heard in opposition to the request, and shall determine whether and subject to what conditions, if any, the amendment ought to be allowed.

(5.) Where no notice of opposition is given, or the person so giving notice does not appear, the comptroller shall determine whether and subject to what conditions, if any, the amendment ought to be allowed.

(6.) When leave to amend is refused by the comptroller, the person making the request may appeal from his decision to the law officer.

(7.) The law officer shall, if required, hear the person making the request and the comptroller, and may make an order determining whether, and subject to what conditions, if any, the amendment ought to be allowed.

(8.) No amendment shall be allowed that would make the specification, as amended, claim an invention substantially larger than or substantially different from the invention claimed by the specification as it stood before amendment.

(9.) Leave to amend shall be conclusive as to the right of the party to make the amendment allowed, except in case of fraud; and the amendment shall in all courts and for all purposes be deemed to form part of the specification.

(10.) The foregoing provisions of this section do not apply when and so long as any action for infringement or other legal proceeding in relation to a patent is pending.

Power to disclaim part of invention during action, &c.

19.—(1.) In an action for infringement of a patent, and in a proceeding for revocation of a patent, the court or a judge may at any time order that the patentee shall, subject to such terms as to costs and otherwise as the court or a judge may impose, be at liberty to apply at the patent office for leave to amend his specification by way of disclaimer, and may direct that in the meantime the trial or hearing of the action shall be postponed.

Restriction on recovery of damages.

20. Where an amendment by way of disclaimer, correction, or explanation, has been allowed under this Act, no damages shall be given in any action in respect of the use of the invention before the disclaimer, correction, or explanation, unless the patentee establishes to the satisfaction of the court that his original claim was framed in good faith and with reasonable skill and knowledge.

21. Every amendment of a specification shall be advertised in the prescribed manner. Advertisement of amendment.

Compulsory Licences.

22. If on the petition of any person interested it is proved to the Board of Trade that by reason of the default of a patentee to grant licences on reasonable terms— Power for Board to order grant of licences.

(a.) The patent is not being worked in the United Kingdom; or

(b.) The reasonable requirements of the public with respect to the invention cannot be supplied; or

(c.) Any person is prevented from working or using to the best advantage an invention of which he is possessed,

the Board may order the patentee to grant licences on such terms as to the amount of royalties, security for payment, or otherwise, as the Board, having regard to the nature of the invention and the circumstances of the case, may deem just, and any such order may be enforced by mandamus.

Register of Patents.

23.—(1.) There shall be kept at the patent office a book called the Register of Patents, wherein shall be entered the names and addresses of grantees of patents, notifications of assignments and of transmissions of patents, of licences under patents, and of amendments, extensions, and revocations of patents, and such other matters affecting the validity or proprietorship of patents as may from time to time be prescribed. Register of patents.

(2.) The register of patents shall be primâ facie evidence of any matters by this Act directed or authorized to be inserted therein.

(3.) Copies of deeds, licences, and any other documents affecting the proprietorship in any letters patent or in any licence thereunder, must be supplied to the comptroller in the prescribed manner for filing in the patent office.

Fees.

24.—(1.) There shall be paid in respect of the several instruments described in the Second Schedule to this Act, the fees in that schedule mentioned, and there shall likewise be paid, in respect of other matters under this part of the Act, such fees as may be from time to time, with the sanction of the Treasury, prescribed by the Board of Trade; and such fees shall be levied and paid to the account of her Majesty's Exchequer in such manner as the Treasury may from time to time direct. Fees in schedule.

(2.) The Board of Trade may from time to time, if they think fit, with the consent of the Treasury, reduce any of those fees.

Extension of Term of Patent.

25.—(1.) A patentee may, after advertising in manner directed by any rules made under this section his intention to do so, present a petition to her Majesty in Council, praying that his patent may be extended for a further term; but such petition must be presented at least six months before the time limited for the expiration of the patent. Extension of term of patent on petition to Queen in Council.

(2.) Any person may enter a caveat, addressed to the Registrar of the Council at the Council Office, against the extension.

(3.) If her Majesty shall be pleased to refer any such petition to the Judicial Committee of the Privy Council, the said committee shall proceed to consider the same, and the petitioner and any person who has entered a caveat shall be entitled to be heard by himself or by counsel on the petition.

(4.) The Judicial Committee shall, in considering their decision, have regard to the nature and merits of the invention in relation to the public, to the profits made by the patentee as such, and to all the circumstances of the case.

(5.) If the Judicial Committee report that the patentee has been inadequately remunerated by his patent, it shall be lawful for Her Majesty in Council to extend the term of the patent for a further term not exceeding seven, or in exceptional cases fourteen, years; or to order the grant of a new patent for the term therein mentioned, and containing any restrictions, conditions, and provisions that the Judicial Committee may think fit.

(6.) It shall be lawful for Her Majesty in Council to make, from time to

time, rules of procedure and practice for regulating proceedings on such petitions, and subject thereto such proceedings shall be regulated according to the existing procedure and practice in patent matters of the Judicial Committee.

(7.) The costs of all parties of and incident to such proceedings shall be in the discretion of the Judicial Committee; and the orders of the Committee respecting costs shall be enforceable as if they were orders of a division of the High Court of Justice.

Revocation.

Revocation of patent.

26.—(1.) The proceeding by scire facias to repeal a patent is hereby abolished.

(2.) Revocation of a patent may be obtained on petition to the court.

(3.) Every ground on which a patent might, at the commencement of this Act, be repealed by scire facias shall be available by way of defence to an action of infringement and shall also be a ground of revocation.

(4.) A petition for revocation of a patent may be presented by—

(a) The Attorney-General in England or Ireland, or the Lord Advocate in Scotland.

(b) Any person authorised by the Attorney-General in England or Ireland, or the Lord Advocate in Scotland.

(c) Any person alleging that the patent was obtained in fraud of his rights, or of the rights of any person under or through whom he claims:

(d) Any person alleging that he, or any person under or through whom he claims was the true inventor of any invention included in the claim of the patentee:

(e) Any person alleging that he, or any person under or through whom he claims an interest in any trade, business, or manufacture, had publicly manufactured, used, or sold, within this realm, before the date of the patent, anything claimed by the patentee as his invention.

(5.) The plaintiff must deliver with his petition particulars of the objections on which he means to rely, and no evidence shall, except by leave of the court or a judge, be admitted in proof of any objection of which particulars are not so delivered.

(6.) Particulars delivered may be from time to time amended by leave of the court or a judge.

(7.) The defendant shall be entitled to begin, and give evidence in support of the patent, and if the plaintiff gives evidence impeaching the validity of the patent the defendant shall be entitled to reply.

(8.) Where a patent has been revoked on the ground of fraud, the comptroller may, on the application of the true inventor made in accordance with the provisions of this Act, grant to him a patent in lieu of and bearing the same date as the date of revocation of the patent so revoked, but the patent so granted shall cease on the expiration of the term for which the revoked patent was granted.

Crown.

Patent to bind Crown.

27.—(1.) A patent shall have to all intents the like effect as against Her Majesty the Queen, her heirs and successors, as it has against a subject.

(2.) But the officers or authorities administering any department of the service of the Crown may, by themselves, their agents, contractors, or others, at any time after the application, use the invention for the services of the Crown on terms to be before or after the use thereof agreed on, with the approval of the Treasury, between those officers or authorities and the patentee, or, in default of such agreement, on such terms as may be settled by the Treasury after hearing all parties interested.

Legal Proceedings.

Hearing with assessor.

28.—(1.) In an action or proceeding for infringement or revocation of a patent, the court may, if it thinks fit, and shall, on the request of either of the parties to the proceeding, call in the aid of an assessor specially qualified, and try and hear the case wholly or partially with his assistance; the action shall be tried without a jury, unless the court shall otherwise direct.

(2.) The Court of Appeal or the Judicial Committee of the Privy Council may, if they see fit, in any proceeding before them respectively, call in the aid of an assessor as aforesaid.

(3.) The remuneration, if any, to be paid to an assessor under this section shall be determined by the court or the Court of Appeal or Judicial Committee, as the case may be, and be paid in the same manner as the other expenses of the execution of this Act.

Delivery of particulars.

29.—(1.) In an action for infringement of a patent the plaintiff must deliver with his statement of claim, or by order of the court or the judge, at any subsequent time, particulars of the breaches complained of.

(2.) The defendant must deliver with his statement of defence, or, by order of the court or a judge, at any subsequent time, particulars of any objections on which he relies in support thereof.

(3.) If the defendant disputes the validity of the patent, the particulars delivered by him must state on what grounds he disputes it, and if one of those grounds is want of novelty, must state the time and place of the previous publication or user alleged by him.

(4.) At the hearing no evidence shall, except by leave of the court or a judge, be admitted in proof of any alleged infringement or objection of which particulars are not so delivered.

(5.) Particulars delivered may be from time to time amended, by leave of the court or a judge.

(6.) On taxation of costs regard shall be had to the particulars delivered by the plaintiff and by the defendant; and they respectively shall not be allowed any costs in respect of any particular delivered by them unless the same is certified by the court or a judge to have been proven or to have been reasonable and proper, without regard to the general costs of the case.

Order for inspection, &c., in action.

30. In an action for infringement of a patent, the court or a judge may, on the application of either party, make such order for an injunction, inspection, or account, and impose such terms and give such directions respecting the same and the proceedings thereon as the court or a judge may see fit.

Certificate of validity questioned and costs thereon.

31. In an action for infringement of a patent, the court or a judge may certify that the validity of the patent came in question; and if the court or a judge so certifies, then in any subsequent action for infringement, the plaintiff in that action on obtaining a final order or judgment in his favour, shall have his full costs, charges and expenses as between solicitor and client, unless the court or judge trying the action certifies that he ought not to have the same.

Remedy in case of groundless threats of legal proceedings.

32. Where any person claiming to be the patentee of an invention, by circulars, advertisements, or otherwise threatens any other person with any legal proceedings or liability in respect of any alleged manufacture, use, sale, or purchase of the invention, any person or persons aggrieved thereby, may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as may have been sustained thereby, if the alleged manufacture, use, sale, or purchase to which the threats related was not in fact an infringement of any legal rights of the person making such threats: Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent.

Miscellaneous.

Patent for one invention only.

33. Every patent may be in the form in the First Schedule to this Act, and shall be granted for one invention only, but may contain more than one claim; but it shall not be competent for any person in an action or other proceeding to take any objection to a patent on the ground that it comprises more than one invention.

Patent on application of representative of deceased inventor.

34.—(1.) If a person possessed of an invention dies without making application for a patent for the invention, application may be made by, and a patent for the invention granted to, his legal representative.

(2.) Every such application must be made within six months of the decease of such person, and must contain a declaration by the legal representative that he believes such person to be the true and first inventor of the invention.

Patent to first inventor not invalidated by application in fraud of him.

35. A patent granted to the true and first inventor shall not be invalidated by an application in fraud of him, or by provisional protection obtained thereon, or by any use or publication of the invention subsequent to that fraudulent application during the period of provisional protection.

Assignment for particular places.

36. A patentee may assign his patent for any place in or part of the United Kingdom, or Isle of Man, as effectually as if the patent were originally granted to extend to that place or part only.

Loss or destruction of patent.

37. If a patent is lost or destroyed, or its non-production is accounted for to the satisfaction of the comptroller, the comptroller may at any time cause a duplicate thereof to be sealed.

Proceedings and costs before law officer.

38. The law officers may examine witnesses on oath and administer oaths for that purpose under this part of this Act, and may from time to time make, alter, and rescind rules regulating references and appeals to the law officers and the practice and procedure before them under this part of this Act; and in any proceeding before either of the law officers under this part of this Act, the law officer may order costs to be paid by either party, and any such order may be made a rule of the court.

Exhibition at industrial or international exhibition not to prejudice patent rights.

39. The exhibition of an invention at an industrial or international exhibition, certified as such by the Board of Trade, or the publication of any description of the invention during the period of the holding of the exhibition, or the use of the invention for the purpose of the exhibition in the place where the exhibition is held, or the use of the invention during the period of the holding of the exhibition by any person elsewhere, without the privity or consent of the inventor, shall not prejudice the right of the inventor or his legal personal representative to apply for and obtain provisional protection and a patent in respect of the invention or the validity of any patent granted on the application, provided that both the following conditions are complied with, namely,—

(a) The exhibitor must, before exhibiting the invention, give the comptroller the prescribed notice of his intention to do so; and

(b) The application for a patent must be made before or within six months from the date of the opening of the exhibition (*a*).

Publication of illustrated journal, indexes, &c.

40.—(1.) The comptroller shall cause to be issued periodically an illustrated journal of patented inventions, as well as reports of patent cases decided by courts of law, and any other information that the comptroller may deem generally useful or important.

(2.) Provision shall be made by the comptroller for keeping on sale copies of such journal, and also of all complete specifications of patents for the time being in force, with their accompanying drawings, if any.

(3.) The comptroller shall continue, in such form as he may deem expedient, the indexes and abridgments of specifications hitherto published, and shall from time to time prepare and publish such other indexes, abridgments of specifications, catalogues, and other works relating to inventions, as he may see fit.

Patent Museum.

41. The control and management of the existing Patent Museum, and its contents shall from and after the commencement of this Act, be transferred to and vested in the Department of Science and Art, subject to such directions as Her Majesty in Council may see fit to give.

Power to require models on payment.

42. The Department of Science and Art may at any time require a patentee to furnish them with a model of his invention on payment to the patentee of the cost of the manufacture of the model; the amount to be settled, in case of dispute, by the Board of Trade.

Foreign vessels in British waters.

43.—(1.) A patent shall not prevent the use of an invention for the purposes of the navigation of a foreign vessel within the jurisdiction of any of Her Majesty's Courts in the United Kingdom, or Isle of Man, or the use of an invention in a foreign vessel within that jurisdiction, provided it is not used therein for or in connection with the manufacture or preparation of anything intended to be sold in or exported from the United Kingdom or Isle of Man.

(2.) But this section shall not extend to vessels of any foreign state of which the laws authorise subjects of such foreign state, having patents or like privileges for the exclusive use or exercise of inventions within its territories, to prevent or interfere with the use of such inventions in British vessels while in the ports of such foreign state, or in the waters within the jurisdiction of its courts, where such inventions are not so used for the manufacture or preparation of anything intended to be sold in or exported from the territories of such foreign state.

Assignment to Secretary for War of certain inventions.

44.—(1.) The inventor of any improvement in instruments or munitions of war, his executors, administrators, or assigns (who are in this section comprised in the expression the inventor) may (either for or without valuable

(*a*) See 49 & 50 Vict. c. 37, s. 3.

consideration) assign to Her Majesty's Principal Secretary of State for the War Department (hereinafter referred to as the Secretary of State), on behalf of Her Majesty, all the benefit of the invention and of any patent obtained or to be obtained for the same; and the Secretary of State may be a party to the assignment.

(2.) The assignment shall effectually vest the benefit of the invention and patent in the Secretary of State for the time being on behalf of Her Majesty, and all covenants and agreements therein contained for keeping the invention secret and otherwise shall be valid and effectual (notwithstanding any want of valuable consideration), and may be enforced accordingly by the Secretary of State for the time being.

(3.) Where any such assignment has been made to the Secretary of State, he may at any time before the application for a patent for the invention, or before publication of the specification or specifications, certify to the comptroller his opinion that, in the interest of the public service, the particulars of the invention and of the manner in which it is to be performed should be kept secret.

(4.) If the Secretary of State so certifies, the application and specification or specifications with the drawings (if any), and any amendment of the specification or specifications, and any copies of such documents and drawings, shall, instead of being left in the ordinary manner at the patent office, be delivered to the comptroller in a packet sealed by authority of the Secretary of State.

(5.) Such packet shall until the expiration of the term or extended term during which a patent for the invention may be in force, be kept sealed by the comptroller, and shall not be opened save under the authority of an order of the Secretary of State, or of the law officers.

(6.) Such sealed packet shall be delivered at any time during the continuance of the patent to any person authorised by writing under the hand of the Secretary of State to receive the same, and shall if returned to the comptroller be again kept sealed by him.

(7.) On the expiration of the term or extended term of the patent, such sealed packet shall be delivered to any person authorised by writing under the hand of the Secretary of State to receive it.

(8.) Where the Secretary of State certifies as aforesaid, after an application for a patent has been left at the patent office, but before the publication of the specification or specifications, the application specification or specifications, with the drawings (if any), shall be forthwith placed in a packet sealed by authority of the comptroller, and such packet shall be subject to the foregoing provisions respecting a packet sealed by authority of the Secretary of State.

(9.) No proceeding by petition or otherwise shall lie for revocation of a patent granted for an invention in relation to which the Secretary of State has certified as aforesaid.

(10.) No copy of any specification or other document or drawing, by this section required to be placed in a sealed packet, shall in any manner whatever be published or open to the inspection of the public, but save as in this section otherwise directed, the provisions of this part of this Act shall apply in respect of any such invention and patent as aforesaid.

(11.) The Secretary of State may, at any time by writing under his hand, waive the benefit of this section with respect to any particular invention, and the specifications, documents and drawings shall be thenceforth kept and dealt with in the ordinary way.

(12.) The communication of any invention for any improvement in instruments or munitions of war to the Secretary of State, or to any person or persons authorised by him to investigate the same or the merits thereof, shall not, nor shall anything done for the purposes of the investigation, be deemed use or publication of such invention so as to prejudice the grant or validity of any patent for the same.

Existing Patents.

Provisions respecting existing patents.

45.—(1.) The provisions of this Act relating to applications for patents and proceedings thereon shall have effect in respect only of applications made after the commencement of this Act.

(2.) Every patent granted before the commencement of this Act, or on an

application then pending, shall remain unaffected by the provisions of this Act relating to patents binding the Crown, and to compulsory licenses.

(3.) In all other respects (including the amount and time of payment of fees) this Act shall extend to all patents granted before the commencement of this Act, or on applications then pending, in substitution for such enactments as would have applied thereto if this Act had not been passed.

(4.) All instruments relating to patents granted before the commencement of this Act required to be left or filed in the Great Seal Patent Office shall be deemed to be so left or filed if left or filed before or after the commencement of this Act in the patent office.

Definitions.

Definitions of patent, patentee, and invention.

46. In and for the purposes of this Act—

"Patent" means letters patent for an invention:

"Patentee" means the person for the time being entitled to the benefit of a patent:

"Invention" means any manner of new manufacture the subject of letters patent and grant of privilege within section six of the Statute of Monopolies (that is, the Act of the twenty-first year of the reign of King James the First, chapter three, intituled "An Act concerning Monopolies and Dispensations with Penal Laws and the Forfeiture thereof"), and includes an alleged invention.

In Scotland "injunction" means "interdict."

PART III.

DESIGNS.

Registration of Designs.

Application for registration of designs.

47.—(1.) The comptroller may, on application by or on behalf of any person claiming to be the proprietor of any new or original design not previously published in the United Kingdom, register the design under this part of this Act.

(2.) The application must be made in the form set forth in the first schedule to this Act, or in such other form as may be from time to time prescribed, and must be left at, or sent by post to, the patent office in the prescribed manner.

(3.) The application must contain a statement of the nature of the design, and the class or classes of goods in which the applicant desires that the design be registered.

(4.) The same design may be registered in more than one class.

(5.) In case of doubt as to the class in which a design ought to be registered, the comptroller may decide the question.

(6.) The comptroller may, if he thinks fit, refuse to register any design presented to him for registration, but any person aggrieved by any such refusal may appeal therefrom to the Board of Trade.

(7.) The Board of Trade shall, if required, hear the applicant and the comptroller, and may make an order determining whether, and subject to what conditions, if any, registration is to be permitted.

Drawings, &c., to be furnished on application.

48.—(1.) On application for registration of a design the applicant shall furnish to the comptroller the prescribed number of copies of drawings, photographs, or tracings of the design sufficient, in the opinion of the comptroller, for enabling him to identify the design; or the applicant may, instead of such copies, furnish exact representations or specimens of the design.

(2.) The comptroller may, if he thinks fit, refuse any drawing, photograph, tracing, representation, or specimen which is not, in his opinion, suitable for the official records.

Ceatificate of registration.

49.—(1.) The comptroller shall grant a certificate of registration to the proprietor of the design when registered.

(2.) The comptroller may, in case of loss of the original certificate, or in any other case in which he deems it expedient, grant a copy or copies of the certificate.

Copyright in registered Designs.

Copyright on registration.

50.—(1.) When a design is registered, the registered proprietor of the design shall, subject to the provisions of this Act, have copyright in the design during five years from the date of registration.

(2.) Before delivery on sale of any articles to which a registered design has been applied, the proprietor must (if exact representations or specimens were not furnished on the application for registration), furnish to the comptroller the prescribed number of exact representations or specimens of the design; and if he fails to do so, the comptroller may erase his name from the register, and thereupon his copyright in the design shall cease.

Marking registered designs.

51. Before delivery on sale of any articles to which a registered design has been applied, the proprietor of the design shall cause each such article to be marked with the prescribed mark, or with the prescribed word or words or figures, denoting that the design is registered; and, if he fails to do so, the copyright in the design shall cease, unless the proprietor shows that he took all proper steps to ensure the marking of the article.

Inspection of registered designs.

52.—(1.) During the existence of copyright in a design, the design shall not be open to inspection except by the proprietor, or a person authorised in writing by the proprietor, or a person authorised by the comptroller or by the court, and furnishing such information as may enable the comptroller to identify the design, nor except in the presence of the comptroller, or of an officer acting under him, nor except on payment of the prescribed fee; and the person making the inspection shall not be entitled to take any copy of the design, or of any part thereof.

(2.) When the copyright in a design has ceased, the design shall be open to inspection, and copies thereof may be taken by any person on payment of the prescribed fee.

Information as to existence of copyright.

53. On the request of any person producing a particular design, together with its mark of registration, or producing only its mark of registration, or furnishing such information as may enable the comptroller to identify the design, and on payment of the prescribed fee, it shall be the duty of the comptroller to inform such person whether the registration still exists in respect of such design, and if so, in respect of what class or classes of goods, and stating also the date of registration, and the name and address of the registered proprietor.

Cesser of copyright in certain events.

54. If a registered design is used in manufacture in any foreign country and is not used in this country within six months of its registration in this country, the copyright in the design shall cease.

Register of Designs.

Register of designs.

55.—(1.) There shall be kept at the patent office a book called the Register of Designs, wherein shall be entered the names and addresses of proprietors of registered designs, notifications of assignments and of transmissions of registered designs, and such other matters as may from time to time be prescribed.

(2.) The register of designs shall be primâ facie evidence of any matters by this Act directed or authorised to be entered therein.

Fees.

Fees on registration, &c.

56. There shall be paid in respect of applications and registration and other matters under this part of this Act such fees as may be from time to time, with the sanction of the Treasury, prescribed by the Board of Trade; and such fees shall be levied and paid to the account of Her Majesty's Exchequer in such manner as the Treasury shall from time to time direct.

Industrial and International Exhibitions.

Exhibition at industrial or international exhibition not to prevent or invalidate registration.

57. The exhibition at an industrial or international exhibition certified as such by the Board of Trade, or the exhibition elsewhere during the period of the holding of the exhibition, without the privity or consent of the proprietor, of a design, or of any article to which a design is applied, or the publication, during the holding of any such exhibition, of a description of a design, shall not prevent the design from being registered, or invalidate the

registration thereof, provided that both the following conditions are complied with; namely,—

(a.) The exhibitor must, before exhibiting the design or article, or publishing a description of the design, give the comptroller the prescribed notice of his intention to do so; and

(b.) The application for registration must be made before or within six months from the date of the opening of the exhibition (*a*).

Legal Proceedings.

Penalty on piracy of registered design.

58. During the existence of copyright in any design—

(a.) It shall not be lawful for any person without the license or written consent of the registered proprietor to apply such design or any fraudulent or obvious imitation thereof, in the class or classes of goods in which such design is registered, for purposes of sale to any article of manufacture or to any substance artificial or natural or partly artificial and partly natural; and

(b.) It shall not be lawful for any person to publish or expose for sale any article of manufacture or any substance to which such design or any fraudulent or obvious imitation thereof shall have been so applied, knowing that the same has been so applied without the consent of the registered proprietor.

Any person who acts in contravention of this section shall be liable for every offence to forfeit a sum not exceeding fifty pounds to the registered proprietor of the design, who may recover such sum as a simple contract debt by action in any court of competent jurisdiction.

Action for damages.

59. Notwithstanding the remedy given by this Act for the recovery of such penalty as aforesaid, the registered proprietor of any design may (if he elects to do so) bring an action for the recovery of any damages arising from the application of any such design, or of any fraudulent or obvious imitation thereof for the purpose of sale, to any article of manufacture or substance, or from the publication sale or exposure for sale by any person of any article or substance to which such design or any fraudulent or obvious imitation thereof shall have been so applied, such person knowing that the proprietor had not given his consent to such application.

Definitions.

Definition of "design," "copyright."

60. In and for the purposes of this Act—

"Design" means any design applicable to any article of manufacture, or to any substance artificial or natural, or partly artificial and partly natural, whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes, and by whatever means it is applicable, whether by printing, painting, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining, or any other means whatever, manual, mechanical, or chemical, separate or combined, not being a design for a sculpture, or other thing within the protection of the Sculpture Copyright Act of the year 1814 (fifty-fourth George the Third, chapter fifty-six).

"Copyright" means the exclusive right to apply a design to any article of manufacture or to any such substance as aforesaid in the class or classes in which the design is registered.

Definition of proprietor.

61. The author of any new and original design shall be considered the proprietor thereof, unless he executed the work on behalf of another person for a good or valuable consideration, in which case such person shall be considered the proprietor, and every person acquiring for a good or valuable consideration a new and originl design, or the right to apply the same to any such article or substance as aforesaid, either exclusively of any other person or otherwise, and also every person on whom the property in such design or such right to the application thereof shall devolve, shall be considered the proprietor of the design in the respect in which the same may have been so acquired, and to that extent, but not otherwise.

49 & 50 Vict. c. 37, s. 3.

PART IV.

TRADE MARKS.

Registration of Trade Marks.

Application for registration.

62.—(1.) The comptroller may, on application by or on behalf of any person claiming to be the proprietor of a trade mark, register the trade mark.

(2.) The application must be made in the form set forth in the First Schedule to this Act, or in such other form as may be from time to time prescribed, and must be left at, or sent by post to, the Patent Office in the prescribed manner.

(3.) The application must be accompanied by the prescribed number of representations of the trade mark, and must state the particular goods or classes of goods in connexion with which the applicant desires the trade mark to be registered.

(4.) The comptroller may, if he thinks fit, refuse to register a trade mark, but any such refusal shall be subject to appeal to the Board of Trade, who shall, if required, hear the applicant and the comptroller, and may make an order determining whether, and subject to what conditions, if any, registration is to be permitted.

(5.) The Board of Trade may, however, if it appears expedient, refer the appeal to the Court; and in that event the Court shall have jurisdiction to hear and determine the appeal and may make such order as aforesaid.

Limit of time for proceeding with application.

63. Where registration of a trade mark has not been or shall not be completed within twelve months from the date of the application, by reason of default on the part of the applicant, the application shall be deemed to be abandoned.

Conditions of registration of trade mark.

64.—(1.) For the purposes of this Act, a trade mark must consist of or contain at least one of the following essential particulars:—

(a) A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or

(b) A written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade mark; or

(c) A distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use.

(2.) There may be added to any one or more of these particulars any letters words or figures, or combination of letters words or figures, or of any of them.

(3.) Provided that any special and distinctive word or words letter, figure, or combination of letters or figures or of letters and figures used as a trade mark before the thirteenth day of August one thousand eight hundred and seventy-five may be registered as a trade mark under this part of this Act.

Connection of trade mark with goods.

65. A trade mark must be registered for particular goods or classes of goods.

Registration of a series of marks.

66. When a person claiming to be the proprietor of several trade marks which, while resembling each other in the material particulars thereof, yet differ in respect of (a) the statement of the goods for which they are respectively used or proposed to be used, or (b) statements of numbers, or (c) statements of price, or (d) statements of quality, or (e) statements of names of places, seeks to register such trade marks, they may be registered as a series in one registration. A series of trade marks shall be assignable and transmissible only as a whole, but for all other purposes each of the trade marks composing a series shall be deemed and treated as registered separately.

Trade marks may be registered in any colour.

67. A trade mark may be registered in any colour, and such registration shall (subject to the provisions of this Act) confer on the registered owner the exclusive right to use the same in that or any other colour.

Advertisement of application.

68. Every application for registration of a trade mark under this part of this Act shall as soon as may be after its receipt be advertised by the comptroller.

Opposition to registration.

69.—(1.) Any person may within two months of the first advertisement of the application, give notice in duplicate at the patent office of opposition to registration of the trade mark, and the comptroller shall send one copy of such notice to the applicant.

(2.) Within two months after receipt of such notice or such further time

as the comptroller may allow, the applicant may send to the comptroller a counter statement in duplicate of the grounds on which he relies for his application, and if he does not do so, shall be deemed to have abandoned his application.

(3.) If the applicant sends such counter statement, the comptroller shall furnish a copy thereof to the person who gave notice of opposition, and shall require him to give security in such manner and to such amount as the comptroller may require for such costs as may be awarded in respect of such opposition; and if such security is not given within fourteen days after such requirement was made or such further time as the comptroller may allow, the opposition shall be deemed to be withdrawn.

(4.) If the person who gave notice of opposition duly gives such security as aforesaid, the comptroller shall inform the applicant thereof in writing, and thereupon the case shall be deemed to stand for the determination of the court.

Assignment and transmission of trade mark.

70. A trade mark, when registered, shall be assigned and transmitted only in connexion with the goodwill of the business concerned in the particular goods or classes of goods for which it has been registered, and shall be determinable with that goodwill.

Conflicting claims to registration.

71. Where each of several persons claims to be registered as proprietor of the same trade mark, the comptroller may refuse to register any of them until their rights have been determined according to law, and the comptroller may himself submit or require the claimants to submit their rights to the court.

Restrictions on registration.

72.—(1.) Except where the court has decided that two or more persons are entitled to be registered as proprietors of the same trade mark, the comptroller shall not register in respect of the same goods or description of goods a trade mark identical with one already on the register with respect to such goods or description of goods.

(2.) The comptroller shall not register with respect to the same goods or description of goods a trade mark so nearly resembling a trade mark already on the register with respect to such goods or description of goods as to be calculated to deceive.

Further restriction on registration.

73. It shall not be lawful to register as part of or in combination with a trade mark any words the exclusive use of which would by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a court of justice, or any scandalous design.

Saving for power to provide for entry on register of common marks as additions to trade marks.

74.—(1.) Nothing in this Act shall be construed to prevent the comptroller entering on the register, in the prescribed manner, and subject to the prescribed conditions, as an addition to any trade mark—

(a) In the case of an application for registration of a trade mark used before the thirteenth day of August, one thousand eight hundred and seventy-five—

Any distinctive device, mark, brand, heading, label, ticket, letter, word, or figure, or combination of letters, words, or figures, though the same is common to the trade in the goods with respect to which the application is made;

(b) In the case of an application for registration of a trade mark not used before the thirteenth day of August one thousand eight hundred and seventy-five—

Any distinctive word or combination of words, though the same is common to the trade in the goods with respect to which the application is made;

(2.) The applicant for entry of any such common particular or particulars must, however, disclaim in his application any right to the exclusive use of the same, and a copy of the disclaimer shall be entered on the register.

(3.) Any device, mark, brand, heading, label, ticket, letter, word, figure, or combination of letters, words, or figures, which was or were, before the thirteenth day of August one thousand eight hundred and seventy-five, publicly used by more than three persons on the same or a similar description of goods shall, for the purposes of this section, be deemed common to the trade in such goods.

Effect of Registration.

Registration equivalent to public use.

75. Registration of a trade mark shall be deemed to be equivalent to public use of the trade mark.

Right of first proprietor to exclusive use of trade mark.

76. The registration of a person as proprietor of a trade mark shall be primâ facie evidence of his right to the exclusive use of the trade mark, and shall, after the expiration of five years from the date of the registration, be conclusive evidence of his right to the exclusive use of the trade mark, subject to the provisions of this Act.

Restrictions on actions for infringement, and on defence to action in certain cases.

77. A person shall not be entitled to institute any proceeding to prevent or to recover damages for the infringement of a trade mark unless, in the case of a trade mark capable of being registered under this Act, it has been registered in pursuance of this Act, or of an enactment repealed by this Act, or, in the case of any other trade mark in use before the thirteenth of August one thousand eight hundred and seventy-five, registration thereof under this part of this Act, or of an enactment repealed by this Act, has been refused. The comptroller may, on request and on payment of the prescribed fee, grant a certificate that such registration has been refused.

Register of Trade Marks.

Register of trade marks.

78. There shall be kept at the patent office a book called the Register of Trade Marks, wherein shall be entered the names and addresses of proprietors of registered trade marks, notifications of assignments and of transmissions of trade marks, and such other matters as may be from time to time prescribed.

Removal of trade mark after fourteen years unless fee paid.

79.—(1.) At a time not being less than two months nor more than three months before the expiration of fourteen years from the date of the registration of a trade mark, the comptroller shall send notice to the registered proprietor that the trade mark will be removed from the register unless the proprietor pays to the comptroller before the expiration of such fourteen years (naming the date at which the same will expire) the prescribed fee; and if such fee be not previously paid, he shall at the expiration of one month from the date of the giving of the first notice send a second notice to the same effect.

(2.) If such fee he not paid before the expiration of such fourteen years the comptroller may after the end of three months from the expiration of such fourteen years remove the mark from the register, and so from time to time at the expiration of every period of fourteen years.

(3.) If before the expiration of the said three months the registered proprietor pays the said fee together with the additional prescribed fee, the comptroller may without removing such trade mark from the register accept the said fee as if it had been paid before the expiration of the said fourteen years.

(4.) Where after the said three months a trade mark has been removed from the register for non-payment of the prescribed fee, the comptroller may, if satisfied that it is just so to do, restore such trade mark to the register on payment of the prescribed additional fee.

(5.) Where a trade mark has been removed from the register for nonpayment of the fee or otherwise, such trade mark shall nevertheless for the purpose of any application for registration during the five years next after the date of such removal, be deemed to be a trade mark which is already registered.

Fees.

Fees for registration, &c.

80. There shall he paid in respect of applications and registration and other matters under this part of this Act, such fees as may be from time to time, with the sanction of the Treasury, prescribed by the Board of Trade; and such fees shall be levied and paid to the account of Her Majesty's Exchequer in such manner as the Treasury may from time to time direct.

Sheffield Marks.

Registration by Cutlers' Company of Sheffield marks.

81. With respect to the master, wardens, searchers, assistante, and commonalty of the Company of Cutlers in Hallamshire, in the county of York (in this Act called the Cutlers' Company) and the marks or devices (in this Act called Sheffield marks) assigned or registered by the master, wardens, searchers, and assistants of that company, the following provisions shall have effect:

(1.) The Cutlers' Company shall establish and keep at Sheffield a new register of trade marks (in this Act called the Sheffield register):

(2.) The Cutlers' Company shall enter in the Sheffield register, in respect of cutlery, edge tools, or raw steel and the goods mentioned in the next sub-section all the trade marks entered before the commencement of this Act in respect of cutlery, edge tools, or raw steel, and such goods in the register established under the Trade Marks Registration Act, 1875, belonging to persons carrying on business in Hallamshire, or within six miles thereof, and shall also enter in such register, in respect of the same goods, all the trade marks which shall have been assigned by the Cutlers' Company and actually used before the commencement of this Act, but which have not been entered in the register established under the Trade Marks Registration Act, 1875:

(3.) An application for registration of a trade mark used on cutlery, edge tools, or on raw steel, or on goods made of steel, or of steel and iron combined, whether with or without a cutting edge, shall, if made after the commencement of this Act by a person carrying on business in Hallamshire, or within six miles thereof, be made to the Cutlers' Company:

(4.) Every application so made to the Cutlers' Company shall be notified to the comptroller in the prescribed manner, and unless the comptroller within the prescribed time gives notice to the Cutlers' Company that he objects to the acceptance of the application, it shall be proceeded with by the Cutlers' Company in the prescribed manner:

(5.) If the comptroller gives notice of objection as aforesaid, the application shall not be proceeded with by the Cutlers' Company, but any person aggrieved may appeal to the court:

(6.) Upon the registration of a trade mark in the Sheffield register the Cutlers' Company shall give notice thereof to the comptroller, who shall thereupon enter the mark in the register of trade marks; and such registration shall bear date as of the day of application to the Cutlers' Company, and have the same effect as if the application had been made to the comptroller on that day:

(7.) The provisions of this Act, and of any general rules made under this Act, with respect to application for registration in the register of trade marks, the effect of such registration, and the assignment and transmission of rights in a registered trade mark shall apply in the case of applications and registration in the Sheffield register; and notice of every entry made in the Sheffield register must be given to the comptroller by the Cutlers' Company, save and except that the provisions of this sub-section shall not prejudice or affect any life, estate, and interest of a widow of the holder of any Sheffield mark which may be in force in respect of such mark at the time when it shall be placed upon the Sheffield register:

(8.) Where the comptroller receives from any person not carrying on business in Hallamshire or within six miles thereof an application for registration of a trade mark used on cutlery, edge tools, or on raw steel, or on goods made of steel, or of steel and iron combined, whether with or without a cutting edge, he shall in the prescribed manner notify the application and proceedings thereon to the Cutlers' Company:

(9.) At the expiration of five years from the commencement of this Act the Cutlers' Company shall close the Cutlers' register of corporate trade marks, and thereupon all marks entered therein shall, unless entered in the Sheffield register, be deemed to have been abandoned:

(10.) A person may (notwithstanding anything in any Act relating to the Cutlers' Company) be registered in the Sheffield register as proprietor of two or more trade marks:

(11.) A body of persons, corporate or not corporate, may (notwithstanding anything in any Act relating to the Cutlers' Company) be registered in the Sheffield register as proprietor of a trade mark or trade marks:

(12.) Any person aggrieved by a decision of the Cutlers' Company in respect of anything done or omitted under this Act may, in the prescribed manner, appeal to the comptroller, who shall have power

to confirm reverse or modify the decision, but the decision of the comptroller shall be subject to a further appeal to the court:

(13.) So much of the Cutlers' Company's Acts as applies to the summary punishment of persons counterfeiting Sheffield corporate marks, that is to say, the fifth section of the Cutlers' Company's Act of 1814, and the provisions in relation to the recovery and application of the penalty imposed by such last-mentioned section contained in the Cutlers' Company's Act of 1791, shall apply to any mark entered in the Sheffield register.

PART V.

GENERAL.

Patent Office and Proceedings thereat.

Patent Office.

82.—(1.) The Treasury may provide for the purposes of this Act an office with all requisite buildings and conveniences, which shall be called, and is in this Act referred to as, the Patent Office.

(2.) Until a new patent office is provided, the offices of the Commissioners of Patents for inventions and for the registration of designs and trade marks existing at the commencement of this Act shall be the patent office within the meaning of this Act.

(3.) The patent office shall be under the immediate control of an officer called the comptroller general of patents, designs, and trade marks, who shall act under the superintendence and direction of the Board of Trade.

(4.) Any act or thing directed to be done by or to the comptroller may, in his absence, be done by or to any officer for the time being in that behalf authorized by the Board of Trade.

Officers and clerks.

83.—(1.) The Board of Trade may at any time after the passing of this Act, and from time to time, subject to the approval of the Treasury, appoint the comptroller-general of patents, designs, and trade marks, and so many examiners and other officers and clerks, with such designations and duties as the Board of Trade think fit, and may from time to time remove any of those officers and clerks.

(2.) The salaries of those officers and clerks shall be appointed by the Board of Trade, with the concurrence of the Treasury, and the same and the other expenses of the execution of this Act shall be paid out of money provided by Parliament.

Seal of patent office.

84. There shall be a seal for the patent office, and impressions thereof shall be judicially noticed and admitted in evidence.

Trust not to be entered in registers.

85. There shall not be entered in any register kept under this Act, or be receivable by the comptroller, any notice of any trust expressed implied or constructive.

Refusal to grant patent, &c., in certain cases.

86. The comptroller may refuse to grant a patent for an invention, or to register a design or trade mark, of which the use would, in his opinion, be contrary to law or morality.

Entry of assignments and transmissions in registers.

87. Where a person becomes entitled by assignment, transmission, or other operation of law to a patent, or to the copyright in a registered design, or to a registered trade mark, the comptroller shall on request, and on proof of title to his satisfaction, cause the name of such person to be entered as proprietor of the patent, copyright in the design, or trade mark, in the register of patents, designs, or trade marks, as the case may be. The person for the time being entered in the register of patents designs or trade-marks, as proprietor of a patent, copyright in a design or trade mark as the case may be, shall, subject to any rights appearing from such register to be vested in any other person, have power absolutely to assign, grant licences as to, or otherwise deal with, the same and to give effectual receipts for any consideration for such assignment, licence, or dealing. Provided that any equities in respect of such patent, design, or trade mark may be enforced in like manner as in respect of any other personal property.

Inspection of and extracts from registers.

88. Every register kept under this Act shall at all convenient times be open to the inspection of the public, subject to such regulations as may be

prescribed; and certified copies, sealed with the seal of the patent office, of any entry in any such register shall be given to any person requiring the same on payment of the prescribed fee.

Sealed copies to be received in evidence.

89. Printed or written copies or extracts, purporting to be certified by the comptroller and sealed with the seal of the patent office, of or from patents specifications disclaimers and other documents in the patent office, and of or from registers and other books kept there, shall be admitted in evidence in all courts in Her Majesty's dominions, and in all proceedings, without further proof or production of the originals.

Rectification of registers by court.

90.—(1.) The court may on the application of any person aggrieved by the omission without sufficient cause of the name of any person from any register kept under this Act, or by any entry made without sufficient cause in any such register, make such order for making expunging or varying the entry, as the court thinks fit; or the court may refuse the application; and in either case may make such order with respect to the costs of the proceedings as the court thinks fit.

(2.) The court may in any proceeding under this section decide any question that it may be necessary or expedient to decide for the rectification of a register, and may direct an issue to be tried for the decision of any question of fact, and may award damages to the party aggrieved.

(3.) Any order of the court rectifying a register shall direct that due notice of the rectification be given to the comptroller.

Power for comptroller to correct clerical errors.

91. The comptroller may, on request in writing accompanied by the prescribed fee,—

(a) Correct any clerical error in or in connection with an application for a patent, or for registration of a design or trade mark; or

(b) Correct any clerical error in the name style or address of the registered proprietor of a patent, design, or trade mark.

(c) Cancel the entry or part of the entry of a trade mark on the register: Provided that the applicant accompanies his request by a statutory declaration made by himself, stating his name, address, and calling, and that he is the person whose name appears on the register as the proprietor of the said trade mark.

Alteration of registered mark.

92.—(1.) The registered proprietor of any registered trade mark may apply to the court for leave to add to or alter such mark in any particular, not being an essential particular within the meaning of this Act, and the court may refuse or grant leave on such terms as it may think fit.

(2.) Notice of any intended application to the court under this section shall be given to the comptroller by the applicant; and the comptroller shall be entitled to be heard on the application.

(3.) If the court grants leave, the comptroller shall, on proof thereof and on payment of the prescribed fee, cause the register to be altered in conformity with the order of leave.

Falsification of entries in registers.

93. If any person makes or causes to be made a false entry in any register kept under this Act, or a writing falsely purporting to be a copy of an entry in any such register, or produces or tenders or causes to be produced or tendered in evidence any such writing, knowing the entry or writing to be false, he shall be guilty of a misdemeanor.

Exercise of discretionary power by comptroller.

94. Where any discretionary power is by this Act given to the comptroller, he shall not exercise that power adversely to the applicant for a patent, or for amendment of a specification, or for registration of a trade mark or design, without (if so required within the prescribed time by the applicant) giving the applicant an opportunity of being heard personally or by his agent.

Power of comptroller to take directions of law officers.

95. The comptroller may, in any case of doubt or difficulty arising in the administration of any of the provisions of this Act, apply to either of the law officers for directions in the matter.

Certificate of comptroller to be evidence.

96. A certificate purporting to be under the hand of the comptroller as to any entry, matter, or thing which he is authorised by this Act, or any general rules made thereunder, to make or do, shall be primâ facie evidence of the entry having been made, and of the contents thereof, and of the matter or thing having been done or left undone.

Applications and notices by post.

97.—(1.) Any application, notice, or other document authorised or required to be left made or given at the patent office, or to the comptroller, or to any other person under this Act, may be sent by a prepaid letter through the post; and if so sent shall be deemed to have been left made or given respec-

tively at the time when the letter containing the same would be delivered in the ordinary course of post.

(2.) In proving such service or sending, it shall be sufficient to prove that the letter was properly addressed and put into the post.

Provision as to days for leaving documents at office.

98. Whenever the last day fixed by this Act, or by any rule for the time being in force, for leaving any document or paying any fee at the patent office shall fall on Christmas Day, Good Friday, or on a Saturday or Sunday, or any day observed as a holiday at the Bank of England, or any day observed as a day of public fast or thanksgiving, herein referred to as excluded days, it shall be lawful to leave such document or to pay such fee on the day next following such excluded day, or days if two or more of them occur consecutively.

Declaration by infant, lunatic, &c.

99. If any person is by reason of infancy lunacy or other inability, incapable of making any declaration or doing anything required or permitted by this Act or by any rules made under the authority of this Act, then the guardian or committee (if any) of such incapable person, or if there be none, any person appointed by any court or judge possessing jurisdiction in respect of the property of incapable persons, upon the petition of any person on behalf of such incapable person, or of any other person interested in the making such declaration or doing such thing, may make such declaration or a declaration as nearly corresponding thereto as circumstances permit, and do such thing in the name and on behalf of such incapable person, and all acts done by such substitute shall, for the purposes of this Act, be as effectual as if done by the person for whom he is substituted.

Transmission of certified printed copies of specifications, &c.

100. Copies of all specifications, drawings, and amendments left at the patent office after the commencement of this Act, printed for and sealed with the seal of the patent office, shall be transmitted to the Edinburgh Museum of Science and Art, and to the Enrolments Office of the Chancery Division in Ireland, and to the Rolls Office in the Isle of Man, within twenty-one days after the same shall respectively have been accepted or allowed at the patent office; and certified copies of or extracts from any such documents shall be given to any person requiring the same on payment of the prescribed fee: and any such copy or extract shall be admitted in evidence in all Courts in Scotland and Ireland, and in the Isle of Man, without further proof or production of the originals.

Power for Board of Trade to make general rules for classifying goods and regulating business of patent office.

101.—(1.) The Board of Trade may from time to time make such general rules and do such things as they think expedient, subject to the provisions of this Act—

(a) For regulating the practice of registration under this Act:

(b) For classifying goods for the purposes of designs and trade marks:

(c) For making or requiring duplicates of specifications, amendment, drawings, and other documents:

(d) For securing and regulating the publishing and selling of copies, at such prices and in such manner as the Board of Trade think fit, of specifications drawings amendments and other documents:

(e) For securing and regulating the making printing publishing and selling of indexes to, and abridgments of, specifications and other documents in the patent office; and providing for the inspection of indexes and abridgments and other documents:

(f) For regulating (with the approval of the Treasury) the presentation of copies of patent office publications to patentees and to public authorities, bodies, and institutions at home and abroad;

(g) Generally for regulating the business of the patent office, and all things by this Act placed under the direction or control of the comptroller, or of the Board of Trade.

(2.) Any of the forms in the First Schedule to this Act may be altered or amended by rules made by the Board as aforesaid.

(3.) General rules may be made under this section at any time after the passing of this Act, but not so as to take effect before the commencement of this Act, and shall (subject as hereinafter mentioned) be of the same effect as if they were contained in this Act, and shall be judicially noticed.

(4.) Any rules made in pursuance of this section shall be laid before both Houses of Parliament, if Parliament be in session at the time of making thereof, or, if not, then as soon as practicable after the beginning of the then next session of Parliament, and they shall also be advertised twice in the official journal to be issued by the comptroller.

(5.) If either House of Parliament, within the next forty days after any rules have been so laid before such House, resolve that such rules or any of them ought to be annulled, the same shall after the date of such resolution be of no effect, without prejudice to the validity of anything done in the meantime under such rules or rule or to the making of any new rules or rule.

Annual reports of comptroller.

102. The comptroller shall, before the first day of June in every year, cause a report respecting the execution by or under him of this Act to be laid before both Houses of Parliament, and therein shall include for the year to which each report relates all general rules made in that year under or for the purposes of this Act, and an account of all fees, salaries, and allowances, and other money received and paid under this Act.

International and Colonial Arrangements.

International arrangements for protection of inventions, designs, and trade marks.

103.—(1.) If Her Majesty is pleased to make any arrangement with the government or governments of any foreign state or states for mutual protection of inventions, designs, and trade marks, or any of them, then any person who has applied for protection for any invention, design, or trade mark in any such state, shall be entitled to a patent for his invention or to registration of his design or trade mark (as the case may be) under this Act, in priority to other applicants; and such patent or registration shall have the same date as the date of the protection obtained (*a*) in such foreign state:

Provided that his application is made, in the case of a patent within seven months, and in the case of a design or trade mark within four months, from his applying for protection in the foreign state with which the arrangement is in force:

Provided that nothing in this section contained shall entitle the patentee or proprietor of the design or trade mark to recover damages for infringements happening prior to the date of the actual acceptance of his complete specification, or the actual registration of his design or trade mark in this country, as the case may be:

(2.) The publication in the United Kingdom, or the Isle of Man during the respective periods aforesaid of any description of the invention, or the use therein during such periods of the invention, or the exhibition or use therein during such periods of the design, or the publication therein during such periods of a description or representation of the design, or the use therein during such periods of the trade mark, shall not invalidate the patent which may be granted for the invention, or the registration of the design or trade mark:

(3.) The application for the grant of a patent, or the registration of a design, or the registration of a trade mark under this section, must be made in the same manner as an ordinary application under this Act: Provided that, in the case of trade marks, any trade mark the registration of which has been duly applied for in the country of origin may be registered under this Act:

(4.) The provisions of this section shall apply only in the case of those foreign states with respect to which Her Majesty shall from time to time by Order in Council declare them to be applicable, and so long only in the case of each state as the Order in Council shall continue in force with respect to that state.

Provision for colonies and India.

104.—(1.) Where it is made to appear to Her Majesty that the legislature of any British possession has made satisfactory provision for the protection of inventions, designs, and trade marks, patented or registered in this country, it shall be lawful for Her Majesty from time to time, by Order in Council, to apply the provisions of the last preceding section, with such variations or additions, if any, as to Her Majesty in Council may seem fit, to such British possession.

(2.) An Order in Council under this Act shall, from a date to be mentioned for the purpose in the Order, take effect as if its provisions had been contained in this Act; but it shall be lawful for Her Majesty in Council to revoke any Order in Council made under this Act.

(*a*) 48 & 49 Vict. c. 63, s. 6.

Offences.

Penalty on falsely representing articles to be patented.

105.—(1.) Any person who represents that any article sold by him is a patented article, when no patent has been granted for the same, or describes any design or trade mark applied to any article sold by him as registered which is not so, shall be liable for every offence on summary conviction to a fine not exceeding five pounds.

(2.) A person shall be deemed, for the purposes of this enactment, to represent that an article is patented or a design or a trade mark is registered, if he sells the article with the word "patent," "patented," "registered," or any word or words expressing or implying that a patent or registration has been obtained for the article stamped, engraved, or impressed on, or otherwise applied to, the article.

Penalty on unauthorised assumption of Royal arms.

106. Any person who, without the authority of Her Majesty, or any of the Royal Family, or of any Government Department, assumes or uses in connexion with any trade, business, calling, or profession, the Royal arms, or arms so nearly resembling the same as to be calculated to deceive, in such a manner as to be calculated to lead other persons to believe that he is carrying on his trade, business, calling, or profession by or under such authority as aforesaid, shall be liable on summary conviction to a fine not exceeding twenty pounds.

Scotland; Ireland; &c.

Saving for courts in Scotland.

107. In any action for infringement of a patent in Scotland the provisions of this Act, with respect to calling in the aid of an assessor, shall apply, and the action shall be tried without a jury, unless the court shall otherwise direct, but otherwise nothing shall affect the jurisdiction and forms of process of the courts in Scotland in such an action, or in any action or proceeding respecting a patent hitherto competent to those courts.

For the purposes of this section "court of appeal" shall mean any court to which such action is appealed.

Summary proceedings in Scotland.

108. In Scotland any offence under this Act declared to be punishable on summary conviction may be prosecuted in the sheriff court.

Proceedings for revocation of patent in Scotland.

109.—(1.) Proceedings in Scotland for revocation of a patent shall be in the form of an action of reduction at the instance of the Lord Advocate, or at the instance of a party having interest with his concurrence, which concurrence may be given on just cause shown only.

(2.) Service of all writs and summonses in that action shall be made according to the forms and practice existing at the commencement of this Act.

Reservation of remedies in Ireland.

110. All parties shall, notwithstanding anything in this Act, have in Ireland their remedies under or in respect of a patent as if the same had been granted to extend to Ireland only.

General saving for jurisdiction of courts.

111.—(1.) The provisions of this Act conferring a special jurisdiction on the court as defined by this Act, shall not, except so far as the jurisdiction extends, affect the jurisdiction of any court in Scotland or Ireland in any proceedings relating to patents or to designs or to trade marks; and, with reference to any such proceedings in Scotland, the term "the court" shall mean any Lord Ordinary of the Court of Session, and the term "Court of Appeal" shall mean either Division of the said Court; and, with reference to any such proceedings in Ireland, the terms "the Court," and "the Court of Appeal," respectively mean the High Court of Justice in Ireland and Her Majesty's Court of Appeal in Ireland.

(2.) If any rectification of a register under this Act is required in pursuance of any proceeding in a court in Scotland or Ireland, a copy of the order, decree, or other authority for the rectification, shall be served on the comptroller, and he shall rectify the register accordingly.

Isle of Man.

112. This Act shall extend to the Isle of Man, and—

(1.) Nothing in this Act shall affect the jurisdiction of the courts in the Isle of Man, in proceedings for infringement or in any action or proceeding respecting a patent, design, or trade mark competent to those courts;

(2.) The punishment for a misdemeanor under this Act in the Isle of Man shall be imprisonment for any term not exceeding two years, with or without hard labour, and with or without a fine not exceeding one hundred pounds, at the discretion of the court;

(3.) Any offence under this Act committed in the Isle of Man which would in England be punishable on summary conviction may be prosecuted, and any fine in respect thereof recovered at the instance of any person aggrieved, in the manner in which offences punishable on summary conviction may for the time being be prosecuted.

Repeal; Transitional Provisions; Savings.

Repeal and saving for past operation of repealed enactments, &c.

113. The enactments described in the Third Schedule to this Act are hereby repealed. But this repeal of enactments shall not—

(a) Affect the past operation of any of those enactments, or any patent or copyright or right to use a trade mark granted or acquired, or application pending, or appointment made, or compensation granted, or order or direction made or given, or right, privilege, obligation, or liability acquired, accrued, or incurred, or anything duly done or suffered under or by any of those enactments before or at the commencement of this Act; or

(b) Interfere with the institution or prosecution of any action or proceeding, civil or criminal, in respect thereof, and any such proceeding may be carried on as if this Act had not been passed; or

(c) Take away or abridge any protection or benefit in relation to any such action or proceeding.

Former registers to be deemed continued.

114.—(1.) The registers of patents and of proprietors kept under any enactment repealed by this Act shall respectively be deemed parts of the same book as the register of patents kept under this Act.

(2.) The registers of designs and of trade marks kept under any enactment repealed by this Act shall respectively be deemed parts of the same book as the register of designs and the register of trade marks kept under this Act.

Saving for existing rules.

115. All general rules made by the Lord Chancellor or by any other authority under any enactment repealed by this Act, and in force at the commencement of this Act, may at any time after the passing of this Act be repealed altered or amended by the Board of Trade, as if they had been made by the Board under this Act, but so that no such repeal alteration or amendment shall take effect before the commencement of this Act; and, subject as aforesaid, such general rules shall, so far as they are consistent with and are not superseded by this Act, continue in force as if they had been made by the Board of Trade under this Act.

Saving for prerogative.

116. Nothing in this Act shall take away abridge or prejudicially affect the prerogative of the Crown in relation to the granting of any letters patent or to the withholding of a grant thereof.

General Definitions.

General definitions.

117.—(1.) In and for the purposes of this Act, unless the context otherwise requires,—

"Person" includes a body corporate:

"The court" means (subject to the provisions for Scotland, Ireland, and the Isle of Man) her Majesty's High Court of Justice in England:

"Law officer" means her Majesty's Attorney-General or Solicitor-General for England:

"The Treasury" means the Commissioners of her Majesty's Treasury:

"Comptroller" means the Comptroller-General of Patents, Designs, and Trade Marks:

"Prescribed" means prescribed by any of the schedules to this Act, or by general rules under or within the meaning of this Act:

"British possession" means any territory or place situate within her Majesty's dominions, and not being or forming part of the United Kingdom, or of the Channel Islands, or of the Isle of Man, and all territories and places under one legislature, as hereinafter defined, are deemed to be one British possession for the purposes of this Act:

"Legislature" includes any person or persons who exercise legislative authority in the British possession; and where there are local legislatures as well as a central legislature, means the central legislature only.

In the application of this Act to Ireland, "summary conviction" means a conviction under the Summary Jurisdiction Acts, that is to say, with reference to the Dublin Metropolitan Police District the Acts regulating the

duties of justices of the peace and of the police for such district, and elsewhere in Ireland the Petty Sessions (Ireland) Act, 1851, and any Act amending it.

SCHEDULES.

THE FIRST SCHEDULE.

FORMS OF APPLICATION, &c.

£1 Stamp.

FORM A. Section 5.

FORM OF APPLICATION FOR PATENT.

I, (a) *John Smith*, of 29, *Perry Street*, *Birmingham*, in the county of *Warwick*, *Engineer*, do solemnly and sincerely declare that I am in possession of an invention for (b) "*Improvements in Sewing Machines*;" that I am the true and first inventor thereof; and that the same is not in use by any other person or persons to the best of my knowledge and belief; and I humbly pray that a patent may be granted to me for the said invention.

And I make the above solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act, 1835.

(c) *John Smith.*

Declared at *Birmingham*, in the county of *Warwick*, this day of , 18 .

Before me,

(d) *James Adams*,
Justice of the Peace.

(a) Here insert name, address and calling of inventor.
(b) Here insert title of invention.
(c) Signature of inventor.
(d) Signature and title of the officer before whom the declaration is made.

NOTE.—Where the above declaration is made out of the United Kingdom, the words "and by virtue of the Statutory Declarations Act, 1835," must be omitted; and the declaration must be made before a British consular officer, or where it is not reasonably practicable to make it before such officer, then before a public officer duly authorized in that behalf.

FORM B.

FORM OF PROVISIONAL SPECIFICATION.

Improvements in Sewing Machines (a).

I, (b) *John Smith*, of 29, *Perry Street*, *Birmingham*, in the county of *Warwick*, *Engineer*, do hereby declare the nature of my invention for "*Improvements in Sewing Machines*," to be as follows (c):—

* * * * * *

(d) *John Smith.*

Dated this day of , 18 .

(a) Here insert title as in declaration.
(b) Here insert name, address, and calling of inventor as in declaration.
(c) Here insert short description of invention.
(d) Signature of inventor.

NOTE.—No stamp is required on this document.

£3 Stamp.

FORM C.

FORM OF COMPLETE SPECIFICATION.

Improvements in Sewing Machines. (*a*)

(*a*) Here insert title, as in declaration.

I, (*b*) *John Smith*, of 29, *Perry Street, Birmingham*, in the county of *Warwick, Engineer*, do hereby declare the nature of my invention for "*Improvements in Sewing Machines*," and in what manner the same is to be performed, to be particularly described and ascertained in and by the following statement (*c*):—

(*b*) Here insert name, address, and calling of inventor, as in declaration.

(*c*) Here insert full description of invention.

* * * * *

Having now particularly described and ascertained the nature of my said invention and in what manner the same is to be performed, I declare that what I claim is (*d*).

(*d*) Here state distinctly the features of novelty claimed.

1.
2.
3, &c.

(*e*) Signature of inventor.

(*e*) *John Smith.*

Dated this day of , 18 .

Section 33.

FORM D.

FORM OF PATENT.

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith: to all to whom these presents shall come greeting:

Whereas *John Smith*, of 29, *Perry Street, Birmingham*, in the county of *Warwick, Engineer*, hath by his solemn declaration represented unto us that he is in possession of an invention for "*Improvements in Sewing Machines*," that he is the true and first inventor thereof, and that the same is not in use by any other person to the best of his knowledge and belief:

And whereas the said inventor hath humbly prayed that we would be graciously pleased to grant unto him (hereinafter together with his executors, administrators, and assigns, or any of them, referred to as the said patentee) our royal letters patent for the sole use and advantage of his said invention:

And whereas the said inventor hath by and in his complete specification particularly described the nature of his invention:

And whereas we being willing to encourage all inventions which may be for the public good, are graciously pleased to condescend to his request:

Know ye, therefore, that we, of our especial grace, certain knowledge, and mere motion do by these presents, for us, our heirs and successors, give and grant unto the said patentee our especial license, full power, sole privilege, and authority, that the said patentee by himself, his agents, or licensees, and no others, may at all times hereafter during the term of years herein mentioned, make, use, exercise, and vend the said invention within our United Kingdom of Great Britain and Ireland, and Isle of Man, in such manner as to him or them may seem meet, and that the said patentee shall have and enjoy the whole profit and advantage from time to time accruing by reason of the said invention, during the term of fourteen years from the date hereunder written of these presents: And to the end that the said patentee may have and enjoy the sole use and exercise and the full benefit of the said invention, we do by these presents for us, our heirs and successors, strictly command all our subjects whatsoever within our United Kingdom of Great Britain and Ireland, and the Isle of Man, that they do not at any time during the continuance of the said term of fourteen years either directly or indirectly make use of or put in practice the said invention, or any part of the same, nor in anywise imitate the same, nor make or

cause to be made any addition thereto or subtraction therefrom, whereby to pretend themselves the inventors thereof, without the consent, licence or agreement of the said patentee in writing under his hand and seal, on pain of incurring such penalties as may be justly inflicted on such offenders for their contempt of this our royal command, and of being answerable to the patentee according to law for his damages thereby occasioned: provided that these our letters patent are on this condition, that, if at any time during the said term it be made to appear to us, our heirs, or successors, or any six or more of our privy council, that this our grant is contrary to law, or prejudicial or inconvenient to our subjects in general, or that the said invention is not a new invention as to the public use and exercise thereof within our United Kingdom of Great Britain and Ireland, and Isle of Man, or that the said patentee is not the first and true inventor thereof within this realm as aforesaid, these our letters patent shall forthwith determine, and be void to all intents and purposes, notwithstanding anything hereinbefore contained: provided also, that if the said patentee shall not pay all fees by law required to be paid in respect of the grant of these letters patent, or in respect of any matter relating thereto at the time or times, and in manner for the time being by law provided; and also if the said patentee shall not supply or cause to be supplied, for our service, all such articles of the said invention as may be required by the officers or commissioners administering any department of our service in such manner, at such times, and at and upon such reasonable prices and terms as shall be settled in manner for the time being by law provided, then, and in any of the said cases, these our letters patent, and all privileges and advantages whatever hereby granted shall determine and become void notwithstanding anything hereinbefore contained: Provided also that nothing herein contained shall prevent the granting of licences and in such manner and for such considerations as they may by law be granted: And lastly, we do by these presents for us, our heirs and successors, grant unto the said patentee that these our letters patent shall be construed in the most beneficial sense for the advantage of the said patentee. In witness whereof we have caused these our letters to be made patent this one thousand eight hundred and and to be sealed as of the one thousand eight hundred and .

Seal of Patent Office.

FORM E. Section 47.

FORM OF APPLICATION FOR REGISTRATION OF DESIGN.

day of , 18 .

You are hereby requested to register the accompanying design, in Class , in the name of (a) of , who claims to be the proprietor thereof, and to return the same to .

Statement of nature of design .

Registration fees enclosed, £ , s.

To the Comptroller,
Patent Office,
25, *Southampton Buildings, Chancery Lane, W.C.*

(Signed) .

(a) Here insert legibly the name and address of the individual or firm.

Section 62.

FORM F.

FORM OF APPLICATION FOR REGISTRATION OF TRADE MARK.

(One representation to be fixed within this square, and two others on separate sheets of foolscap of same size.)

(Representations of a larger size may be folded, but must be mounted upon linen and affixed hereto.)

You are hereby requested to register the accompanying trade mark [*In Class* , *iron in bars, sheets, and plates; in Class* , *steam engines and boilers; and in Class* , *warming apparatus*], in the name of (*a*), who claims to be the proprietor thereof.

Registration fees enclosed, £ ,, s.

(*a*) Here insert legibly the name, address, and business of the individual or firm.

To the Comptroller,
Patent Office,
25, *Southampton Buildings, Chancery Lane, W.C.*

(Signed)

Note.—If the trade mark has been in use before August 13, 1875, state length of user.

Section 24.

THE SECOND SCHEDULE.

Fees on instruments for obtaining Patents, and renewal.

(*a*) *Up to sealing.*

	£	s.	d.	£	s.	d.
On application for provisional protection	1	0	0			
On filing complete specification	3	0	0			
				4	0	0
or						
On filing complete specification with first application				4	0	0

(*b*) *Further before end of four years from date of patent.*

On certificate of renewal				50	0	0

(*c*) *Further before end of seven years, or in the case of patents granted after the commencement of this Act, before the end of eight years from date of patent.*

On certificate of renewal				100	0	0

Or in lieu of the fees of £50 and £100 the following annual fees:—

Before the expiration of the	fourth	year	from the date of the patent		10	0	0
,, ,,	fifth	,,	,,		10	0	0
,, ,,	sixth	,,	,,		10	0	0
,, ,,	seventh	,,	,,		10	0	0
,, ,,	eighth	,,	,,		15	0	0
,, ,,	ninth	,,	,,		15	0	0
,, ,,	tenth	,,	,,		20	0	0
,, ,,	eleventh	,,	,,		20	0	0
,, ,,	twelfth	,,	,,		20	0	0
,, ,,	thirteenth	,,	,,		20	0	0

THE THIRD SCHEDULE.

Section 113.

Enactments repealed.

21 James I. c. 3 .... [1623.]	The Statute of Monopolies. In part; namely,— Sections, ten, eleven, and twelve.
5 & 6 Will. 4, c. 62.. [1835.] In part.	The Statutory Declarations Act, 1835. In part; namely,— Section eleven.
5 & 6 Will. 4, c. 83.. [1835.]	An Act to amend the law touching letters patent for inventions.
2 & 3 Vict. c. 67 .... [1839.]	An Act to amend an Act of the fifth and sixth years of the reign of King William the Fourth, intituled "An Act to amend the law touching letters patent for inventions."
5 & 6 Vict. c. 100 .. [1842.]	An Act to consolidate and amend the laws relating to the copyright of designs for ornamenting articles of manufacture.
6 & 7 Vict. c. 65 .... [1843.]	An Act to amend the laws relating to the copyright of designs.
7 & 8 Vict. c. 69 (*a*).. [1844.] In part.	An Act for amending an Act passed in the fourth year of the reign of his late Majesty, intituled "An Act for the better administration of justice in his Majesty's Privy Council, and to extend its jurisdiction and powers." In part; namely,— Sections two to five, both included.
13 & 14 Vict. c. 104.. [1850.]	An Act to extend and amend the Acts relating to the copyright of designs.
15 & 16 Vict. c. 83 .. [1852.]	The Patent Law Amendment Act, 1852.
16 & 17 Vict. c. 5 .. [1853.]	An Act to substitute stamp duties for fees on passing letters patent for inventions, and to provide for the purchase for the public use of certain indexes of specifications.
16 & 17 Vict. c. 115.. [1853.]	An Act to amend certain provisions of the Patent Law Amendment Act, 1852, in respect of the transmission of certified copies of letters patent and specifications to certain offices in Edinburgh and Dublin, and otherwise to amend the said Act.
21 & 22 Vict. c. 70 .. [1858.]	An Act to amend the Act of the fifth and sixth years of her present Majesty, to consolidate and amend the laws relating to the copyright of designs for ornamenting articles of manufacture.
22 Vict. c. 13 ..... [1859.]	An Act to amend the law concerning patents for inventions with respect to inventions for improvements in instruments and munitions of war.
24 & 25 Vict. c. 73 .. [1861.]	An Act to amend the law relating to the copyright of designs.
28 & 29 Vict. c. 3 .. [1865.]	The Industrial Exhibitions Act, 1865.
33 & 34 Vict. c. 27 .. [1870.]	The Protection of Inventions Act, 1870.
33 & 34 Vict. c. 97 .. [1870.]	The Stamp Act, 1870. In part; namely,— Section sixty-five, and in the schedule the words and figures. "Certificate of the registration of a design..£5 0 0 And see section 65."

(*a*) *Note.*—Sections six and seven of this Act are repealed by the Statute Law Revision (No. 2) Act, 1874.

38 & 39 Vict. c. 91 .. [1875.]	The Trade Marks Registration Act, 1875.
38 & 39 Vict. c. 93 .. [1875.]	The Copyright of Designs Act, 1875.
39 & 40 Vict. c. 33 .. [1876.]	The Trade Marks Registration Amendment Act, 1876.
40 & 41 Vict. c. 37 .. [1877.]	The Trade Marks Registration Extension Act, 1877.
43 & 44 Vict. c. 10 .. [1880.]	The Great Seal Act, 1880. In part; namely,— Section five.
45 & 46 Vict. c. 72 .. [1882.]	The Revenue, Friendly Societies, and National Debt Act, 1882. In part; namely,— Section sixteen.

48 & 49 Vict. c. 63.

An Act to Amend the Patents, Designs, and Trade Marks Act, 1883.
[14*th August*, 1885.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Construction and short title.

1. This Act shall be construed as one with the Patents, Designs, and Trade Marks Act, 1883 (in this Act referred to as the principal Act).

This Act may be cited as the Patents, Designs, and Trade Marks (Amendment) Act, 1885, and this Act and the principal Act may be cited together as the Patents, Designs, and Trade Marks Acts, 1883 and 1885.

Amendment of s. 5 of 46 & 47 Vict. c. 57.

2. Whereas subsection two of section five of the principal Act requires a declaration to be made by an applicant for a patent to the effect in that subsection mentioned, and doubts have arisen as to the nature of that declaration, and it is expedient to remove such doubts: Be it therefore enacted that:

5 & 6 Will. 4, c. 62.

The declaration mentioned in subsection two of section five of the principal Act may be either a statutory declaration under the Statutory Declarations Act, 1835, or not, as may be from time to time prescribed.

Amendment of ss. 8, 9, and 12 of 46 & 47 Vict. c. 57.

3. Whereas under the principal Act, a complete specification is required (by section eight) to be left within nine months, and (by section nine) to be accepted within twelve months, from the date of application, and a patent is required by section twelve to be sealed within fifteen months from the date of application, and it is expedient to empower the comptroller to extend in certain cases the said times: Be it therefore enacted as follows:

A complete specification may be left and accepted within such extended times, not exceeding one month and three months respectively after the said nine and twelve months respectively as the comptroller may on payment of the prescribed fee allow, and where such extension of time has been allowed, a further extension of four months after the said fifteen months shall be allowed for the sealing of the patent; and the principal Act shall have effect as if any time so allowed were addded to the said periods specified in the principal Act.

Specifications, &c. not to be published unless application accepted.

4. Where an application for a patent has been abandoned, or become void, the specification or specifications and drawings (if any) accompanying or left in connexion with such application, shall not at any time be open to public inspection or be published by the comptroller.

Power to grant patents to several persons jointly.

5. Whereas doubts have arisen whether under the principal Act a patent may lawfully be granted to several persons jointly, some or one of whom only are or is the true and first inventors or inventor; be it therefore

enacted and declared that it has been and is lawful under the principal Act to grant such a patent.

6. In subsection one of section one hundred and three of the principal Act, the words "date of the application" shall be substituted for the words "date of the protection obtained." Amendment of s. 103 of 46 & 47 Vict. c. 57.

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49 VICT. c. 23.

An Act to amend the Companies Acts of 1862, 1867, 1870, 1877, 1879, 1880, *and* 1883.

[*4th June*, 1886.]

WHEREAS it has become expedient to amend the provisions of the Companies Act, 1862, and of the other Acts amending the same hereinafter recited, in so far as the said provisions relate to the liquidation of companies in Scotland: 25 & 26 Vict. c. 89.

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as the Companies Act, 1886. Short title.

2. This Act shall, so far as consistent with the tenor thereof, be construed as one with the Companies Acts, 1862, 1867, 1877, 1879, 1880, and 1883, and the Joint Stock Companies Arrangement Act, 1870, and the said Acts and this Act may be referred to as the Companies Acts, 1862 to 1886. Construction of Acts. 25 & 26 Vict. c. 89. 30 & 31 Vict. c. 131. 40 & 41 Vict. c. 26. 42 & 43 Vict. c. 76. 43 Vict. c. 19. 46 & 47 Vict. c. 28. 33 & 34 Vict. c. 104.

3. In the winding up, by or subject to the supervision of the court, of any company under the Companies Acts, 1862 to 1886, whose registered office is in Scotland, where the winding up shall commence after the passing of this Act, the following provisions shall have effect:

(1.) Such winding up shall, in the case of a winding up by the court as at the commencement thereof, and in the case of a winding up subject to the supervision of the court as at the date of the presentation of the petition, on which a supervision order is afterwards pronounced, be equivalent to an arrestment in execution and decree of forthcoming, and to an executed or completed poinding; and no arrestment or poinding of the funds or effects of the company, executed on or after the sixtieth day prior to the commencement of the winding up by the court, or to the presentation of the petition on which a supervision order is made, as the case may be, shall be effectual; and such funds or effects, or the proceeds of such effects, if sold, shall be made forthcoming to the liquidator: Provided that any arrester or poinder, before the date of such winding up, or of such petition, as the case may be, who shall be thus deprived of the benefit of his diligence, shall have preference out of such funds or effects for the expense bonâ fide incurred by him in such diligence. Effect of diligence within 60 days of winding-up by or subject to supervision of court.

(2.) Such winding up shall, as at the respective dates aforesaid, be equivalent to a decree of adjudication of the heritable estates of the company for payment of the whole debts of the company, principal and interest, accumulated at the said dates respectively, subject always to such preferable heritable rights and securities as existed at the said dates and are valid and unchallengeable, and the right to poind the ground hereinafter provided.

(3.) The provisions of sections one hundred and twelve to one hundred and seventeen inclusive, and also of section one hundred and twenty, of the Bankruptcy (Scotland) Act, 1856, shall, so far as consistent with the tenor of the recited Acts, apply to the realization of heritable estates affected by such heritable rights and securities as aforesaid; and for the purposes of this Act the words "sequestration" and "trustee" occurring in said sections of the Bankruptcy (Scotland) Act, 1856, shall mean respectively "liquidation" and "liquidator"; and the expression "the lord ordinary or the court" shall mean "the court" as defined by this Act. 19 & 20 Vict. c. 79.

(4.) No poinding of the ground which has not been carried into execution by sale of the effects sixty days before the respective dates aforesaid shall, except to the extent hereinafter provided, be available in any question with the liquidator: Provided that no creditor who holds a security over the heritable estate preferable to the right of the liquidator shall be prevented from executing a poinding of the ground after the respective dates aforesaid, but such poinding shall in competition with the liquidator be available only for the interest on the debt for the current half-yearly term, and for the arrears of interest for one year immediately before the commencement of such term.

Ranking of claims.

4. In the winding up of any company under the Companies Acts, 1862 to 1886, whose registered office is in Scotland, and where the winding up shall commence after the passing of this Act, the general and special rules in regard to voting and ranking for payment of dividends, provided by the Bankruptcy (Scotland) Act, 1856, sections forty-nine to sixty-six inclusive, or any other rules in regard thereto which may be in force for the time being in the sequestration of the estates of bankrupts in Scotland, shall, so far as consistent with the tenor of the said recited Acts, apply to creditors of such companies voting in matters relating to the winding up, and ranking for payment of dividends; and for this purpose sequestration shall be taken to mean liquidation, trustee to mean liquidator, and sheriff to mean the court.

Jurisdiction of the Lord Ordinary on the Bills in vacation.

5. Wherever the expression "the court of session" occurs in the said recited Acts, or the expression "the court" occurring therein or in this Act refers to the court of session in Scotland, it shall mean and include either division thereof, or, in the event of a remit to a permanent Lord Ordinary, as hereinafter provided, such Lord Ordinary, during session, and in time of vacation the Lord Ordinary on the Bills; and in regard to orders or judgments pronounced by the said Lord Ordinary on the Bills in vacation, the following provisions shall have effect:—

(1.) No order or judgment pronounced by the said Lord Ordinary in vacation, under or by virtue, in whole or in part, of the following sections of the said recited Acts, shall be subject to review, reduction, suspension, or stay of execution, videlicet, of the Companies Act, 1862, sections ninety-one, one hundred and seven, one hundred and fifteen, one hundred and seventeen, and one hundred and twenty-seven, and section one hundred and forty-nine so far as it authorises the court to direct meetings of creditors or contributories to be held, and that portion of section two of the Joint Stock Companies Arrangement Act, 1870, which authorises the court to order that a meeting of creditors or class of creditors shall be summoned; and also sections one hundred and twenty-two and one hundred and twenty-three of the Companies Act, 1862, so far as they may affect the sections above enumerated.

25 & 26 Vict. c. 89.

33 & 34 Vict. c. 104.

(2.) All other orders or judgments pronounced by the said Lord Ordinary in vacation (except as after mentioned) shall be subject to review only by reclaiming note, in common form, presented (notwithstanding the terms of section one hundred and twenty-four of the Companies Act, 1862,) within fourteen days from the date of such order or judgment: Provided always, that such orders or judgments pronounced by the said Lord Ordinary in vacation, under or by virtue, in whole or in part, of the following sections of the Companies Act, 1862, shall, from the dates of such orders or judgments, and notwithstanding any reclaiming note against the same, be carried out and receive effect till such reclaiming note be disposed of by the court, videlicet, sections eighty-five, eighty-seven, eighty-nine, ninety-three (except in regard to the removal or remuneration of liquidators), ninety-five, ninety-six (except in regard to the power to sell), one hundred, one hundred and eighteen, first part of one hundred and forty-one, one hundred and forty-seven, one hundred and fifty (except in regard to the removal of liquidators and the filling up of vacancies caused by such removal), one hundred and ninety-seven, one hundred and ninety-eight, and two hundred and one; and also sections one hundred and twenty-two, and one hundred and twenty-three of the Companies Act, 1862, so far as they may affect the sections above enumerated.

Provided that nothing in this section contained shall in any way affect the provisions of section one hundred and twenty-one of the Companies Act, 1862, in reference to decrees for payment of calls in the winding up of companies, whether voluntary or by or subject to the supervision of the court.

Winding up may be remitted to Lord Ordinary.

6. When the court makes a winding up or a supervision order, or at any time thereafter, it shall be lawful for the court, in either division thereof, if it thinks fit, to direct all subsequent proceedings in the winding up to be taken before one of the permanent Lords Ordinary, and to remit the winding up to him accordingly; and thereupon such Lord Ordinary shall, for the purposes of the winding up, be deemed to be "the court," within the meaning of the recited Acts and this Act, and shall have, for the purposes of such winding up, all the jurisdiction and powers of the court of session: Provided always, that all orders or judgments pronounced by such Lord Ordinary shall be subject to review only by reclaiming note in common form, presented (notwithstanding the terms of section one hundred and twenty-four of the Companies Act, 1862,) within fourteen days from the date of such order or judgment. But, should a reclaiming note not be presented and moved during session, the provisions of section five of this Act shall apply to such orders or judgments: Provided also, that the said Lord Ordinary may report to the division of the court any matter which may arise in the course of the winding up. This section and the immediately preceding section shall come into force from the passing of this Act, and shall include companies then in the course of being wound up.

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49 & 50 VICT. c. 37.

An Act to remove certain Doubts respecting the construction of the Patents, Designs, and Trade Marks Act, 1883, so far as respects the Drawings by which Specifications are required to be accompanied, and as respects Exhibitions.

[25*th June*, 1886.]

46 & 47 Vict. c. 57.

WHEREAS by section five of the Patents, Designs, and Trade Marks Act, 1883, specifications, whether provisional or complete, must be accompanied by drawings if required, and doubts have arisen as to whether it is sufficient that a complete specification refers to the drawings by which the provisional specification was accompanied, and it is expedient to remove such doubts:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title and construction. 46 & 47 Vict. c. 57. 48 & 49 Vict. c. 63.

1. This Act may be cited as the Patents Act, 1886, and shall be construed as one with the Patents, Designs, and Trade Marks Acts, 1883 and 1885, and, together with those Acts, may be cited as the Patents, Designs, and Trade Marks Acts, 1883 to 1886.

The same drawings may accompany both specifications.

2. The requirement of sub-section four of section five of the Patents, Designs, and Trade Marks Act, 1883, as to drawings shall not be deemed to be insufficiently complied with by reason only that instead of being accompanied by drawings the complete specification refers to the drawings which accompanied the provisional specification. And no patent heretofore sealed shall be invalid by reason only that the complete specification was not accompanied by drawings, but referred to those which accompanied the provisional specification.

Protection of patents and designs exhibited at international exhibitions.

3. Whereas by section thirty-nine of the Patents, Designs, and Trade Marks Act, 1883, as respects patents, and by section fifty-seven of the same Act as respects designs, provision is made that the exhibition of an invention or design at an industrial or international exhibition, certified as such by the Board of Trade, shall not prejudice the rights of the inventor or proprietor thereof, subject to the conditions therein mentioned, one of which is that the exhibitor must, before exhibiting the invention, design, or article, or publishing a description of the design, give the controller the prescribed notice of his intention to do so:

And whereas it is expedient to provide for the extension of the said sections to industrial and international exhibitions held out of the United Kingdom, be it therefore enacted as follows:

It shall be lawful for Her Majesty, by Order in Council, from time to time to declare that sections thirty-nine and fifty-seven of the Patents, Designs, and Trade Marks Act, 1883, or either of those sections, shall apply to any exhibition mentioned in the Order in like manner as if it were an industrial or international exhibition certified by the Board of Trade, and to provide that the exhibitor shall be relieved from the conditions, specified in the said sections, of giving notice to the controller of his intention to exhibit, and shall be so relieved either absolutely or upon such terms and conditions as to Her Majesty in Council may seem fit.

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50 & 51 VICT. C. 28.

An Act to consolidate and amend the Law relating to Fraudulent Marks on Merchandise.

[*23rd August*, 1887.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited as the Merchandise Marks Act, 1887.

Offences as to trade marks and trade descriptions.

2.—(1.) Every person who—

(a) Forges any trade mark; or

(b) Falsely applies to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive; or

(c) Makes any die, block, machine, or other instrument for the purpose of forging, or for being used for forging, a trade mark; or

(d) Applies any false trade description to goods; or

(e) Disposes of or has in his possession any die, block, machine, or other instrument for the purpose of forging a trade mark; or

(f) Causes any of the things above in this section mentioned to be done,

shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be guilty of an offence against this Act.

(2.) Every person who sells, or exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description is applied, or to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves—

(a) That having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of

the alleged offence no reason to suspect the genuineness of the trade mark, mark, or trade description; and

(b) That on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or

(c) That otherwise he had acted innocently;

be guilty of an offence against this Act.

(3.) Every person guilty of an offence against this Act shall be liable—

(i) On conviction on indictment, to imprisonment, with or without hard labour, for a term not exceeding two years, or to fine, or to both imprisonment and fine; and

(ii) On summary conviction to imprisonment, with or without hard labour, for a term not exceeding four months, or to a fine not exceeding twenty pounds, and in the case of a second or subsequent conviction to imprisonment, with or without hard labour, for a term not exceeding six months, or to a fine not exceeding fifty pounds; and

(iii) In any case, to forfeit to her Majesty every chattel, article, instrument, or thing by means of or in relation to which the offence has been committed.

(4.) The court before whom any person is convicted under this section may order any forfeited articles to be destroyed or otherwise disposed of as the court thinks fit.

(5.) If any person feels aggrieved by any conviction made by a court of summary jurisdiction, he may appeal therefrom to a court of quarter sessions.

(6.) Any offence for which a person is under this Act liable to punishment on summary conviction may be prosecuted, and any articles liable to be forfeited under this Act by a court of summary jurisdiction may be forfeited, in manner provided by the Summary Jurisdiction Acts: Provided that a person charged with an offence under this section before a court of summary jurisdiction shall, on appearing before the court, and before the charge is gone into, be informed of his right to be tried on indictment, and if he requires be so tried accordingly. 42 & 43 Vict. c. 49.

3.—(1.) For the purposes of this Act— Definitions. 46 & 47 Vict. c. 57.

The expression "trade mark" means a trade mark registered in the register of trade marks kept under the Patents, Designs, and Trade Marks Act, 1883, and includes any trade mark which, either with or without registration, is protected by law in any British possession or foreign State to which the provisions of the one hundred and third section of the Patents, Designs, and Trade Marks Act, 1883, are, under Order in Council, for the time being applicable:

The expression "trade description" means any description, statement, or other indication, direct or indirect,

(a) as to the number, quantity, measure, gauge, or weight of any goods, or

(b) as to the place or country in which any goods were made or produced, or

(c) as to the mode of manufacturing or producing any goods, or

(d) as to the material of which any goods are composed, or

(e) as to any goods being the subject of an existing patent, privilege, or copyright,

and the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of this Act:

The expression "false trade description" means a trade description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect, and the fact that a trade description is a trade mark, or part of a trade mark, shall not prevent such trade description being a false trade description within the meaning of this Act:

The expression "goods" means anything which is the subject of trade, manufacture, or merchandise:

The expressions "person," "manufacturer, dealer, or trader," and "proprietor" include any body of persons corporate or unincorporate:

The expression "name" includes any abbreviation of a name.

(2.) The provisions of this Act respecting the application of a false trade description to goods shall extend to the application to goods of any such figures, words, or marks, or arrangement or combination thereof, whether including a trade mark or not, as are reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are.

(3.) The provisions of this Act respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, shall extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description, and for the purpose of this enactment the expression false name or initials means as applied to any goods, any name or initials of a person which—

(a) are not a trade mark, or part of a trade mark, and

(b) are identical with, or a colourable imitation of the name or initials of a person carrying on business in connexion with goods of the same description, and not having authorised the use of such name or initials, and

(c) are either those of a fictitious person or of some person not bonâ fide carrying on business in connexion with such goods.

Forging trade mark.

4. A person shall be deemed to forge a trade mark who either—

(a) without the assent of the proprietor of the trade mark makes that trade mark or a mark so nearly resembling that trade mark as to be calculated to deceive; or

(b) falsifies any genuine trade mark, whether by alteration, addition, effacement, or otherwise;

and any trade mark or mark so made or falsified is in this Act referred to as a forged trade mark.

Provided that in any prosecution for forging a trade mark the burden of proving the assent of the proprietor shall lie on the defendant.

Applying marks and descriptions.

5.—(1.) A person shall be deemed to apply a trade mark or mark or trade description to goods who—

(a) applies it to the goods themselves; or

(b) applies it to any covering, label, reel, or other thing in or with which the goods are sold or exposed or had in possession for any purpose of sale, trade, or manufacture; or

(c) places, encloses, or annexes any goods which are sold or exposed or had in possession for any purpose of sale, trade, or manufacture, in, with, or to any covering, label, reel, or other thing to which a trade mark or trade description has been applied; or

(d) uses a trade mark or mark or trade description in any manner calculated to lead to the belief that the goods in connexion with which it is used are designated or described by that trade mark or mark or trade description.

(2.) The expression "covering" includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame, or wrapper; and the expression "label" includes any band or ticket.

A trade mark, or mark, or trade description, shall be deemed to be applied whether it is woven, impressed, or otherwise worked into, or annexed, or affixed to the goods, or to any covering, label, reel, or other thing.

(3.) A person shall be deemed to falsely apply to goods a trade mark or mark, who without the assent of the proprietor of a trade mark applies such trade mark, or a mark so nearly resembling it as to be calculated to deceive, but in any prosecution for falsely applying a trade mark or mark to goods the burden of proving the assent of the proprietor shall lie on the defendant.

Exemption of certain persons employed in ordinary course of business.

6. Where a defendant is charged with making any die, block, machine, or other instrument for the purpose of forging, or being used for forging, a trade mark, or with falsely applying to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive, or with applying to goods any false trade description, or causing any of the things in this section mentioned to be done, and proves—

(a) That in the ordinary course of his business he is employed, on behalf of other persons, to make dies, blocks, machines, or other instruments for making, or being used in making, trade marks, or as the

case may be, to apply marks or descriptions to goods, and that in the case which is the subject of the charge he was so employed by some person resident in the United Kingdom, and was not interested in the goods by way of profit or commission dependent on the sale of such goods; and

(b) That he took reasonable precautions against committing the offence charged; and

(c) That he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark, or trade description; and

(d) That he gave to the prosecutor all the information in his power with respect to the persons on whose behalf the trade mark, mark, or description was applied—

he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he has given due notice to him that he will rely on the above defence.

Application of Act to watches.

7. Where a watch case has thereon any words or marks which constitute, or are by common repute considered as constituting, a description of the country in which the watch was made, and the watch bears no description of the country where it was made, those words or marks shall primâ facie be deemed to be a description of that country within the meaning of this Act, and the provisions of this Act with respect to goods to which a false trade description has been applied, and with respect to selling or exposing for or having in possession for sale, or any purpose of trade or manufacture, goods with a false trade description, shall apply accordingly, and for the purposes of this section the expression "watch" means all that portion of a watch which is not the watch case.

Mark on watch case.

8.—(1.) Every person who after the date fixed by Order in Council sends or brings a watch case, whether imported or not, to any assay office in the United Kingdom for the purpose of being assayed, stamped, or marked, shall make a declaration declaring in what country or place the case was made. If it appears by such declaration that the watch case was made in some country or place out of the United Kingdom, the assay office shall place on the case such a mark (differing from the mark placed by the office on a watch case made in the United Kingdom), and in such a mode as may be from time to time directed by Order in Council.

(2.) The declaration may be made before an officer of an assay office, appointed in that behalf by the office (which officer is hereby authorised to administer such a declaration), or before a justice of the peace, or a commissioner having power to administer oaths in the Supreme Court of Judicature in England or Ireland, or in the Court of Session in Scotland, and shall be in such form as may be from time to time directed by Order in Council.

(3.) Every person who makes a false declaration for the purposes of this section shall be liable, on conviction on indictment, to the penalties of perjury, and on summary conviction to a fine not exceeding twenty pounds for each offence.

Trade mark, how described in pleading.

9. In any indictment, pleading, proceeding, or document, in which any trade mark or forged trade mark is intended to be mentioned, it shall be sufficient, without further description and without any copy or facsimile, to state that trade mark or forged trade mark to be a trade mark or forged trade mark.

Rules as to evidence.

10. In any prosecution for an offence against this Act,—

(1.) A defendant, and his wife or her husband, as the case may be, may, if the defendant thinks fit, be called as a witness, and, if called, shall be sworn and examined, and may be cross-examined and re-examined in like manner as any other witness.

(2.) In the case of imported goods, evidence of the port of shipment shall be primâ facie evidence of the place or country in which the goods were made or produced.

Punishment of accessories.

11. Any person who, being within the United Kingdom, procures, counsels, aids, abets, or is accessory to the commission, without the United Kingdom, of any act, which, if committed in the United Kingdom, would under this Act be a misdemeanour, shall be guilty of that misdemeanour as a principal, and be liable to be indicted, proceeded against, tried, and convicted in any county or

place in the United Kingdom in which he may be, as if the misdemeanour had been there committed.

Search warrant.

12.—(1.) Where, upon information of an offence against this Act, a justice has issued either a summons requiring the defendant charged by such information to appear to answer to the same, or a warrant for the arrest of such defendant, and either the said justice on or after issuing the summons or warrant, or any other justice, is satisfied by information on oath that there is reasonable cause to suspect that any goods or things by means of or in relation to which such offence has been committed are in any house or premises of the defendant, or otherwise in his possession or under his control in any place, such justice may issue a warrant under his hand by virtue of which it shall be lawful for any constable named or referred to in the warrant, to enter such house, premises, or place at any reasonable time by day, and to search there for and seize and take away those goods or things; and any goods or things seized under any such warrant shall be brought before a court of summary jurisdiction for the purpose of its being determined whether the same are or are not liable to forfeiture under this Act.

(2.) If the owner of any goods or things which, if the owner thereof had been convicted, would be liable to forfeiture under this Act, is unknown or cannot be found, an information or complaint may be laid for the purpose only of enforcing such forfeiture, and a court of summary jurisdiction may cause notice to be advertised stating that, unless cause is shown to the contrary at the time and place named in the notice, such goods or things will be forfeited, and at such time and place the court, unless the owner or any person on his behalf, or other person interested in the goods or things, shows cause to the contrary, may order such goods or things or any of them to be forfeited.

(3.) Any goods or things forfeited under this section, or under any other provision of this Act, may be destroyed or otherwise disposed of, in such manner as the court by which the same are forfeited may direct, and the court may, out of any proceeds which may be realised by the disposition of such goods (all trade marks and trade descriptions being first obliterated), award to any innocent party any loss he may have innocently sustained in dealing with such goods.

Extension of 22 & 23 Vict. c. 17, to offences under this Act.

13. The Act of the session of the twenty-second and twenty-third years of the reign of her present Majesty, chapter seventeen, intituled "An Act to prevent vexatious indictments for certain misdemeanours," shall apply to any offence punishable on indictment under this Act, in like manner as if such offence were one of the offences specified in section one of that Act, but this section shall not apply to Scotland.

Costs of defence or prosecution.

14. On any prosecution under this Act the court may order costs to be paid to the defendant by the prosecutor, or to the prosecutor by the defendant, having regard to the information given by and the conduct of the defendant and prosecutor respectively.

Limitation of prosecution.

15. No prosecution for an offence against this Act shall be commenced after the expiration of three years next after the commission of the offence, or one year next after the first discovery thereof by the prosecutor, whichever expiration first happens.

Prohibition on importation.

16. Whereas it is expedient to make further provision for prohibiting the importation of goods which, if sold, would be liable to forfeiture under this Act; be it therefore enacted as follows:

(1.) All such goods, and also all goods of foreign manufacture bearing any name or trade mark being or purporting to be the name or trade mark of any manufacturer, dealer, or trader in the United Kingdom, unless such name or trade mark is accompanied by a definite indication of the country in which the goods were made or produced, are hereby prohibited to be imported into the United Kingdom, and, subject to the provisions of this section, shall be included among goods prohibited to be imported as if they were specified in section forty-two of the Customs Consolidation Act, 1876.

39 & 40 Vict. c. 36.

(2.) Before detaining any such goods, or taking any further proceedings with a view to the forfeiture thereof under the law relating to the Customs, the Commissioners of Customs may require the regulations under this section, whether as to information, security, conditions, or other matters, to be complied with, and may satisfy themselves in

accordance with those regulations that the goods are such as are prohibited by this section to be imported.

(3.) The Commissioners of Customs may from time to time make, revoke, and vary regulations, either general or special, respecting the detention and forfeiture of goods the importation of which is prohibited by this section, and the conditions, if any, to be fulfilled before such detention and forfeiture, and may by such regulations determine the information, notices, and security to be given, and the evidence requisite for any of the purposes of this section, and the mode of verification of such evidence.

(4.) Where there is on any goods a name which is identical with or a colourable imitation of the name of a place in the United Kingdom, that name, unless accompanied by the name of the country in which such place is situate, shall be treated for the purposes of this section as if it were the name of a place in the United Kingdom.

(5.) Such regulations may apply to all goods the importation of which is prohibited by this section, or different regulations may be made respecting different classes of such goods or of offences in relation to such goods.

(6.) The Commissioners of Customs, in making and in administering the regulations, and generally in the administration of this section, whether in the exercise of any discretion or opinion, or otherwise, shall act under the control of the Commissioners of her Majesty's Treasury.

(7.) The regulations may provide for the informant reimbursing the Commissioners of Customs all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention.

(8.) All regulations under this section shall be published in the "London Gazette" and in the "Board of Trade Journal."

(9.) This section shall have effect as if it were part of the Customs Consolidation Act, 1876, and shall accordingly apply to the Isle of Man as if it were part of the United Kingdom.

(10.) Section two of the Revenue Act, 1883, shall be repealed as from a day fixed by regulations under this section, not being later than the first day of January one thousand eight hundred and eighty-eight, without prejudice to anything done or suffered thereunder. 46 & 47 Vict. c. 55.

Implied warranty on sale of marked goods.

17. On the sale or in the contract for the sale of any goods to which a trade mark, or mark, or trade description has been applied, the vendor shall be deemed to warrant that the mark is a genuine trade mark and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of this Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the vendee.

Provisions of Act as to false description not to apply in certain cases.

18. Where, at the passing of this Act, a trade description is lawfully and generally applied to goods of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods, the provisions of this Act with respect to false trade descriptions shall not apply to such trade description when so applied: Provided that where such trade description includes the name of a place or country, and is calculated to mislead as to the place or country where the goods to which it is applied were actually made or produced, and the goods are not actually made or produced in that place or country, this section shall not apply unless there is added to the trade description, immediately before or after the name of that place or country, in an equally conspicuous manner, with that name, the name of the place or country in which the goods were actually made or produced, with a statement that they were made or produced there.

Savings.

19.—(1.) This Act shall not exempt any person from any action, suit, or other proceeding which might, but for the provisions of this Act, be brought against him.

(2.) Nothing in this Act shall entitle any person to refuse to make a complete discovery, or to answer any question or interrogatory in any action, but such discovery or answer shall not be admissible in evidence against such person in any prosecution for an offence against this Act.

(3.) Nothing in this Act shall be construed so as to render liable to any prosecution or punishment any servant of a master resident in the United

Kingdom who bonâ fide acts in obedience to the instructions of such master, and, on demand made by or on behalf of the prosecutor, has given full information as to his master.

False representation as to Royal Warrant.

20. Any person who falsely represents that any goods are made by a person holding a royal warrant, or for the service of her Majesty, or any of the Royal Family, or any Government department, shall be liable, on summary conviction, to a penalty not exceeding twenty pounds.

Application of Act to Scotland.

21. In the application of this Act to Scotland, the following modifications shall be made:—

The expression "Summary Jurisdiction Acts" means the Summary Procedure Act, 1864, and any Acts amending the same.

The expression "justice" means sheriff.

The expression "court of summary jurisdiction" means the Sheriff Court, and all jurisdiction necessary for the purpose of this Act is hereby conferred on sheriffs.

Application of Act to Ireland.

22. In the application of this Act to Ireland the following modifications shall be made:—

The expression "Summary Jurisdiction Acts," means, so far as respects the police district of Dublin metropolis, the Acts regulating the powers and duties of justices of the peace of such district, and as regards the rest of Ireland means the Petty Sessions (Ireland) Act, 1851, and any Act amending the same.

14 & 15 Vict. c. 93.

The expression "court of summary jurisdiction" means justices acting under those Acts.

Repeal of 25 & 26 Vict. c. 88.

23. The Merchandise Marks Act, 1862, is hereby repealed, and any unrepealed enactment referring to any enactment so repealed shall be construed to apply to the corresponding provision of this Act; provided that this repeal shall not affect—

(a) Any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment hereby repealed; nor

(b) The institution or continuance of any proceeding or other remedy under any enactment so repealed for the recovery of any penalty incurred, or for the punishment of any offence committed, before the commencement of this Act; nor

(c) Any right, privilege, liability, or obligation acquired, accrued, or incurred under any enactment hereby repealed.

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50 & 51 Vict. c. 46.

An Act to amend and extend the Law relating to Truck.

[16*th September*, 1887.]

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

1 & 2 Will. 4, c. 37.

1. This Act may be cited as the Truck Amendment Act, 1887. The Act of the session of the first and second years of the reign of King William the Fourth, chapter thirty-seven, intituled "An Act to prohibit the payment in certain trades of wages in goods or otherwise than in the current coin of the realm" (in this Act referred to as the principal Act (*a*)), may be cited as the Truck Act, 1831, and that Act and this Act may be cited together as the Truck Acts, 1831 and 1887, and shall be construed together as one Act.

Application of principal Act to workman as defined by 38 & 39 Vict. c. 90.

2. The provisions of the principal Act shall extend to, apply to, and include any workman as defined in the Employers and Workmen Act, 1875, section ten (*a*), and the expression "artificer" in the principal Act shall be construed to include every workman to whom the principal Act is extended and applied by this Act, and all provisions and enactments in the principal Act inconsistent herewith are hereby repealed.

Advance of wages.

3. Whenever by agreement, custom, or otherwise a workman is entitled to receive in anticipation of the regular period of the payment of his wages an advance as part or on account thereof, it shall not be lawful for the employer to withhold such advance or make any deduction in respect of such

(*a*) *Supra.*

advance on account of poundage, discount, or interest, or any similar charge.

Saving for servant in husbandry.

4. Nothing in the principal Act or this Act shall render illegal a contract with a servant in husbandry for giving him food, drink, not being intoxicating, a cottage, or other allowances or privileges in addition to money wages as a remuneration for his services.

Order for goods as a deduction from wages illegal.

5. In any action brought by a workman for the recovery of his wages, the employer shall not be entitled to any set off or counterclaim in respect of any goods supplied to the workman by any person under any order or direction of the employer, or any agent of the employer, and the employer of a workman or any agent of the employer, or any person supplying goods to the workman under any order or direction of such employer or agent, shall not be entitled to sue the workman for or in respect of any goods supplied by such employer or agent, or under such order or direction, as the case may be.

Provided that nothing in this section shall apply to anything excepted by section twenty-three of the principal Act (*b*).

No contracts with workman as to spending wages at any particular shop, &c.

6. No employer shall, directly or indirectly, by himself or his agent, impose as a condition, express or implied, in or for the employment of any workman any terms as to the place at which, or the manner in which, or the person with whom, any wages or portion of wages paid to the workman are or is to be expended, and no employer shall by himself or his agent dismiss any workman from his employment for or on account of the place at which, or the manner in which, or the person with whom, any wages or portion of wages paid by the employer to such workman are or is expended or fail to be expended (*c*).

Deduction for education.

7. Where any deduction is made by an employer from a workman's wages for education, such workman on sending his child to any state-inspected school selected by the workman shall be entitled to have the school fees of his child at that school paid by the employer at the same rate and to the same extent as the other workmen from whose wages the like deduction is made by such employer (*c*).

In this section "state-inspected school" means any elementary school inspected under the direction of the Education Department in England or Scotland or of the Board of National Education in Ireland.

Deduction for sharpening tools, &c.

8. No deduction shall be made from a workman's wages for sharpening or repairing tools, except by agreement not forming part of the condition of hiring (*c*).

Audit of deductions.

9. Where deductions are made from the wages of any workmen for the education of children or in respect of medicine, medical attendance, or tools, once at least in every year the employer shall, by himself or his agent, make out a correct account of the receipts and expenditure in respect of such deductions, and submit the same to be audited by two auditors appointed by the said workmen, and shall produce to the auditors all such books, vouchers, and documents, and afford them all such other facilities as are required for such audit.

Artificer to be paid in cash and not by way of barter for articles made by him.

10. Where articles are made by a person at his own home, or otherwise, without the employment of any person under him except a member of his own family, the principal Act (*b*) and this Act shall apply as if he were a workman, and the shopkeeper, dealer, trader, or other person buying the articles in the way of trade were his employer, and the provisions of this Act with respect to the payment of wages shall apply as if the price of an article were wages earned during the seven days next preceding the date at which any article is received from the workman by the employer.

This section shall apply only to articles under the value of five pounds knitted or otherwise manufactured of wool, worsted, yarn, stuff, jersey, linen, fustian, cloth, serge, cotton, leather, fur, hem, flax, mohair, or silk, or of any combination thereof, or made or prepared of bone, thread, silk, or cotton lace, or of lace made of any mixed materials. Where it is made to appear to her Majesty the Queen in Council that, in the interests of persons making articles to which this section applies in any county or place in the United Kingdom, it is expedient so to do, it shall be lawful for her Majesty, by Order in Council, to suspend the operation of this section in such county or place, and the same shall accordingly be suspended, either wholly or in

(*b*) See sect. 1, *supra*.

(*c*) See sect. 11, *infra*.

part, and either with or without any limitations or exceptions, according as is provided by the order.

Offences.

11. If any employer or his agent contravenes or fails to comply with any of the foregoing provisions of this Act, such employer or agent, as the case may be, shall be guilty of an offence against the principal Act (*a*), and shall be liable to the penalties imposed by section nine of that Act as if the offence were such an offence as in that section mentioned.

Fine on person committing offence for which employer is liable, and power of employer to exempt himself from penalty on conviction of actual offender.

12.—(1.) Where an offence for which an employer is, by virtue of the principal Act (*a*) or this Act, liable to a penalty has in fact been committed by some agent of the employer or other person, such agent or other person shall be liable to the same penalty as if he were the employer.

(2.) Where an employer is charged with an offence against the principal Act (*a*) or this Act he shall be entitled, upon information duly laid by him, to have any other person whom he charges as the actual offender brought before the court at the time appointed for hearing the charge, and if, after the commission of the offence has been proved the employer proves to the satisfaction of the court that he had used due diligence to enforce the execution of the said Acts, and that the said other person had committed the offence in question without his knowledge, consent, or connivance, the said other person shall be summarily convicted of such offence, and the employer shall be exempt from any penalty.

When it is made to appear to the satisfaction of an inspector of factories or mines, or in Scotland a procurator fiscal, at the time of discovering the offence, that the employer had used due diligence to enforce the execution of the said Acts, and also by what person such offence had been committed, and also that it had been committed without the knowledge, consent, or connivance of the employer, then the inspector or procurator fiscal shall proceed against the person whom he believes to be the actual offender in the first instance without first proceeding against the employer.

Recovery of penalties.

13.—(1.) Any offence against the principal Act (*a*) or this Act may be prosecuted, and any penalty therefor recovered in manner provided by the Summary Jurisdiction Acts, so, however, that no penalty shall be imposed on summary conviction exceeding that prescribed by the principal Act for a second offence.

(2.) It shall be the duty of the inspectors of factories and the inspectors of mines to enforce the provisions of the principal Act (*a*) and this Act within their districts so far as respects factories, workshops, and mines inspected by them respectively, and such inspectors shall for this purpose have the same powers and authorities as they respectively have for the purpose of enforcing the provisions of any Acts relating to factories, workshops, or mines, and all expenses incurred by them under this section shall be defrayed out of moneys provided by Parliament.

(3.) In England all penalties recovered under the principal Act (*a*) and this Act shall be paid into the receipt of her Majesty's Exchequer, and be carried to the Consolidated Fund.

(4.) In Scotland—

(a) The procurators fiscal of the sheriff court shall, as part of their official duty, investigate and prosecute offences against the principal Act or this Act, and such prosecution may also be instituted in the sheriff court at the instance of any inspector of factories or inspector of mines;

(b) All offences against the said Acts shall be prosecuted in the sheriff court.

Definitions.

14. In this Act, unless the context otherwise requires,—

The expression "Summary Jurisdiction Acts" means, as respects England, the Summary Jurisdiction Acts as defined by the Summary Jurisdiction Act, 1879; and, as respects Scotland, means the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and any Acts amending the same:

Other expressions have the same meaning as in the principal Act.

Disqualification of justice.

15. So much of the principal Act as disqualifies any justice from acting as such under the principal Act is hereby repealed.

A person engaged in the same trade or occupation as an employer charged with an offence against the principal Act or this Act shall not act as a justice of the peace in hearing and determining such charge.

(*a*) See sect. 1, *supra*.

16. The provisions of the principal Act (*b*) conferring powers on any overseers or overseer of the poor shall be deemed to confer those powers in the case of England on the guardians of a union, and in the case of Scotland on the inspectors of the poor. Amendment of 1 & 2 Will. 4, c. 37, as to overseers.

17. The Acts mentioned in the schedule to this Act are hereby repealed to the extent in the third column of the said schedule mentioned without prejudice to anything heretofore done or suffered in respect thereof. Repeal.

18. The principal Act (*b*), so far as it is not hereby repealed, and this Act shall extend to Ireland, subject to the following provisions: Application of Acts to Ireland.

(1.) Any offence against the principal Act or this Act may be prosecuted and any penalty therefor may be recovered in the manner provided by the Summary Jurisdiction (Ireland) Acts; (that is to say,) within the Dublin Metropolitan Police District the Acts regulating the powers and duties of justices of the peace and of the police of that district, and elsewhere in Ireland the Petty Sessions (Ireland) Act, 1851, and the Acts amending the same;

(2.) Penalties recovered under the principal Act or this Act shall be applied in the manner directed by the Fines (Ireland) Act, 1851, and the Acts amending the same.

SCHEDULE.

Session and Chapter.	Title of Act.	Extent of Repeal.
12 Geo. 1, c. 34..	An Act to prevent unlawful combinations of workmen employed in the woollen manufactures, and for better payment of their wages.	Section three, and so much of section eight as applies section three.
22 Geo. 2, c. 27..	An Act, the title of which begins with "An Act for the more effectual preventing of frauds," and ends with the words "and for the better payment of their wages."	So much of section twelve as applies to any enactment repealed by this Act.
30 Geo. 2, c. 12..	An Act, the title of which begins with the words "An Act to amend an Act," and ends with the words "payment of the workmen's wages in any other manner than in money."	Sections two and three.
57 Geo. 3, c. 115..	An Act, the title of which begins with the words "An Act to extend the provisions of an Act," and ends with the words "articles of cutlery."	The whole Act.
57 Geo. 3, c. 122..	An Act, the title of which begins with the words "An Act to extend the provisions," and ends with the words "extending the provisions of the said Acts to Scotland and Ireland."	The whole Act.

(*b*) See sect. 1, *supra*.

Session and Chapter.	Title of Act.	Extent of Repeal.
1 & 2 Will. 4, c. 37	An Act to prohibit the payment in certain trades of wages in goods or otherwise than in the current coin of the realm.	Section ten, down to "be produced to the court and jury" inclusive; section eleven, section twelve, section fifteen, section sixteen, section eighteen, section nineteen, in section twenty the words "or servant in husbandry"; section twenty-one, section twenty-two, section twenty-four from "and unless the agreement" inclusive to end of section, and section twenty-five from "all workmen" to "purposes aforesaid," both inclusive, and the schedules.

50 & 51 VICT. C. 57.

An Act to provide for the Registration of Deeds of Arrangement.
[16*th September*, 1887.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited for all purposes as the Deeds of Arrangement Act, 1887.

Extent of Act.

2. This Act shall not extend to Scotland.

Commencement of Act.

3. This Act shall, except as in this Act specially provided, come into operation on the first day of January one thousand eight hundred and eighty-eight, which date is in this Act referred to as the commencement of this Act.

Application of Act.

4.—(1.) This Act shall apply to every deed of arrangement, as defined in this section, made after the commencement of this Act.

(2.) A deed of arrangement to which this Act applies shall include any of the following instruments, whether under seal or not, made by, for, or in respect of the affairs of a debtor for the benefit of his creditors generally (otherwise than in pursuance of the law for the time being in force relating to bankruptcy), that is to say:—

(a) An assignment of property;

(b) A deed of or agreement for a composition;

And in cases where creditors of a debtor obtain any control over his property or business:—

(c) A deed of inspectorship entered into for the purpose of carrying on or winding up a business;

(d) A letter of license authorising the debtor or any other person to manage, carry on, realise, or dispose of a business, with a view to the payment of debts; and

(e) Any agreement or instrument entered into for the purpose of carrying on or winding up the debtor's business, or authorising the debtor or any other person to manage, carry on, realise, or dispose of the debtor's business, with a view to the payment of his debts.

Avoidance of unregistered deeds of arrangement.

5. From and after the commencement of this Act a deed of arrangement to which this Act applies shall be void unless the same shall have been registered under this Act within seven clear days after the first execution

thereof by the debtor or any creditor, or if it is executed in any place out of England or Ireland respectively, then within seven clear days after the time at which it would, in the ordinary course of post, arrive in England or Ireland respectively, if posted within one week after the execution thereof, and unless the same shall bear such ordinary and ad valorem stamp as is under this Act provided.

Mode of registration.

6. The registration of a deed of arrangement under this Act shall be effected in the following manner:—

(1.) A true copy of the deed, and of every schedule or inventory thereto annexed, or therein referred to, shall be presented to and filed with the registrar within seven clear days after the execution of the said deed (in like manner as a bill of sale given by way of security for the payment of money is now required to be filed), together with an affidavit verifying the time of execution, and containing a description of the residence and occupation of the debtor, and of the place or places where his business is carried on, and an affidavit by the debtor stating the total estimated amount of property and liabilities included under the deed, the total amount of the composition (if any) payable thereunder, and the names and addresses of his creditors;

(2.) No deed shall be registered under this Act unless the original of such deed, duly stamped with the proper inland revenue duty, and in addition to such duty a stamp denoting a duty computed at the rate of one shilling for every hundred pounds or fraction of a hundred pounds of the sworn value of the property passing, or (where no property passes under the deed) the amount of composition payable under the deed, is produced to the registrar at the time of such registration.

Form of register.

7. The registrar shall keep a register wherein shall be entered, as soon as conveniently may be after the presentation of a deed for registration, an abstract of the contents of every deed of arrangement registered under this Act, containing the following and any other prescribed particulars:—

(a) The date of the deed:

(b) The name, address, and description of the debtor, and the place or places where his business is carried on, and the title of the firm or firms under which the debtor carries on business, and the name and address of the trustee (if any) under the deed:

(c) A short statement of the nature and effect of the deed, and of the composition in the pound payable thereunder:

(d) The date of registration:

(e) The amount of property and liabilities included under the deed, as estimated by the debtor.

Registrar and office for registration.

8.—(1.) The registrar of bills of sale in England and Ireland respectively shall be the registrar for the purposes of this Act.

(2.) In England the Bills of Sale Department of the Central Office of the Supreme Court of Judicature, and in Ireland the Bills of Sale Office of the Queen's Bench Division of the High Court of Justice, shall be the office for the registration of deeds of arrangement.

Rectification of register.

9. The court or a judge upon being satisfied that the omission to register a deed of arrangement within the time required by this Act or that the omission or mis-statement of the name, residence, or description of any person was accidental or due to inadvertence, or to some cause beyond the control of the debtor and not imputable to any negligence on his part, may on the application of any party interested, and on such terms and conditions as are just and expedient, extend the time for such registration, or order such omission or mis-statement to be supplied or rectified by the insertion in the register of the true name, residence, or description.

Time for registration.

10. When the time for registering a deed of arrangement expires on a Sunday, or other day on which the registration office is closed, the registration shall be valid if made on the next following day on which the office is open.

Office copies.

11. Subject to the provisions of this Act, and to any rules made thereunder, any person shall be entitled to have an office copy of, or extract from, any deed registered under this Act upon paying for the same at the like rate as for office copies of judgments of the High Court of Justice, and any copy or extract purporting to be an office copy or extract shall, in all courts

and before all arbitrators or other persons, be admitted as primâ facie evidence thereof, and of the fact and date of registration as shown thereon.

Inspection of register and registered deeds.

12.—(1.) Any person shall be entitled, at all reasonable times, to search the register on payment of one shilling, or such other fee as may be prescribed, and subject to such regulations as may be prescribed, and shall be entitled, at all reasonable times, to inspect, examine, and make extracts from any registered deed of arrangement, without being required to make a written application or to specify any particulars in reference thereto, upon payment of one shilling, or such other fee as may be prescribed, for each deed of arrangement inspected.

(2.) Provided that the said extracts shall be limited to the dates of execution and of registration, the names, addresses, and descriptions of the debtor and of the parties to the deed, a short statement of the nature and effect of the deed, and any other prescribed particulars.

Local registration of copy of deeds.

13.—(1.) When the place of business or residence of the debtor who is one of the parties to a deed of arrangement, or who is referred to therein, is situate in some place outside the London bankruptcy district, as defined by the Bankruptcy Act, 1883, the registrar shall within three clear days after registration, and in accordance with the prescribed directions, transmit a copy of such deed to the registrar of the county court in the district of which such place of business or residence is situate.

(2.) Every copy so transmitted shall be filed, kept, and indexed by the registrar of the county court in the prescribed manner, and any person may search, inspect, make extracts from, and obtain copies of, the registered copy, in the like manner and upon the like terms, as to payment or otherwise, as near as may be, as in the case of deeds registered under this Act.

(3.) This section shall not apply to Ireland.

Affidavits.

14. Every affidavit required by or for the purposes of this Act may be sworn before a master of the Supreme Court of Judicature in England or Ireland, or before any person empowered to take affidavits in the Supreme Courts of Judicature of England or Ireland.

Fees.

15.—(1.) There shall be taken, in respect of the registration of deeds of arrangement, and in respect of any office copies or extracts, or official searches made by the registrar, such fees as may be from time to time prescribed; and nothing in this Act contained shall make it obligatory on the registrar to do, or permit to be done, any act in respect of which any fee is specified or prescribed, except on payment of such fee.

38 & 39 Vict. c. 77, s. 26.

(2.) The twenty-sixth section of the Supreme Court of Judicature Act, 1875, as regards England, and the eighty-fourth section of the Supreme Court of Judicature Act (Ireland), 1877, as regards Ireland, and any enactments for the time being in force amending or substituted for those sections respectively shall apply to fees under this Act, and orders under those sections may, if need be, be made in relation to such fees accordingly.

Amendment of 46 & 47 Vict. c. 52, s. 28.

16.—(1.) The third sub-section, paragraph (g) of the twenty-eighth section of the Bankruptcy Act, 1883, which enacts, amongst other things that one of the facts on proof of which the court shall either refuse an order of discharge to a bankrupt, or suspend the operation of the order for a specified time, or grant the bankrupt an order of discharge subject to the conditions mentioned in the section, is that the bankrupt has on any previous occasion made a statutory composition or arrangement with his creditors, shall be read and construed with the word "statutory" omitted therefrom.

(2.) This section shall not apply to Ireland.

Saving as to Bankruptcy Acts.

17. Nothing contained in this Act shall be construed to repeal or shall affect any provision of the law for the time being in force in relation to bankruptcy, or shall give validity to any deed or instrument which by law is an act of bankruptcy, or void or voidable.

Rules.

18.—(1.) Rules for carrying this Act into effect may be made, revoked, and altered from time to time by the like persons and in the like manner in which rules may be made under and for the purposes of the Supreme Court of Judicature Acts, 1873 to 1884, as regards England, and the Supreme Court of Judicature Act (Ireland), 1877, as regards Ireland.

40 & 41 Vict. c. 57.

(2.) Such rules as may be required for the purposes of this Act may be made at any time after the passing of this Act.

Interpretation of terms.

19. In this Act, unless the context otherwise requires,—

"Court or a judge" means the High Court of Justice and any judge thereof;

"Creditors generally" includes all creditors who may assent or take the benefit of a deed of arrangement;
"Person" includes a body of persons corporate or unincorporate;
"Prescribed" means prescribed by rules to be made under this Act;
"Property" has the same meaning as the same expression has in the Bankruptcy Act, 1883;
"Rules" includes forms.

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50 & 51 VICT. c. 62.

An Act to amend in certain minor particulars some of the Enactments relating to Merchant Shipping and Seamen.

[16*th September*, 1887.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Short title and construction.

1.—(1.) This Act may be cited as the Merchant Shipping (Miscellaneous) Act, 1887.

(2.) This Act shall be construed as one with the Merchant Shipping Act, 1854, and the Acts amending the same, and this Act and those Acts may be cited collectively as the Merchant Shipping Acts, 1854 to 1887.

Fees on examinations of engineers to be paid to Mercantile Marine Fund. 25 & 26 Vict. c. 63, s. 7. 39 & 40 Vict. c. 80, s. 39. 43 & 44 Vict. c. 22, s. 4.

2. Whereas by section seven of the Merchant Shipping Act Amendment Act, 1862, it is provided that the fees payable by applicants for examination for certificates of competency as engineers shall be carried to the account of the Mercantile Marine Fund, and at the time of the passing of that Act the salaries of the surveyors by whom the examinations are conducted were paid out of the Mercantile Marine Fund:

And whereas by section thirty-nine of the Merchant Shipping Act, 1876, it was provided that the salaries of the said surveyors should be paid out of moneys provided by Parliament, and by section four of the Merchant Shipping (Fees and Expenses) Act, 1880, it was provided that the fees paid by the said applicants for examination for certificates of competency as engineers should be paid into the Exchequer:

45 & 46 Vict. c. 55, s. 3.

And whereas under section three of the Merchant Shipping (Expenses) Act, 1882, the salaries of the said surveyors are charged on and paid out of the Mercantile Marine Fund, and it is expedient that the fees paid by the said applicants for examination should be carried to the account of the Mercantile Marine Fund; be it therefore enacted as follows:

The fees payable in pursuance of section seven of the Merchant Shipping Act Amendment Act, 1862, shall cease to be payable into the Exchequer, and all such of those fees as have been levied since the first day of April one thousand eight hundred and eighty-three, or are hereafter levied, shall be carried to the account of the Mercantile Marine Fund.

Explanation of 17 & 18 Vict. c. 104, s. 31, as to powers of colonial governors.

3. Whereas doubts have been expressed as to the extent of the powers conferred by section thirty-one of the Merchant Shipping Act, 1854, on certain colonial authorities, and it is expedient to remove those doubts: Be it therefore enacted that the powers conferred by that section on the governor, lieutenant-governor, or other person administering the government in a British possession shall include and be deemed to have always included the following powers, namely:—

(a.) Power to approve a port or place within the possession for the registry of ships; and

(b.) Power to appoint surveyors within the limits of the possession to survey and measure ships for registry or re-registry as British ships in accordance with the provisions of the Merchant Shipping Acts, 1854 to 1887.

Public Record Acts to apply to records in custody of Registrar-General of Seamen.

4. All documents which, under section two hundred and seventy-seven of the Merchant Shipping Act, 1854, or any enactment amending the same, are required to be recorded and preserved by the Registrar-General of Seamen shall be deemed to be public records and documents within the meaning of the Public Record Offices Acts, 1838 and 1877, and those Acts shall, where applicable, apply to such documents in all respects as if such documents had been specifically referred to in the said Acts.

Explanation of meaning of lighthouses.

5. In the Merchant Shipping Act, 1854, and the Acts amending the same, the expression "lighthouses" shall, in addition to the meaning assigned to it by the Merchant Shipping Act, 1854, include sirens and all other descriptions of fog signals, and the expression "new lighthouse" shall include the addition to any existing lighthouse of any improved light, or any siren, or any description of fog signal.

Repeal.

6. The enactments mentioned in the Schedule to this Act are hereby repealed to the extent appearing in the third column of that Schedule:

Provided that the repeal of any enactment by this Act shall not affect the validity of anything done, or any right acquired or liability incurred, before the commencement of this Act under the repealed enactment, and that proceedings for enforcing any such right or liability may be commenced, continued, and completed as if this Act had not passed.

Section 6.

SCHEDULE.

REPEAL.

Session and Chapter.	Title.	Extent of repeal.
14 & 15 Vict. c. 102..	The Seamen's Fund Winding-up Act, 1851.	Section forty-eight.
43 & 44 Vict. c. 22 ..	The Merchant Shipping (Fees and Expenses) Act, 1880.	Section four.

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50 & 51 Vict. c. 66.

An Act to amend the Law relating to the discharge of Bankrupts and the closure of Bankruptcy Proceedings.

[16*th September*, 1887.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title and construction.

1.—(1.) This Act may be cited as the Bankruptcy (Discharge and Closure) Act, 1887.

(2.) Expressions used in this Act shall, unless a contrary intention appears, have the same meaning as in the Bankruptcy Act, 1883.

Proceedings for discharge of bankrupt under repealed Bankruptcy Acts. 32 & 33 Vict. c. 71.

2.—(1.) A debtor who has been adjudged bankrupt, or whose affairs have been liquidated by arrangement under the Bankruptcy Act, 1869, or any previous Bankruptcy Act, and who has not obtained his discharge, may apply to the court for an order of discharge, and thereupon the court shall appoint a day for hearing the application in open court.

(2.) Notice of the appointment by the court of the day for hearing the application for discharge shall twenty-one days at least before the day so appointed be sent by the debtor to each creditor who has proved in the

bankruptcy or liquidation, or to those of them whose addresses appear in the debtor's statement of affairs or are known to the debtor, and shall also, fourteen days at least before the day so appointed, be published in the London Gazette.

(3.) On the hearing of the application the court may hear any creditor, and may put such questions to the debtor and receive such evidence as the court thinks fit, and, on being satisfied that the notice required by this section has been duly sent and published, may either grant or refuse the order of discharge or suspend the operation of the order for a specified time, or grant the order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the debtor, or with respect to his after-acquired property: Provided that the court shall refuse the discharge in all cases where the court is satisfied by evidence that the debtor has committed any misdemeanour under Part Two of the Debtors Act, 1869, or any amendment thereof. 32 & 33 Vict. c. 62.

(4.) The court may, as one of the conditions referred to in this section, require the debtor to consent to judgment being entered against him in the court having jurisdiction in the bankruptcy or liquidation by the official receiver of the court, or the trustee or assignee in the bankruptcy or liquidation, for any balance of the debts provable under the bankruptcy or liquidation which is not satisfied at the date of the discharge, or for such sum as the court shall think fit, but in such case execution shall not be issued on the judgment without the leave of the court, which leave may be given on proof that the debtor has since his discharge acquired property or income available for payment of his debts.

(5.) A discharge granted under this section shall have the same effect as if it had been granted in pursuance of the Act under which the debtor was adjudged bankrupt or liquidated his affairs by arrangement.

Proceedings for closing bankruptcies under Bankruptcy Act, 1869.

3.—(1.) Every bankruptcy under the Bankruptcy Act, 1869, which is pending on the thirty-first day of December one thousand eight hundred and eighty-seven shall, by virtue of this Act, be closed on that day unless the court otherwise orders.

(2.) Subject to the provisions of this section, the court may, on the application of the trustee under any such bankruptcy, and on being satisfied that there are special circumstances rendering it expedient to postpone the close of the bankruptcy, make an order postponing the close of the bankruptcy until such date as the court may from time to time determine.

(3.) The order may be made either before or after the said day, but an application under this section shall not be entertained unless made before the said day.

(4.) The trustees shall, before making an application under this section, give notice to the Board of Trade of his intention to do so, and shall supply the Board with such information as the Board may require as to the position of the bankruptcy, and the court before making an order under this section shall consider any representation which may be made by or on behalf of the Board of Trade with respect thereto.

In bankruptcies, insolvencies, or arrangements under Acts prior to 1869 in the London district, official assignee may be appointed to supersede creditors assignee.

4.—(1.) In each of the following cases, that is to say:

(a) Any insolvency under any Act for the relief of insolvent debtors;

(b) Any commission, fiat, or adjudication in bankruptcy within the jurisdiction of the old London Bankruptcy Court, under any Act prior to the Bankruptcy Act, 1869;

(c) Any administration by way of arrangement pursuant to an Act of the session held in the seventh and eighth years of the reign of Her Majesty, chapter seventy, entitled "An Act for facilitating arrangements between debtors and creditors," or pursuant to the provisions of the Bankrupt Law Consolidation Act, 1849, or the hundred and ninety-second section of the Bankruptcy Act, 1861, within the jurisdiction of the old London Bankruptcy Court,

in which the estate is now vested in a creditors assignee, or trustee, or inspector, either alone or jointly with the official assignee, the court may at any time after the passing of this Act, upon the application of any creditor, and upon being satisfied that there is good ground for removing such creditors assignee, trustee, or inspector, or in any other case in which it shall appear to the court just or expedient, appoint the official assignee, or any person appointed under the one hundred and fifty-third section of the Bankruptcy Act, 1883, to perform the remaining duties of the office of official 46 & 47 Vict. c. 52.

assignee, to be sole assignee, or trustee, or inspector of the estate in the place of such creditors assignee, trustee, or inspector, as the case may be.

(2.) Such appointment shall operate as a removal of the creditors assignee, trustee, or inspector of the estate, and shall vest the whole of the property of the bankrupt or debtor in the official assignee or person appointed by the Board of Trade as aforesaid alone; and all estate, rights, powers, and duties of such former creditors assignee, trustee, or inspector shall thereupon vest in and devolve upon the official assignee or person appointed by the Board of Trade as aforesaid alone.

Provision to release trustee.

5. An application by a trustee in a bankruptcy under the Bankruptcy Act, 1869, to the comptroller in bankruptcy for a report on his accounts with a view to his release shall not be entertained unless made within twelve months after the close of the bankruptcy.

Effect of release.

6.—(1.) Where on the close of a bankruptcy or liquidation, or on the release of a trustee, a registrar or official receiver or official assignee is or is acting as trustee, and where under section one hundred and fifty-nine, section one hundred and sixty, or section one hundred and sixty-one of the Bankruptcy Act, 1883, an official receiver is or is acting as trustee, no liability shall attach to him personally in respect of any act done or default made or liability incurred by any prior trustee.

(2.) Section eighty-two of the Bankruptcy Act, 1883 (which section relates to the release of a trustee), shall, with the exception of sub-section four thereof, apply to an official receiver or official assignee when he is or is acting as trustee, and when an official receiver or official assignee has been released under that section he shall continue to act as trustee for any subsequent purposes of the administration of the debtor's estate, but no liability shall attach to him personally by reason of his so continuing in respect of any act done, default made, or liability incurred before his release.

Disposal of old books and papers.

40 & 41 Vict. c. 55.

7. All books and papers in the custody of an official receiver or official assignee, or of the acting comptroller in bankruptcy, and relating to any bankruptcy under the Bankruptcy Act, 1869, may, on the expiration of one year after the close of the bankruptcy, be disposed of in accordance with rules made under section one of the Public Records Office Act, 1877, and that section shall apply accordingly.

Power to make rules and prescribe fees.

8.—(1.) General rules for carrying into effect the objects of this Act may from time to time be made, revoked, or altered by the same authority and subject to the same provisions as general rules for carrying into effect the objects of the Bankruptcy Act, 1883.

(2.) There shall be paid in respect of proceedings under this Act such fees as the Lord Chancellor may, with the sanction of the Treasury, from time to time prescribe, and the Treasury may direct by whom and in what manner the same are to be collected and accounted for, and to what account they are to be paid.

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51 & 52 VICT. C. 25.

An Act for the better regulation of Railway and Canal Traffic, and for other purposes.

[10*th August*, 1888.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title and construction.

36 & 37 Vict. c. 48.

1. This Act may be cited as the Railway and Canal Traffic Act, 1888.

This Act shall be construed as one with the Regulation of Railways Act, 1873, and the Acts amending it; and those Acts and this Act may be cited together as the Railway and Canal Traffic Acts, 1873 and 1888.

PART I.

COURT AND PROCEDURE OF RAILWAY AND CANAL COMMISSIONERS.

Establishment of Railway and Canal Commission.

Establishment of new Railway and Canal Commission.

2. On the expiration of the provisions of the Regulation of Railways Act, 1873, with respect to the commissioners therein mentioned, there shall be established a new Commission, styled the Railway and Canal Commission (in this Act referred to as the commissioners), and consisting of two appointed and three ex officio commissioners; and such commission shall be a court of record, and have an official seal, which shall be judicially noticed. The commissioners may act notwithstanding any vacancy in their body.

Appointment and tenure of office of appointed commissioners.

3.—(1.) The two appointed commissioners may be appointed by her Majesty at any time after the passing of this Act, and from time to time as vacancies occur.

(2.) They shall be appointed on the recommendation of the President of the Board of Trade, and one of them shall be of experience in railway business.

(3.) Section five of the Regulation of Railways Act, 1873, shall apply to each appointed commissioner.

(4.) There shall be paid to each appointed commissioner such salary not exceeding three thousand pounds a year as the President of the Board of Trade may, with the concurrence of the Treasury, determine.

(5.) It shall be lawful for the Lord Chancellor, if he think fit, to remove for inability or misbehaviour any appointed commissioner.

Appointment and attendance of ex officio commissioners.

4.—(1.) Of the three ex officio commissioners of the Railway and Canal Commission one shall be nominated for England, one for Scotland, and one for Ireland; and an ex officio commissioner shall not be required to attend out of the part of the United Kingdom for which he is nominated.

(2.) The ex officio commissioner in each case shall be such judge of a superior court as—

(a) in England the Lord Chancellor; and

(b) in Scotland the Lord President of the Court of Session; and

(c) in Ireland the Lord Chancellor of Ireland;

may from time to time by writing under his hand assign, and such assignment shall be made for a period of not less than five years.

(3.) For the purpose of the attendance of the ex officio commissioners, regulations shall be made from time to time by the Lord Chancellor, the Lord President of the Court of Session, and the Lord Chancellor of Ireland respectively, in communication with the ex officio commissioners for England, Scotland, or Ireland, as the case may be, as to the arrangements for securing their attendance, as to the times and place of sitting in each case, and otherwise for the convenient and speedy hearing thereof.

Sittings of commissioners.

5.—(1.) Subject to the provisions of this Act, and to general rules under this Act, the commissioners may hold sittings in any part of the United Kingdom, in such place or places as may be most convenient for the determination of proceedings before them.

(2.) The central office of the commissioners shall be in London, and the commissioners when holding a public sitting in London shall hold the same at the Royal Courts of Justice, or at such other place as the Lord Chancellor may from time to time appoint.

(3.) Not less than three commissioners shall attend at the hearing of any case, and the ex officio commissioner shall preside, and his opinion upon any question which in the opinion of the commissioners is a question of law shall prevail.

36 & 37 Vict. c. 48.

(4.) Save as aforesaid, section twenty-seven of the Regulation of Railways Act, 1873, shall apply, and any act may be done by any two commissioners.

(5.) Every judge who may with his consent be assigned to hold the office of ex officio commissioner shall attend to hear any cases before the commission, which as ex officio commissioner he is required to hear, when and as soon as the cases are ready to be heard, or as soon thereafter as reasonably may be; and any such judge shall be required to perform any of the other duties of a judge of a superior court only when his attendance on the commission is not required.

(6.) If and when any judge who may be assigned to hold the office of ex officio commissioner is temporarily unable to attend, the Lord Chancellor

in England, the Lord President of the Court of Session in Scotland, and the Lord Chancellor in Ireland, may respectively nominate any judge of a superior court to sit as ex officio commissioner in place of the judge who is so temporarily unable to attend as aforesaid, and the judge so nominated shall for the purpose of any case which he may hear be an ex officio commissioner.

(7.) If the President of the Board of Trade is satisfied either of the inability of an appointed commissioner to attend at the hearing of any case, or of there being a vacancy in the office, and in either case of the necessity of a speedy hearing of the case, he may appoint a temporary commissioner to hear such case, and such commissioner, for all purposes connected with such case, shall, until the final determination thereof, have the same jurisdiction and powers as if he were an appointed commissioner. A temporary commissioner shall be paid such sum by the commissioner so unable to sit, or, if the office is vacant, out of the salary of the office, as the President of the Board of Trade may assign.

Appointment of additional judge.

6. On an address from both Houses of Parliament representing that, regard being had to the duties imposed by this Act on the ex officio commissioners, the state of business of the High Court in England requires the appointment of an additional judge of that court, it shall be lawful for her Majesty to appoint an additional judge of such court, and from time to time, on a like address but not otherwise, to fill any vacancy in such judgeship, and the law relating to the appointment and qualification of the judges of such superior court, to their duties and tenure of office, to their precedence, salary and pension, and otherwise, shall apply to any judge so appointed under this section, and a judge so appointed under this section shall be attached to such division or branch of the court as her Majesty may direct, subject to such power of transfer as may exist in the case of any other judge of such division or branch.

Provision for complaints by public authority in certain cases.

7.—(1.) Any of the following authorities, that is to say—

(a) any of the following local authorities, namely, any harbour board, or conservancy authority, the common council of the city of London, any council of a city or borough, any representative county body which may be created by an Act passed in the present or any future session of Parliament, any justices in quarter sessions assembled, the commissioners of supply of any county in Scotland, the Metropolitan Board of Works, or any urban sanitary authority not being a council as aforesaid, or any rural sanitary authority; or

(b) any such association of traders or freighters, or chamber of commerce or agriculture as may obtain a certificate from the Board of Trade that it is, in the opinion of the Board of Trade, a proper body to make such complaint,

may make to the commissioners any complaint which the commissoners have jurisdiction to determine, and may do so without proof that such authority is aggrieved by the matter complained of, and any of such authorities may appear in opposition to any complaint which the commissioners have jurisdiction to determine in any case where such authority, or the persons represented by them, appear to the commissioners to be likely to be affected by any determination of the commissioners upon such complaint.

(2.) The Board of Trade may, if they think fit, require, as a condition of giving a certificate under this section, that security be given in such manner and to such amount as they think necessary for any costs which the complainants may be ordered to pay or bear.

(3.) Any certificate granted under this section shall, unless withdrawn, be in force for twelve months from the date on which it was given.

Jurisdiction.

Jurisdiction of Railway Commissioners transferred to the Commission.

8. There shall be transferred to and vested in the commissioners all the jurisdiction and powers which at the commencement of this Act were vested in, or capable of being exercised by the Railway Commissioners, whether under the Regulation of Railways Act, 1873, or any other Act, or otherwise, and any reference to the Railway Commissioners in the Regulation of Railways Act, 1873, or in any other Act, or in any document, shall, from and after the commencement of this Act, be construed to refer to the Railway and Canal Commission established by this Act.

Jurisdiction of commissioners under special Acts. 17 & 18 Vict. c. 31.

9. Where any enactment in a special Act—

(a) contains provisions relating to traffic facilities, undue preference, or other matters mentioned in section two of the Railway and Canal Traffic Act, 1854 (*a*), or

(b) requires a company to which this part of this Act applies to provide any station, road, or other similar work for public accommodation, or

(c) otherwise imposes on a company to which this part of this Act applies any obligation in favour of the public or any individual,

or where any Act contains provisions relating to private branch railways or private sidings, the commissioners shall have the like jurisdiction to hear and determine a complaint of a contravention of the enactment as the commissioners have to hear and determine a complaint of a contravention of section two of the Railway and Canal Traffic Act, 1854, as amended by subsequent Acts.

Jurisdiction over tolls and rates.

10. Where any question or dispute arises, involving the legality of any toll, rate, or charge, or portion of a toll, rate, or charge, charged or sought to be charged for merchandise traffic by a company to which this part of this Act applies, the commissioners shall have jurisdiction to hear and determine the same, and to enforce payment of such toll, rate, or charge, or so much thereof as the commissioners decide to be legal.

Jurisdiction to order traffic facilities, notwithstanding agreements.

11. Nothing in any agreement, whether made before or after the passing of this Act, which has not been confirmed by Act or by the Board of Trade, or by the commissioners under the Regulation of Railways Act, 1873, or this Act, shall render a company to which this part of this Act applies unable to afford, or shall authorise such company to refuse, such reasonable facilities for traffic as may in the opinion of the commissioners be required in the interests of the public, or shall prevent the commissioners from making or enforcing any order with respect to such facilities.

Power to award damages.

12. Where the commissioners have jurisdiction to hear and determine any matter, they may, in addition to or in substitution for any other relief, award to any complaining party who is aggrieved such damages as they find him to have sustained; and such award of damages shall be in complete satisfaction of any claim for damages, including repayment of overcharges, which, but for this Act, such party would have had by reason of the matter of complaint.

Provided that such damages shall not be awarded unless complaint has been made to the commissioners within one year from the discovery by the party aggrieved of the matter complained of.

The commissioners may ascertain the amount of such damages either by trial before themselves, or by directing an inquiry to be taken before one or more of themselves or before some officer of their court.

No damages where rates published under certain conditions.

13. In cases of complaint of undue preference no damages shall be awarded if the commissioners shall find that the rates complained of have, for the period during which such rates have been in operation, been duly published in the rate books of the railway company kept at their stations in accordance with section fourteen of the Regulation of Railways Act, 1873, as amended by this Act, unless and until the party complaining shall have given written notice to the railway company requiring them to abstain from or remedy the matter of complaint, and the railway company shall have failed, within a reasonable time, to comply with such requirements in such a manner as the commissioners shall think reasonable.

Orders on two or more companies.

14. The commissioners may order two or more companies to which this part of this Act applies to carry into effect an order of the commissioners, and to make mutual arrangements for that purpose, and may further order the companies or, in case of difference, any of them, to submit to the commissioners for approval a scheme for carrying into effect the order, and when the commissioners have finally approved the scheme, they may order each of the companies to do all that is necessary on the part and within the power of such company to carry into effect the scheme, and may determine the proportions in which the respective companies are to defray the expense of so doing, and may for the above purposes make, if they think fit, separate orders on any one or more of such companies.

(*a*) *Supra.*

Provided that nothing in this section shall authorise the commissioners to require two companies to do anything which they would not have jurisdiction to require to be done if such two companies were a single company.

Amendment of 36 & 37 Vict. c. 48, s. 8, as to references to arbitration.

15. For the purposes of section eight of the Regulation of Railways Act, 1873, and any other enactment relating to the reference to the Railway Commission of any difference between companies which under the provisions of any general or special Act is required or authorised to be referred to arbitration, the provisions of any agreement confirmed or authorised by any such Act shall be deemed to be provisions of such Act.

Power to apportion expenses between railway company and applicants for works.

16.—(1.) Where the Board of Trade or the commissioners, in the exercise of any power given by any general or special Act, on application order a company to which this part of this Act applies, to provide a bridge, subway, or approach, or any work of a similar character, the Board of Trade or the Commissioners, as the case may be, may require as a condition of making the order that an agreement to pay the whole or a portion of the expenses of complying with the order shall be entered into by the applicants or some of them, or such other persons as the Board of Trade or commissioners think fit, and any of the following local authorities, namely, any sanitary authority, highway board, surveyor of highways acting with the consent of the vestry of his parish, or any other authority having power to levy rates, shall have power, if such authority think fit, to enter into any such agreement as is sanctioned by the Board of Trade or commissioners for the purpose of the order.

(2.) In such case any question respecting the persons by whom or the proportions in which the expenses of complying with the order are to be defrayed may, on the application of any party to the application, or on a certificate of the Board of Trade, be determined by the commissioners.

(3.) In this section the expression "parish" shall have the same meaning as the same expression has in the Acts relating to highways; and the expression "the consent of the vestry of his parish" shall, in any place where there is no vestry meeting, mean the consent of a meeting of inhabitants contributing to the highway rates, provided that the same notice shall have been given of such a meeting as would be required by law for the assembling of a meeting in vestry.

Appeals.

Appeals on certain questions to superior court of appeal.

17.—(1.) No appeal shall lie from the commissioners upon a question of fact, or upon any question regarding the locus standi of a complainant.

(2.) Save as otherwise provided by this Act, an appeal shall lie from the commissioners to a Superior Court of Appeal.

(3.) An appeal shall not be brought except in conformity with such rules of court as may from time to time be made in relation to such appeals by the authority having power to make rules of court for the Superior Court of Appeal.

(4.) On the hearing of an appeal the Court of Appeal may draw all such inferences as are not inconsistent with the facts expressly found, and are necessary for determining the question of law, and shall have all such powers for that purpose as if the appeal were an appeal from a judgment of a Superior Court, and may make any order which the commissioners could have made, and also any such further or other order as may be just, and the costs of and incidental to an appeal shall be in the discretion of the Court of Appeal, but no commissioner shall be liable to any costs by reason or in respect of any appeal.

(5.) The decision of the Superior Court of Appeal shall be final: provided that where there has been a difference of opinion between any two of such Superior Courts of Appeal, any Superior Court of Appeal in which a matter affected by such difference of opinion is pending may give leave to appeal to the House of Lords, on such terms as to costs as such court shall determine.

(6.) Save as provided by this Act, an order or proceeding of the commissioners shall not be questioned or reviewed, and shall not be restrained or removed by prohibition, injunction, certiorari, or otherwise, either at the instance of the Crown or otherwise.

Supplemental.

General powers and enforcement of orders.

18.—(1.) For the purposes of this Act the commissioners shall have full jurisdiction to hear and determine all matters whether of law or of fact, and

shall as respects the attendance and examination of witnesses, the production and inspection of documents, the enforcement of their orders, the entry on and inspection of property, and other matters necessary or proper for the due exercise of their jurisdiction under this Act, or otherwise for carrying this Act into effect, have all such powers, rights, and privileges as are vested in a Superior Court: provided that no person shall be punished for contempt of court, except with the consent of an ex officio commissioner.

(2.) The commissioners may review and rescind or vary any order made by them; but, save as is by this Act provided, every decision or order of the commissioners shall be final.

Costs.

19. The costs of and incidental to every proceeding before the commissioners shall be in the discretion of the commissioners, who may order by whom and to whom the same are to be paid, and by whom the same are to be taxed and allowed.

Power to make rules.

20.—(1.) The commissioners may from time to time, with the approval of the Lord Chancellor and the President of the Board of Trade, make, rescind, and vary general rules for their procedure and practice under this Act, and generally for carrying into effect this part of this Act.

(2.) All rules made under this section shall be laid before Parliament within three weeks after they are made, if Parliament is then sitting, and if Parliament is not then sitting within three weeks after the beginning of the then next session of Parliament, and shall be judicially noticed, and shall have effect as if they were enacted by this Act.

Appointment of officers, clerks, &c.

21.—(1.) There shall be attached to the Railway and Canal Commission such officers, clerks, and messengers as the Lord Chancellor, with the consent of the Treasury as to number, from time to time appoints.

(2.) There shall be paid to each of such officers, clerks, and messengers, such salaries as the Treasury from time to time determine.

Salaries, expenses, &c.

22. The salaries of the appointed commissioners, and of all officers, clerks, and messengers attached to the Railway and Canal Commission, and all the expenses of the said commission of and incidental to the carrying out of this Act, shall be paid out of moneys to be provided by Parliament.

Company to which Part I. applies.

23. This part of this Act shall apply to any railway company, and to any canal company, and to any railway and canal company.

PART II.

TRAFFIC.

Revised classification of traffic and schedule of rates.

24.—(1.) Notwithstanding any provision in any general or special Act, every railway company shall submit to the Board of Trade a revised classification of merchandise traffic, and a revised schedule of maximum rates and charges applicable thereto, proposed to be charged by such railway company, and shall fully state in such classification and schedule the nature and amounts of all terminal charges proposed to be authorised in respect of each class of traffic, and the circumstances under which such terminal charges are proposed to be made. In the determination of the terminal charges of any railway company regard shall be had only to the expenditure reasonably necessary to provide the accommodation in respect of which such charges are made, irrespective of the outlay which may have been actually incurred by the railway company in providing that accommodation.

(2.) The classification and schedule shall be submitted within six months from the passing of this Act, or such further time as the Board of Trade may, in any particular case, permit, and shall be published in such manner as the Board of Trade may direct.

(3.) The Board of Trade shall consider the classification and schedule, and any objections thereto, which may be lodged with them on or before the prescribed time and in the prescribed manner, and shall communicate with the railway company and the persons (if any) who have lodged objections, for the purpose of arranging the differences which may have arisen.

(4.) If, after hearing all parties whom the Board of Trade consider to be

entitled to be heard before them respecting the classification and schedule, the Board of Trade come to an agreement with the railway company as to the classification and schedule, they shall embody the agreed classification and schedule in a Provisional Order, and shall make a report thereon, to be submitted to Parliament, containing such observations as they think fit in relation to the agreed classification and schedule.

(5.) When any agreed classification and schedule have been embodied in a Provisional Order, the Board of Trade, as soon as they conveniently can after the making of the Provisional Order (of which the railway company shall be deemed to be the promoters), shall procure a Bill to be introduced into either House of Parliament for an Act to confirm the Provisional Order, which shall be set out at length in the schedule to the Bill.

(6.) In any case in which a railway company fails within the time mentioned in this section to submit a classification and schedule to the Board of Trade, and also in every case in which a railway company has submitted to the Board of Trade a classification and schedule, and after hearing all parties whom the Board of Trade consider to be entitled to be heard before them, the Board of Trade are unable to come to an agreement with the railway company as to the railway company's classification and schedule, the Board of Trade shall determine the classification of traffic which, in the opinion of the Board of Trade, ought to be adopted by the railway company, and the schedule of maximum rates and charges, including all terminal charges proposed to be authorised applicable to such classification which would, in the opinion of the Board of Trade, be just and reasonable, and shall make a report, to be submitted to Parliament, containing such observations as they may think fit in relation to the said classification and schedule, and calling attention to the points therein on which differences which have arisen have not been arranged.

(7.) After the commencement of the session of Parliament next after that in which the said report of the Board of Trade has been submitted to Parliament, the railway company may apply to the Board of Trade to submit to Parliament the question of the classification and schedule which ought to be adopted by the railway company, and the Board of Trade shall on such application, and in any case may, embody in a Provisional Order such classification and schedule as in the opinion of the Board of Trade ought to be adopted by the railway company, and procure a Bill to be introduced into either House of Parliament for an Act to confirm the Provisional Order, which shall be set out at length in the schedule to the Bill.

(8.) If, while any Bill to confirm a Provisional Order made by the Board of Trade under this section is pending in either House of Parliament, a petition is presented against the Bill or any classification and schedule comprised therein, the Bill, so far as it relates to the matter petitioned against, shall be referred to a Select Committee, or if the two Houses of Parliament think fit so to order, to a joint committee of such Houses, and the petitioner shall be allowed to appear and oppose as in the case of a private Bill.

(9.) In preparing, revising, and settling the classifications and schedules of rates and charges, the Board of Trade may consult and employ such skilled persons as they may deem necessary or desirable; and they may pay to such persons such remuneration as they may think fit and as the Treasury may approve.

(10.) The Act of Parliament confirming any Provisional Order made under this section shall be a public general Act, and the rates and charges mentioned in a Provisional Order as confirmed by such Act shall, from and after the Act coming into operation, be the rates and charges which the railway company shall be entitled to charge and make.

(11.) At any time after the confirmation of any Provisional Order under this section any railway company may, and any person, upon giving not less than twenty-one days notice to the railway company may, apply in the prescribed manner to the Board of Trade to amend any classification and schedule by adding thereto any articles, matters, or things, and the Board of Trade may hear and determine such application, and classify and deal with the articles, matters, or things referred to therein in such manner as the Board of Trade shall think right. Every determination of the Board of Trade under this sub-section shall forthwith be published in the "London Gazette," and shall take effect as from the date of the publication thereof.

(12.) Nothing in this section shall apply to any remuneration payable by

the Postmaster-General to any railway company for the conveyance of mails, letter bags, or parcels under any general or special Act relating to the conveyance of mails, or under the Post Office (Parcels) Act, 1882. 45 & 46 Vict. c. 74.

(13.) Nothing in this section shall apply to any remuneration payable by the Secretary of State for War to any railway company for the conveyance of War Office stores under the powers conferred by the Cheap Trains Act, 1883. 46 & 47 Vict. c. 34.

Provisions as to through traffic.

25. Whereas by section two of the Railway and Canal Traffic Act, 1854 (*a*), it is enacted that every railway company and canal company, and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles; and that no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, or shall subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and that every railway company and canal company and railway and canal company having or working railways or canals which form part of a continuous line of railway, or canal or railway and canal communication, or which have the terminus station or wharf of the one near the terminus station or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding by one of such railways or canals all the traffic arriving by the other, without any unreasonable delay, and without any such prefereuce or advantage or prejudice or disadvantage as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may by means of the railways and canals of the several companies be at all times afforded to the public in that behalf:

And whereas it is expedient to explain and amend the said enactment:

Be it therefore enacted, that—

Subject as hereinafter mentioned, the said facilities to be so afforded are hereby declared to and shall include the due and reasonable receiving, forwarding, and delivering by every railway company and canal company and railway and canal company, at the request of any other such company, of through traffic to and from the railway or canal of any other such company at through rates, tolls, or fares (in this Act referred to as through rates); and also the due and reasonable receiving, forwarding, and delivering by every railway company and canal company and railway and canal company, at the request of any person interested in through traffic, of such traffic at through rates: Provided that no application shall be made to the commissioners by such person until he has made a complaint to the Board of Trade under the provisions of this Act as to complaints to the Board of Trade of unreasonable charges, and the Board of Trade have heard the complaint in the manner herein provided.

Provided as follows:

(1.) The company or person requiring the traffic to be forwarded shall give written notice of the proposed through rate to each forwarding company, stating both its amount and the route by which the traffic is proposed to be forwarded; and when a company gives such notice it shall also state the apportionment of the through rate. The proposed through rate may be per truck or per ton:

(2.) Each forwarding company shall, within ten days, or such longer period as the commissioners may from time to time by general order prescribe, after the receipt of such notice, by written notice inform the company or persons requiring the traffic to be forwarded, whether they agree to the rate and route; and if they object to either, the grounds of the objection:

(3.) If at the expiration of the prescribed period no such objection has been sent by any forwarding company, the rate shall come into operation at such expiration:

(4.) If an objection to the rate or route has been sent within the

(*a*) *Supra.*

prescribed period, the matter shall be referred to the commissioners for their decision:

(5.) If an objection be made to the granting of the rate or to the route, the commissioners shall consider whether the granting of a rate is a due and reasonable facility in the interest of the public, and whether, having regard to the circumstances, the route proposed is a reasonable route, and shall allow or refuse the rate accordingly, or fix such other rate as may seem to the commissioners just and reasonable:

(6.) Where, upon the application of a person requiring traffic to be forwarded, a through rate is agreed to by the forwarding companies, or is made by order of the commissioners, the apportionment of such through rate, if not agreed upon between the forwarding companies, shall be determined by the commissioners:

(7.) If the objection be only to the apportionment of the rate, the rate shall come into operation at the expiration of the prescribed period, but the decision of the commissioners, as to its apportionment, shall be retrospective; in any other case the operation of the rate shall be suspended until the decision is given:

(8.) The commissioners, in apportioning the through rate, shall take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance, or working of the route, or any part of the route, as well as any special charges which any company may have been entitled to make in respect thereof:

(9.) It shall not be lawful for the commissioners in any case to compel any company to accept lower mileage rates than the mileage rates which such company may for the time being legally be charging for like traffic carried by a like mode of transit on any other line of communication between the same points, being the points of departure and arrival of the through route.

Where a railway company or canal company use, maintain, or work, or are party to an arrangement for using, maintaining, or working steam vessels for the purpose of carrying on a communication between any towns or ports, the provisions of this section shall extend to such steam vessels, and to the traffic carried thereby.

When any company, upon written notice being given as aforesaid, refuses or neglects without reason to agree to the proposed through rates, or to the route, or to the apportionment, the commissioners, if an order is made by them upon an application for through rates, may order the respondent company or companies to pay such costs to the applicants as they think fit.

Powers of commissioners as to through rates.

26. Subject to the provisions in the last preceding section contained, the commissioners shall have full power to decide that any proposed through rate is just and reasonable, notwithstanding that a less amount may be allotted to any forwarding company out of such through rate than the maximum rate such company is entitled to charge, and to allow and apportion such through rate accordingly.

Undue preference in case of unequal tolls, rates, and charges, and unequal services performed.

27.—(1.) Whenever it is shown that any railway company charge one trader or class of traders, or the traders in any district, lower tolls, rates, or charges for the same or similar merchandise, or lower tolls, rates, or charges for the same or similar services, than they charge to other traders, or classes of traders, or to the traders in another district, or make any difference in treatment in respect of any such trader or traders, the burden of proving that such lower charge or difference in treatment does not amount to an undue preference shall lie on the railway company.

(2.) In deciding whether a lower charge or difference in treatment does or does not amount to an undue preference, the court having jurisdiction in the matter, or the commissioners, as the case may be, may, so far as they think reasonable, in addition to any other considerations affecting the case, take into consideration whether such lower charge or difference in treatment is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant: Provided that no railway company shall make, nor shall the court, or the commissioners, sanction any difference in the tolls, rates, or charges made for, or any difference in the treatment of, home and foreign merchandise, in respect of the same or similar services.

(3.) The court or the commissioners shall have power to direct that no higher charge shall be made to any person for services in respect of merchandise carried over a less distance than is made to any other person for similar services in respect of the like description and quantity of merchandise carried over a greater distance on the same line of railway.

Extension of enactments as to undue preference to goods carried by sea.

28. The provisions of section two of the Railway and Canal Traffic Act, 1854 (*a*), and of section fourteen of the Regulation of Railways Act, 1873 (*b*), and of any enactments amending and extending those enactments, shall apply to traffic by sea in any vessels belonging to or chartered or worked by any railway company, or in which any railway company procures merchandise to be carried, in the same manner and to the like extent as they apply to the land traffic of a railway company.

Group rates to be chargeable by railway companies.

29.—(1.) Notwithstanding any provision in any general or special Act, it shall be lawful for any railway company, for the purpose of fixing the rates to be charged for the carriage of merchandise to and from any place on their railway, to group together any number of places in the same district, situated at various distances from any point of destination or departure of merchandise, and to charge a uniform rate or uniform rates of carriage for merchandise to and from all places comprised in the group from and to any point of destination or departure.

(2.) Provided that the distances shall not be unreasonable, and that the group rates charged and the places grouped together shall not be such as to create an undue preference.

(3.) Where any group rate exists or is proposed, and in any case where there is a doubt whether any rates charged or proposed to be charged by a railway company may not be a contravention of section two of the Railway and Canal Traffic Act, 1854, and any Acts amending the same, the railway company may, upon giving notice in the prescribed manner, apply to the commissioners, and the commissioners may, after hearing the parties interested and any of the authorities mentioned in section seven of this Act, determine whether such group rate or any rate charged or proposed to be charged as aforesaid does or does not create an undue preference. Any persons aggrieved, and any of the authorities mentioned in section seven of this Act, may, at any time after the making of any order under this section, apply to the commissioners to vary or rescind the order, and the commissioners, after hearing all parties who are interested, may make an order accordingly.

Power to dock companies and harbour boards to complain of undue preference.

30. Any port or harbour authority or dock company which shall have reason to believe that any railway company is by its rates or otherwise placing their port, harbour, or dock, at an undue disadvantage as compared with any other port, harbour, or dock to or from which traffic is or may be carried by means of the lines of the said railway company, either alone or in conjunction with those of other railway companies, may make complaint thereof to the commissioners, who shall have the like jurisdiction to hear and determine the subject-matter of such complaint as they have to hear and determine a complaint of a contravention of section two of the Railway and Canal Traffic Act, 1854, as amended by subsequent Acts.

Complaints to Board of Trade of unreasonable charges by railway companies.

31.—(1.) Whenever any person receiving or sending or desiring to send goods by any railway is of opinion that the railway company is charging him an unfair or an unreasonable rate of charge, or is in any other respect treating him in an oppressive or unreasonable manner, such person may complain to the Board of Trade.

(2.) The Board of Trade, if they think that there is reasonable ground for the complaint, may thereupon call upon the railway company for an explanation, and endeavour to settle amicably the differences between the complainant and the railway company.

(3.) For the purpose aforesaid, the Board of Trade may appoint either one of their own officers or any other competent person to communicate with the complainant and the railway company, and to receive and consider such explanations and communications as may be made in reference to the complaint; and the Board of Trade may pay to such last-mentioned person such remuneration as they may think fit, and as may be approved by the Treasury.

(4.) The Board of Trade shall from time to time submit to Parliament

(*a*) *Supra.* (*b*) *Supra.*

reports of the complaints made to them under the provisions of this section, and the results of the proceedings taken in relation to such complaints, together with such observations thereon as the Board of Trade shall think fit.

(5.) A complaint under this section may be made to the Board of Trade by any of the authorities mentioned in section seven of this Act, in any case in which, in the opinion of any of such authorities, they or any traders or persons in their district are being charged unfair or unreasonable rates by a railway company; and all the provisions of this section shall apply to a complaint so made as if the same had been made by a person entitled to make a complaint under this section.

Annual returns by railway companies to contain such statistics as the Board of Trade shall require. 34 & 35 Vict. c. 78, s. 9. 36 & 37 Vict. c. 76.

32.—(1.) The returns required of a railway company under section nine of the Railways Regulation Act, 1871, shall include such statements as the Board of Trade may from time to time prescribe, and the forms referred to in that section may from time to time he altered by the Board of Trade in such manner as they think expedient for giving effect to this section, and the said section nine of the Railways Regulation Act, 1871, shall apply accordingly.

(2.) The Board of Trade may from time to time alter the times fixed by the said Act or by the Railways Regulation Act (Returns of Signal Arrangements, Workings, &c.), 1873, for the forwarding of any of the returns required by the said Act or this Act.

Classification table to be open for inspection. Copies to be sold.

33—(1.) The book, tables, or other document in use for the time being containing the general classification of merchandise carried on the railway of any company, shall, during all reasonable hours, be open to the inspection of any person without the payment of any fee at every station at which merchandise is received for conveyance, or where merchandise is received at some other place than a station then at the station nearest such place, and the said book, tables, or other document as revised from time to time shall be kept on sale at the principal office of the company at a price not exceeding one shilling.

(2.) Printed copies of the classification of merchandise traffic, and schedule of maximum tolls, rates, and charges of every railway company authorised, as provided by this Act, shall be kept for sale by the railway company at such places and at such reasonable price as the Board of Trade may by any general or special order prescribe.

(3.) The company shall within one week after application in writing made to the secretary of any railway company by any person interested in the carriage of any merchandise which has been or is intended to be carried over the railway of such company, render an account to the person so applying in which the charge made or claimed by the company for the carriage of such merchandise shall be divided, and the charge for conveyance over the railway shall be distinguished from the terminal charges (if any), and from the dock charges (if any), and if any terminal charge or dock charge is included in such account the nature and detail of the terminal expenses or dock charges in respect of which it is made shall be specified.

(4.) Every railway company shall publish at every station at which merchandise is received for conveyance, or where merchandise is received at some other place than a station then at the station nearest to such place, a notice, in such form as may be from time to time prescribed by the Board of Trade, to the effect that such book, tables, and document touching the classification of merchandise and the rates as they are required by this section and section fourteen of the Regulation of Railways Act, 1873, to keep at that station, are open to public inspection, and that information as to any charge can be obtained by application to the secretary or other officer at the address stated in such notice.

36 & 37 Vict c. 48.

(5.) Where a railway company carries merchandise partly by land and partly by sea, all the books, tables, and documents, touching the rates of charge of the railway company, which are kept by the railway company at any port in the United Kingdom used by the vessels which carry the sea traffic of the railway company, shall, besides containing all the rates charged for the sea traffic, state what proportion of any through rate is appropriated to conveyance by sea, distinguishing such proportion from that which is appropriated to the conveyance by land on either side of the sea.

(6.) Where a railway company intend to make any increase in the tolls, rates, or charges published in the books required to be kept by the company for public inspection, under section fourteen of the Regulation of Railways Act, 1873, or this Act, they shall give by publication in such manner as the

Board of Trade may prescribe at least fourteen days notice of such intended increase, stating in such notice the date on which the altered rate or charge is to take effect; and no such increase in the published tolls, rates, or charges of the railway company shall have effect unless and until the fourteen days notice required under this section has been given.

(7.) Any company failing to comply with the provisions of this section shall, for each offence, and in the case of a continuing offence for every day during which the offence continues, be liable, on summary conviction, to a penalty not exceeding five pounds.

Place of publication of rates in respect of traffic at places other than stations.

34. When traffic is received or delivered at any place on any railway other than a station within the meaning of section fourteen of the Regulation of Railways Act, 1873, the railway company on whose line such place is, shall keep at the station nearest such place a book or books showing every rate for the time being charged for the carriage of traffic other than passengers and their luggage, from such place to any place to which they book, including any rates charged under any special contract, and stating the distance from that place of every station, wharf, siding, or place to which such rate is charged.

Every such book shall, during all reasonable hours, be open to the inspection of any person without the payment of a fee.

Power to make rules for purposes of Part II. of Act.

35.—(1.) The Board of Trade may from time to time make, rescind, and vary rules with respect to the following matters:—

(a) The form and manner in which classifications and schedules under this part of this Act are to be prepared and submitted to the Board of of Trade and to Parliament, and the publication, advertisement, and settlement (by the Board of Trade) of such classifications and schedules, and of provisional orders;

(b) All proceedings before the Board of Trade under this part of this Act;

(c) The fees to be paid in respect of such proceedings; and

(d) Any matter authorized by this Act to be prescribed.

(2.) Any rules made by the Board of Trade in pursuance of this section shall be laid before Parliament within three weeks after they are made, if Parliament be then sitting, and if Parliament be not then sitting, within three weeks after the beginning of the then next session of Parliament, and shall be judicially noticed, and shall have effect as if they were enacted by this Act.

PART III.

CANALS.

Part II. to extend to canal companies.

36. All the provisions of Part II. of this Act relating to any railway company shall, so far as applicable, apply to every canal company, and to every railway and canal company; and in Part II. of this Act, unless the context otherwise requires, the expression "railway company" shall include a canal company and railway and canal company, and the expression "railway" shall include a canal, and the expression "rate" shall include tolls and dues of every description chargeable for the use of any canal or by any canal company.

Application of 36 & 37 Vict. c. 48, to canals.

37.—(1.) Section fifteen of the Regulation of Railways Act, 1873, shall apply to the terminal charges of a canal company.

(2.) The Railway and Canal Traffic Act, 1854, as amended by the Regulation of Railways Act, 1873, shall extend to any person whose consent is required to any variation of the rates, tolls, or dues charged for the use of any canal, or by any canal company, in like manner as if such person were a canal company, and the expressions "canal company" and "railway and canal company" in the said Acts and this Act shall be construed accordingly to include such person.

(3.) The provisions of the Railway and Canal Traffic Act, 1854, and the Regulation of Railways Act, 1873, with respect to rates, shall apply to tolls and dues of every description chargeable for the use of any canal or by any canal company. And nothing in any agreement, whether made before or after the passing of this Act, and whether confirmed by Act of Parliament or

not, and nothing in this Act shall prevent the commissioners from making or enforcing any order for a through rate or toll which may in their opinion be required in the interest of the public.

(4.) Any company allowing traffic to pass from a canal on to any other canal or any railway, or from a railway on to a canal, shall be deemed to be a forwarding company, and the allowing of traffic so to pass shall be deemed to be the forwarding of traffic within the meaning of the above-mentioned Acts.

(5.) The provisions of the Railway and Canal Traffic Act, 1854, and of the Regulation of Railways Act, 1873, and of this Act, with respect to through rates, shall extend to any canals which, in connection with any river or other waterway, form part of a continuous line of water communication, notwithstanding that tolls may not be leviable by authority of Parliament upon such river or other waterway.

Powers of commissioners over canal tolls, rates, and charges where a railway company or its officers own or control the traffic of a canal.

38. Where a railway company, or the directors or officers of a railway company, or any of them or any persons on their behalf, have the control over, or the right to interfere in or concerning the traffic conveyed, or the tolls, rates, or charges levied on the traffic of or for the conveyance of merchandise on a canal, or any part of a canal, and it is proved to the satisfaction of the commissioners that the tolls, rates, or charges levied on the traffic of or for the conveyance of merchandise on the canal are such as are calculated to divert the traffic from the canal to the railway, to the detriment of the canal or persons sending traffic over the canal or other canals adjacent to it—

(1.) The commissioners may, on the application of any person interested in the traffic of the canal, make an order requiring the tolls, rates, and charges levied on the traffic of or for the conveyance of merchandise on the canal, to be altered and adjusted in such a manner that the same shall be reasonable as compared with the rates and charges for the conveyance of merchandise on the railway:

(2.) If within such time as may be prescribed by the order of the commissioners, the tolls, rates, and charges levied on the traffic of or for the conveyance of merchandise on the canal are not altered and adjusted as required by such order, the commissioners may themselves by an order make such alterations in and adjustment of the tolls, rates, and charges levied on the traffic of or for the conveyance of merchandise on the canal as they shall think just and reasonable, and the tolls, rates, and charges as altered and adjusted by the order of the commissioners shall be binding on the company or persons owning or having the control over the traffic of, or the tolls, rates, and charges levied on the traffic of, or for the conveyance of merchandise on the canal:

(3.) No application shall be made to the commissioners under this section until the Board of Trade have certified that the applicant is a fit person to make the application, and that the application is a proper one to be submitted for the adjudication of the commissioners; and no order shall be made by the commissioners under this section unless notice of the application has been served upon such company and persons, and in such manner as the Board of Trade may direct:

(4.) The commissioners may at any time, upon the application of any company or person affected by any order made under this section, and after notice to and hearing such companies and persons as the commissioners may by any general rules or special order prescribe, rescind or vary any order made under this section.

Returns by canal companies.

39.—(1.) Every canal company shall, on or before the first day of January in every year, beginning on the first day of January next after the passing of this Act, send to the registrar of joint stock companies a return stating the name of the company, a short description of their canal, the name of their principal officer, and the place of their office, or, if they have more than one office, of their principal office.

(2.) Every canal company shall within such time as may be prescribed by the Board of Trade, and afterwards from time to time whenever required by the Board of Trade, not being oftener than once in every year, forward to the Board of Trade in such form and manner as the Board may from time to time prescribe, such returns as the Board of Trade may require for the purpose of showing the capacity of such canal for traffic, and the capital, revenue, expenditure, and profits of the canal company.

(3.) When the canal of a canal company, or any part thereof, is intended to be stopped for more than two days, the company shall report to the Board of Trade, stating the time during which such stoppage is intended to last, and when the same is re-opened the company shall so report to the Board of Trade.

(4.) A company failing to comply with this section, shall be liable, on summary conviction, to a fine not exceeding five pounds for every day during which their default continues, and any director, manager, and officer of the company who knowingly and wilfully authorises or permits the default shall be liable, on summary conviction, to the like fine.

Byelaws of canal companies.

40.—(1.) Every canal company shall, before such date as the Board of Trade may prescribe, forward to the Board of Trade true copies, certified in such manner as the Board of Trade direct, of any byelaws or regulations of such company which are in force at the commencement of this Act; and the byelaws of any canal company, copies of which are not forwarded to the Board of Trade as provided by this section, shall from and after the said date cease to have any operation, save in so far as any penalty may have been already incurred under the same.

(2.) A byelaw or regulation of any canal company hereafter to be made under any power which has before or at the time of the passing of this Act been, or which may hereafter be, conferred on any canal company, shall not have any force or effect until two months after a true copy of such byelaw or regulation, certified in such manner as the Board of Trade direct, has been forwarded to the Board of Trade, unless the Board of Trade before the expiration of such period have signified their approbation thereof.

(3.) The Board of Trade may, at any time after any existing or future byelaws or regulations of a canal company have been forwarded to them, notify to the company their disallowance thereof, or of any of them, and in case such byelaws or regulations are in force at the time of the disallowance, the time at which the said byelaws or regulations shall cease to be in force. A byelaw or regulation disallowed by the Board of Trade shall not after such disallowance have any force or effect whatever, save (as regards any byelaw or regulation which may be in force at the time of the disallowance thereof) in so far as any penalty may have been then already incurred under the same.

(4.) The Board of Trade may from time to time make, rescind, and vary such regulations as they think fit with respect to the publication by canal companies of their byelaws and regulations, and with respect to the publication by canal companies of their intention to apply to the Board of Trade for the allowance of any intended byelaws and regulations. Any regulations so made which are for the time being in force, shall have effect as if they had been enacted in this Act.

Inspection of canals.

41. Whenever the Board of Trade are, through their officers or otherwise, informed that the works of any canal are in such a condition as to be dangerous to the public, or to cause serious inconvenience or hindrance to traffic, the Board of Trade may direct such officer or other person as they appoint for the purpose to inspect the said canal and report thereon to the Board of Trade, and for the purpose of making any inspection under this section the officer or person appointed for the purpose shall, in relation to the canal or works to be inspected, have all the powers of an inspector appointed under the Regulation of Railways Act, 1871. 34 & 35 Vict. c. 78.

Misapplication of a railway company's funds for acquisition of unauthorised interest in canal.

42.—(1.) No railway company, or director, or officer of a railway company shall, without express statutory authority, apply or use or authorise or permit the application or use of any part of the company's funds for the purpose of acquiring either in the name of the railway company, or of any director or officer of the railway company, or other person, any canal interest, or of enabling any director or officer of the railway company, or other person, to purchase or acquire any canal interest, or of guaranteeing or repaying to any director or officer of the railway company or other person who has purchased or acquired any canal interest the sums of money expended or liability incurred by such director, officer, or person, in the purchase or acquisition of such canal interest, or any part of such money or liability.

(2.) In the event of any contravention of the provisions of this section, the canal interest purchased in such contravention shall be forfeited to the Crown, and the directors or officers of the company who so applied or used,

or authorised or permitted such application or use of the company's funds, shall be liable to repay to the company the sums so applied or used, and the value of the canal interest so forfeited; and proceedings to compel such repayment may be taken by any shareholder in the company.

(3.) In this section the expression "company's funds" means the corporate funds of any railway company, and includes any funds which are under the control of or administered by a railway company; the expression "officer" includes any person having any control over a company's funds or any part thereof; and the expression "canal interest" means shares in the capital of a canal company, and includes any interest of any kind in a canal company or canal.

Canal companies may agree for through tolls, &c.

43.—(1.) Any canal company may make and enter into contracts and arrangements with any other canal company or canal companies for the passage over and along their respective canals, or any of them, of boats, barges, vessels, and other through traffic, and for the use, by such traffic, of the wharves, landing-places, and other works of any such canal, upon payment of such through tolls, rates, and charges, and subject to such conditions and restrictions as may be agreed upon between such companies; and for the collection and recovery by any one of the companies on behalf of themselves and the other companies interested of the tolls, rates, and charges payable in respect of such through traffic; and for the division and apportionment of the tolls, rates, and charges; and any such contract may contain provisions for the erection and maintenance of or otherwise for providing warehouses, offices, and other buildings and conveniences, and any other provisions for the purpose of carrying into effect any such arrangement, and any company may apply their funds or moneys for the same purpose.

(2.) Notwithstanding any enactments providing for the charge of equal tolls, rates, and charges, such through tolls, rates, and charges as above mentioned may respectively be computed at a lower toll or rate per mile than the tolls, rates, or charges charged for the passage over and along the same canals of like traffic, not being through traffic, without necessitating or occasioning any reduction of the last-mentioned tolls, rates, or charges.

(3.) Any like contracts and arrangements existing at the passing of this Act shall be, and from the respective dates of the making thereof shall be deemed to have been, as valid as if the same had been made after the commencement of this Act.

Canal companies may establish clearing system.

44. For the purpose of facilitating through traffic upon canals, any canal companies upon whose canals through tolls, rates, or charges may be in operation, may establish a canal clearing system, on such principles, in such manner, and subject to such regulations as to the admission of other companies to such system, the retirement of members, the appointment of a committee to conduct the business of the system, and of a secretary or other necessary officers, the mode of conducting business, and such other regulations for carrying into effect such system as may from time to time be approved by the Board of Trade in writing under the hand of the secretary or one of the assistant secretaries of that Board; and any company may apply any funds or money belonging to them, for the purpose of establishing or carrying into effect any such system, and the provisions of sections eleven to twenty-six inclusive of the Railway Clearing Act, 1850, shall, mutatis mutandis, apply to any canal clearing system when so established.

13 & 14 Vict. c. xxxiii.;

Abandonment of canal.

45.—(1.) Where, on the application of a canal company, it appears to the Board of Trade that any canal or part of a canal belonging to the applicants (hereinafter referred to as an unnecessary canal) is at the time of making the application unnecessary for the purposes of public navigation, or where, on the application of any local authority, or of three or more owners of lands adjoining or near to any canal or part of a canal, it appears to the Board of Trade that that canal or part of a canal (hereinafter referred to as a derelict canal) has for at least three years previously to the making of the application been disused for navigation, or, by reason of the default of the proprietors thereof, has become unfit for navigation, or that the lands adjoining or near thereto have suffered injury by water that has escaped from the derelict canal, and that the proprietors of the derelict canal decline or are unable to effect the repairs necessary to prevent further injury, the Board of Trade may by warrant signed by their secretary authorise the abandonment by the existing proprietors of such unnecessary canal or such derelict canal, and after the granting of the warrant, and the due publication as required

by the Board of Trade of a notice of the granting thereof, the Board of Trade may make an order releasing the canal company or other the proprietors of the unnecessary or derelict canal from all liability to maintain the same canal, and from all statutory and other obligations in respect thereof, or of or consequent on the abandonment thereof.

(2.) In the case of an unnecessary canal no warrant of abandonment shall be granted unless the Board of Trade are satisfied—

(a) That it is unnecessary for the purposes of public navigation;

(b) That the application has been expressly authorised by a resolution of a majority of the shareholders of the canal company owning the canal present and voting at an extraordinary or special general meeting of that company;

(c) That such public and other notices of the application have been given as the Board of Trade may require;

(d) That compensation (the amount thereof to be determined in case of difference as the Board of Trade may prescribe) has been made to all persons entitled to compensation by reason of the proposed abandonment of the canal.

(3.) In the case of a derelict canal the warrant may be granted on the condition that the canal or any part thereof, with all or any of the powers relating thereto, be transferred to any person, body of persons, or local authority, and where any such condition is imposed the Board of Trade may, if they think fit, frame and embody in a Provisional Order a scheme for the management of the canal or any part thereof.

(4.) The Provisional Order may provide for the constitution of a body to manage the canal or any part thereof, for the transfer to that body or any local authority of the canal or any part thereof, and of all or any of the powers relating thereto, for the limitation or discharge of any liabilities affecting the canal or the owners thereof for the time being, and for any other matters which may appear to the Board of Trade to be necessary or proper for carrying this section into effect.

(5.) The Board of Trade may submit to Parliament for confirmation any Provisional Order made by it in pursuance of this section, but any such order shall be of no force unless and until it is confirmed by Act of Parliament.

(6.) If while the Bill confirming any such order is pending in either House of Parliament, a petition is presented against any order comprised therein, the Bill, so far as it relates to the order, may be referred to a select committee, and the petitioner shall be allowed to appear and oppose as in the case of private Bills.

(7.) In this section the expression "local authority" means any one of the local authorities mentioned in section seven of this Act.

(8.) For the purpose of giving effect to the provisions of this section, the Board of Trade may require the applicants to furnish any evidence in their possession or under their control relative to the application, and may at the expense of the applicants appoint and send an officer to inspect the canal referred to in the application, and to obtain information and evidence in the neighbourhood thereof relative to the proposed abandonment, and may from time to time make regulations as to the mode of making applications, and the nature and mode of publication of notices, and generally as to the conduct of proceedings.

Definition of "canal company."

46. In this part of this Act the expression "canal company" shall include a "railway and canal company," so far as relating to any canal of any such last-mentioned company.

PART IV.

MISCELLANEOUS.

Perpetuation of 36 & 37 Vict. c. 48.

47. So much of the Regulation of Railways Act, 1873, as limits the time during which that Act shall continue in force shall, save so far as it relates to the appointment of the Commission, be repealed, and the said Act, save as aforesaid, shall be perpetual.

Evidence on rating appeals.

48. On any rating appeal, and before any court, where it may be material to show the receipts or profits of a railway company or canal company, or railway and canal company, it shall be lawful for the company to prove the same by written statements or returns verified by the affidavit or statutory declaration of the manager or other responsible officer, and any such statements or returns shall be primâ facie evidence of the facts therein stated with respect to such receipts or profits: Provided that the person by whom any such affidavit or statutory declaration is made shall in every case, if required, attend to be cross-examined thereon.

Recovery and application of penalties.

49. Every penalty recoverable on summary conviction under this Act may be prosecuted and recovered in the manner directed by the Summary Jurisdiction Acts before a court of summary jurisdiction.

Parties may appear in person or by counsel, &c.

50. In any proceedings under this Act any party may appear before the Commissioners either by himself in person or by counsel or solicitor.

Parliamentary agents entitled to practise before Commissioners.

51. Any person who shall be certified by the Chairman of Committees of the House of Lords or the Speaker of the House of Commons to have practised for two years before the passing of this Act in promoting or opposing Bills in Parliament shall be entitled to practise in any proceedings under this Act as an attorney or agent before the Commissioners: Provided that every such person so practising as aforesaid shall, in respect of such practice and everything relating thereto, be subject to the jurisdiction and orders of the Commissioners, and further provided that no such person shall practise as aforesaid until his name shall have been entered in a roll to be made and kept, and which is hereby authorised to be made and kept, by the Commissioners.

Saving of powers conferred on Commissioners and Board of Trade.

52. The powers and jurisdiction conferred by this Act on the Commissioners or Board of Trade shall be in addition to and not in substitution for any powers and jurisdiction vested in the Commissioners or Board of Trade by any statute.

Proceedings of Board of Trade.

53.—(1.) All documents purporting to be rules, orders, or certificates made or issued by the Board of Trade, and to be sealed with the seal of the Board, or to be signed by a secretary or assistant secretary of the Board, or any person authorised in that behalf by the President of the Board, shall be received in evidence, and deemed to be such orders, rules, or certificates without further proof, unless the contrary is shown.

(2.) A certificate signed by the President of the Board of Trade that any order made, certificate issued, or act done, is the order, certificate, or act of the Board of Trade, shall be conclusive evidence of the fact so certified.

Expenses of local authorities.

54.—(1.) Where any local authority having power under this Act to make or oppose any complaint to the Commissioners, or the Board of Trade, or to enter into any agreement to pay the whole or a portion of the expenses of complying with an order of the Commissioners or the Board of Trade, or to make any application for the abandonment or acquisition of a canal under this Act, incur any expenses in or incidental to such complaint, opposition, agreement, or application, such expenses may be defrayed out of the rates or funds out of which the expenses incurred by such authority in the execution of their ordinary duties are defrayed, and if such authority is a rural sanitary authority in England, shall be defrayed as general expenses, unless the Local Government Board direct that they shall be defrayed as special expenses.

(2.) A local authority may enter into any contract involving the payment by themselves and their successors of any expenses authorised by this section to be defrayed.

(3.) Where any such local authority have no power to borrow money for the purpose of defraying any expenses authorised by this section, such authority, if other than a surveyor of highways, may, with the consent of the Board of Trade in the case of any harbour board or conservancy authority, and with the consent of the Local Government Board in the case of any other authority, borrow money in manner provided by the Local Loans Act, 1875, on the security of the rates or funds out of which the expenses are authorised to be defrayed, and the prescribed period for the loan shall be such period as the Board giving such consent may approve.

38 & 39 Vict. c. 83.

(4.) On the request of any board whose consent is required for such loan, the Board of Trade or Commissioners shall certify such particulars respecting the amount of the said expenses and the propriety of incurring the same and of borrowing for the payment thereof as may be requested by such board.

(5.) In Ireland, any authority borrowing in pursuance of this section may borrow in manner provided by the Public Health (Ireland) Act, 1878, in like manner as if the provisions of that Act with respect to borrowing were re-enacted in this section, and in terms made applicable thereto. 41 & 42 Vict. c. 52.

55. In this Act, unless the context otherwise requires,— Definitions.

Terms defined by the Regulation of Railways Act, 1873, have the meanings thereby assigned to them:

The term "conservancy authority" means any persons who are otherwise than for private profit intrusted with the duty or invested with the power of conserving, maintaining, or improving the navigation of any tidal or inland water or navigation:

The term "harbour board" means any persons who are otherwise than for private profit intrusted with the duty or invested with the power of constructing, improving, managing, regulating, and maintaining a harbour, whether natural or artificial, or any dock:

The term "Lord Chancellor" means the Lord High Chancellor of Great Britain:

The term "undue preference" includes an undue preference, or an undue or unreasonable prejudice or disadvantage, in any respect, in favour of or against any person or particular class of persons or any particular description of traffic:

The term "terminal charges" includes charges in respect of stations, sidings, wharves, depots, warehouses, cranes, and other similar matters, and of any services rendered thereat:

The term "merchandise" includes goods, cattle, live stock, and animals of all descriptions:

The term "trader" includes any person sending, receiving, or desiring to send merchandise by railway or canal:

The term "home," in relation to merchandise, includes the United Kingdom, the Channel Islands, and the Isle of Man:

The term "rating appeal" means an appeal against any valuation list or against any poor rate or any other local rate:

The term "Summary Jurisdiction Acts" in Scotland means the Summary Procedure Act, 1864, the Summary Jurisdiction (Process) Act, 1881, and any Act or Acts amending the same; and in Ireland, within the police district of Dublin metropolis, the Acts regulating the powers and duties of justices of the peace for such district, or of the police of such district, and elsewhere, the Petty Sessions (Ireland) Act, 1851, and any Act amending the same: 27 & 28 Vict. c. 53. 44 & 45 Vict. c. 24. 14 & 15 Vict. c. 93.

The term "superior court" means, as regards England, the High Court of Justice, as regards Scotland, the Court of Session, and as regards Ireland, the High Court of Justice:

The term "superior court of appeal" means, as regards England, Her Majesty's Court of Appeal; as regards Scotland, the Court of Session in either division of the Inner House; and as regards Ireland, Her Majesty's Court of Appeal.

The term "rules of court" means, as regards Scotland, acts of sederunt.

In the application of this Act to Ireland, the expression "council of a borough," includes town or township commissioners, and any reference to justices in quarter sessions shall be construed to refer to a grand jury; and any reference to the Local Government Board or to an urban or rural sanitary authority, shall be construed to refer to the Local Government Board for Ireland, and to an urban or rural sanitary authority in Ireland.

56. This Act shall come into operation on the first day of January one thousand eight hundred and eighty-nine, which day is in this Act referred to as the commencement of this Act: provided that at any time after the passing of this Act any appointment and rules may be made, and other things done for the purpose of bringing this Act into operation at such commencement. Commencement of Act.

57. Subject to general rules to be made under this Act, all proceedings which, at the commencement of this Act, under the Regulation of Railways Act, 1873, and Acts amending it, or under any other Acts, are pending before the Railway Commissioners, shall be transferred to the Railway and Canal Commission under this Act, and may thereupon be continued and concluded in all respects as if such proceedings had been originally instituted before that Commission. Pending business. 36 & 37 Vict. c. 48.

Transfer of pending business from superior courts.

58. Every action or proceeding which might have been brought before the Railway Commissioners if this Act had been in force at the time when such action or proceeding was begun, and is at the commencement of this Act pending before any superior court, may, upon the application of either party, be transferred by any judge of such superior court to the Railway and Canal Commissioners under this Act, and may thereupon be continued and concluded in all respects as if such action or proceeding had been originally instituted before that Commission: Provided that no such transfer, nor anything herein contained, shall vary or affect the rights or liabilities of any party to such action or proceeding.

Repeal.

59.—(1.) The enactments mentioned in the schedule to this Act are hereby repealed to the extent therein specified.

(2.) The repeal effected by this Act shall not affect—

(a) Anything done or suffered before the commencement of this Act under any enactment repealed by this Act, or the expiration of any office which would otherwise have expired by virtue of any enactment repealed by this Act; nor

(b) Any right or privilege acquired, or duty imposed, or liability or disqualification incurred, under any enactment so repealed; nor

(c) Any fine, forfeiture, or other punishment incurred or to be incurred in respect of any offence committed or to be committed against any enactment so repealed; nor

(d) The institution or continuance of any proceeding or other remedy, whether under any enactment so repealed, or otherwise, for ascertaining or enforcing any such liability or disqualification, or enforcing or recovering any such fine, forfeiture, or punishment as aforesaid.

SCHEDULE.

ACTS REPEALED.

Section 59.

Note.—A description or citation in this schedule of a portion of an Act is inclusive of the words, section, or other part first and last mentioned, or otherwise referred to as forming the beginning or as forming the end of the portion described in the description or citation.

Session and Chapter of Act.	Short Title.	Extent of Repeal.
17 & 18 Vict. c. 31	The Railway and Canal Traffic Act, 1854.	Section four and section five.
31 & 32 Vict. c. 119	The Regulation of Railways Act, 1868.	Section sixteen, paragraph two, from "The provisions of" to the end of the section.
36 & 37 Vict. c. 48	The Regulation of Railways Act, 1873.	Section three, from "The term 'superior court'" to the end of the section, section four, section eleven, section twelve, section thirteen, section twenty-one, section twenty-two, section twenty-three, section twenty-four, section twenty-five, section twenty-six, from the words "The Commissioners may review" to the end of the section, section twenty-eight, section twenty-nine, section thirty-four, and section thirty-seven.
37 & 38 Vict. c. 40	The Board of Trade Arbitrations, &c. Act, 1874.	Section eight, from "and shall continue in force" to "expiration."

51 & 52 VICT. c. 62.

An Act to amend the Law with respect to Preferential Payments in Bankruptcy, and in the winding-up of Companies.

[*24th December*, 1888.]

Priority of debts.

1.—(1.) In the distribution of the property of a bankrupt, and in the distribution of the assets of any company being wound up under the Companies Act, 1862, and the Acts amending the same, there shall be paid in priority to all other debts—

(a) All parochial or other local rates due from the bankrupt or the company at the date of the receiving order or, as the case may be, the commencement of the winding-up, and having become due and payable within twelve months next before that time, and all assessed taxes, land tax, property or income tax assessed on the bankrupt or the company up to the fifth day of April next before the date of the receiving order, or, as the case may be, the commencement of the winding-up, and not exceeding in the whole one year's assessment;

(b) All wages or salary of any clerk or servant in respect of services rendered to the bankrupt or the company during four months before the date of the receiving order, or, as the case may be, the commencement of the winding-up, not exceeding fifty pounds; and

(c) All wages of any labourer or workman not exceeding twenty-five pounds, whether payable for time or for piece work, in respect of services rendered to the bankrupt or the company during two months before the date of the receiving order or, as the case may be, the commencement of the winding-up: Provided that where any labourer in husbandry has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, he shall have priority in respect of the whole of such sum, or a part thereof, as the Court may decide to be due under the contract, proportionate to the time of service up to the date of the receiving order, or, as the case may be, the commencement of the winding-up.

(2.) The foregoing debts shall rank equally between themselves and shall be paid in full, unless the property of the bankrupt is, or the assets of the company are, insufficient to meet them, in which case they shall abate in equal proportions between themselves.

(3.) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, the foregoing debts shall be discharged forthwith so far as the property of the debtor, or the assets of the company, as the case may be, is or are sufficient to meet them.

(4.) In the event of a landlord or other person distraining or having distrained on any goods or effects of a bankrupt or a company being wound up within three months next before the date of the receiving order or the winding-up order respectively, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof.

Provided, that in respect of any money paid under any such charge the landlord or other person shall have the same rights of priority as the person to whom such payment is made.

(5.) This section, so far as it relates to the property of a bankrupt, shall have effect as part of section forty of the Bankruptcy Act, 1883.

(6.) This section shall apply, in the case of a deceased person who dies insolvent, as if he were a bankrupt, and as if the date of his death were substituted for the date of the receiving order.

Savings.

2.—(1.) Nothing in this Act shall alter the effect of section five of the Act twenty-eight and twenty-nine Victoria, chapter eighty-six, "To amend the law of partnership," or shall prejudice the provisions of the Friendly Societies Act, 1875, or shall affect the priority given to the payment of funeral and testamentary expenses by section one hundred and twenty-five of the Bankruptcy Act, 1883.

(2.) Nothing in this Act shall affect the provisions of the Stannaries Act, 1887.

Application of Act.

3. This Act shall apply only in the case of receiving orders and orders for the administration of the estates of deceased debtors according to the law of bankruptcy made and windings-up commenced after the commencement of this Act.

Extent of Act.

4. This Act shall not apply to Ireland.

Repeal.

6. The enactments specified in the schedule hereto are hereby repealed to the extent in the third column of that schedule mentioned.

Short title.

7. This Act may be cited as the Preferential Payments in Bankruptcy Act, 1888.

SCHEDULE.

ENACTMENTS REPEALED.

Session and Chapter.	Title.	Extent of Repeal.
46 & 47 Vict. c. 28	The Companies Act, 1883.	The whole Act except as regards its application to Ireland.
46 & 47 Vict. c. 52	The Bankruptcy Act, 1883.	Section forty, sub-sections one and two.
49 & 50 Vict. c. 28	The Bankruptcy (Agricultural Labourers' Wages) Act, 1886.	The whole Act.

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52 & 53 VICT. c. 21.

An Act for amending the Law relating to Weights and Measures, and for other purposes connected therewith.

[26*th July*, 1889.]

PART I.

Weights and Measures.

Verification of weighing instruments.

1.—(1.) Every weighing instrument used for trade shall be verified and stamped by an inspector of weights and measures with a stamp of verification under this Act.

(2.) Every person who, after the expiration of twelve months from the commencement of this Act, uses, or has in his possession for use, for trade any weighing instrument not stamped as required by this Act, shall be liable to a fine not exceeding two pounds, or in the case of a second offence five pounds.

(3.) The power of making bye-laws conferred by section fifty-three of the principal Act (*a*) shall extend to the making of bye-laws for giving effect to this section.

(4.) Section thirty-two of the principal Act (*a*) shall apply to weighing instruments in like manner as it applies to weights and measures.

Local verification of metric weights and measures.

2. The Board of Trade may, if they think fit, at the expense of the local authority, deposit with any inspector of weights and measures copies of any of the metric standards in their custody, and cause to be verified with any copy so deposited any metric weights and measures which can under section thirty-eight of the principal Act be compared with the metric standards in their custody.

Amendment of 41 & 42 Vict. c. 49, ss. 25 and 26.

3. The fine for a second or a subsequent offence under section twenty-five or section twenty-six of the principal Act (*a*) shall be a sum not exceeding twenty pounds, and the provisions of the said section twenty-six with respect to forfeiture shall apply to weighing instruments in like manner as they apply to weights, measures, scales, balances, and steelyards.

(*a*) 41 & 42 Vict. c. 49, *supra*.

4. Where a person is convicted under any section of the principal Act or this Act of a second or subsequent offence, and the Court by which he is convicted is of opinion that such offence was committed with intent to defraud, he shall be liable, in addition to or in lieu of any fine, to be imprisoned with or without hard labour for a term not exceeding two months. Liability to imprisonment in cases of fraud.

5. [Repeal of 41 & 42 Vict. c. 49, ss. 16, 46.]

6. [New denominations of standards.]

7. Any local authority may provide for the use of their officers working standards of measure and weight, and scale-beams of such material and in such form as the Board of Trade may approve, and those standards may, if verified in such manner as the Board of Trade from time to time direct, be used for the inspection and verification of weights and measures as if they were local standards. Working standards.

8. [Power for Board of Trade to take fees.]

9. [Local authorities or persons having power to appoint inspectors of weights and measures, with the approval of the Board of Trade, to make general regulations for the guidance of inspectors.]

10. [Provision as to local inquiries.]

11. [Qualification of inspectors of weights and measures.]

12.—(1.) An inspector of weights and measures shall not, during the time he holds office, be a person deriving any profit from or employed in the making, adjusting, or selling of weights, measures, or measuring or weighing instruments : Inspector not to be maker, seller, or adjuster of weights, measures, or weighing instruments.

(2.) Provided that in any district where, on the representation of the local authority, it appears to be desirable for an inspector of weights and measures to be allowed to adjust weights and measures, the Board of Trade may, if they think fit, authorise an inspector appointed by that local authority to act as an adjuster of weights and measures.

(3.) An inspector so authorised may for any such adjustment make such charges as the local authority approve, and shall account for and pay any money received by him in respect of such charges in such manner as the local authority direct.

13. [Inspectors may take in respect of the verification and stamping of weights, measures, and weighing instruments the fees specified in the First Schedule.]

14. Where a person is convicted before any Court of any offence under the principal Act or this Act, the Court may, if it thinks fit, cause the conviction to be published in such manner as it thinks desirable. Publication of convictions.

15. The provisions of the principal Act and of this Act as to the verification and re-verification of local and working standards shall apply to the standards used by any local authority in testing meters under the Act of the Session held in the twenty-second and twenty-third years of the reign of Her present Majesty, chapter sixty-six, intituled "An Act for regulating measures used in sales of gas," and the Acts amending the same. Application of 41 & 42 Vict. c. 49, s. 66, to gas standards.

16. [Powers to London County Council to exercise jurisdiction throughout the county.]

17. [Provision as to city of London.]

18. [Provision of copies of local standards in Ireland.]

19. [Amendment of 41 & 42 Vict. c. 49, as to inspectors in Ireland.]

PART II.

Sale of Coal.

20.—(1.) All coal shall be sold by weight only, except where by the written consent of the purchaser it is sold by boat load or by waggons or tubs delivered from the colliery into the works of the purchaser. Coal to be sold by weight.

(2.) If any person sells coal otherwise than is required by this section he shall be liable to a fine not exceeding five pounds for every such sale.

21. [Weight ticket or note to be delivered on delivery of coal over two hundredweight.]

22. [Tare weight of vehicle where coal sold in bulk.]

23. [Frauds by drivers of coal carts.]

24. [Penalty on deficiency in weight of coal on small sales.]
25. [Weighing instrument to be kept in place where coal sold by retail.]
26. [Local authorities may erect and maintain fixed weighing instruments at convenient places for the purpose of weighing coal, and may provide portable weighing instruments for the same purpose.]
27. [Power to require weighment of coal or vehicle.]
28. [Local authorities may make byelaws.]
29. [Power to weigh coal in shop or vehicle.]
30. [Power to make local exemptions.]
31. This part of this Act, except the provision requiring coal to be sold by weight only, shall not extend to Scotland.

PART III.

Bread.

Explanation of law as to bakers.

32. Nothing in the enactments referred to in the Fourth Schedule to this Act shall render any baker or seller of bread, or the journeyman, servant, or other person employed by such baker or seller of bread, liable to any forfeiture or penalty for refusing to weigh in the presence of the purchaser any bread conveyed or carried out in any cart or other carriage, unless he is requested so to do by or on behalf of the purchaser.

PART IV.

Supplemental.

Saving for liabilities otherwise than under Act.

33.—(1.) No proceeding or conviction for any offence punishable under this Act shall affect any civil remedy to which any person aggrieved by the offence may be entitled.

(2.) This Act shall not exempt any person from any indictment or other proceeding for an offence which is punishable at common law or under some Act of Parliament other than this Act, so that no person be punished twice for the same offence.

(3.) Where proceedings are taken before any Court against any person in respect of any offence punishable under this Act, and the offence is also punishable at common law or under some Act of Parliament other than this Act, the Court may direct that, instead of those proceedings being continued, proceedings shall be taken against that person at common law or under some Act of Parliament other than this Act.

Construction of Act.

34. This Act and the principal Act shall be construed together as one Act.

Definitions.

35. In this Act, unless the context otherwise requires,—

"Weighing instrument" includes scales, with the weights belonging thereto, scale-beams, balances, spring-balances, steelyards, weighing machines, and other instruments for weighing:

"Measuring instrument" includes any instrument for the measurement of length, capacity, volume, temperature, pressure, or gravity, or for the measurement and determination of electrical quantities:

"Vehicle" means any carriage, cart, waggon, truck, barrow, or other means of carrying coal by land, in whatever manner the same may be drawn or propelled, but does not include a railway truck or waggon:

"Inspector" means an inspector under the principal Act:

Other expressions have the same meaning as in the principal Act: Provided that the expression "local authority" shall, in its application to England, be construed subject to the provisions of the Local Government Act, 1888, and the expression "weighing machine" in the principal Act shall include any weighing instrument as defined by this Act.

51 & 52 Vict. c. 41.

36.—(1.) The enactments specified in the Fifth Schedule to this Act are hereby repealed to the extent mentioned in the third column of that schedule. Repeal.

(2.) The repeal of any enactment by this Act shall not affect—

(a) the past operation of any enactment so repealed, or anything duly done or suffered under any enactment so repealed; or

(b) any right or liability acquired or incurred under any enactment so repealed; or

(c) any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment so repealed; or

(d) any power, legal proceeding, or remedy in respect of any such right, liability, penalty, forfeiture, or punishment as aforesaid; and any such power, legal proceeding, and remedy may be exercised and carried on as if this Act had not passed.

37. This Act shall come into operation on the first day of January one thousand eight hundred and ninety, which date is in this Act referred to as the commencement of this Act: Commencement.

Provided as follows:

(a) At any time after the passing of this Act any appointment, byelaw, or regulation may be made, and any other thing may be done, which appears to a local authority to be necessary or proper for the purpose of bringing this Act into operation at the commencement thereof;

(b) In Ireland, where a grand jury is the local authority, so much of this Act as concerns the powers and duties of the local authority and the consequences of the exercise of such powers and duties shall come into operation on the first day of May one thousand eight hundred and ninety.

38. [Saving for corporation of Dublin.]

FIRST SCHEDULE.

Section 13.

Fees to be taken on the verification and stamping of Weights, Measures, and Weighing Instruments by Inspectors of Local Authorities.

Weights.

	s.	d.
Avoirdupois:		
Each weight of 100 lb. (cental)	0	4
,, ,, ,, 56 lb. and 28 lb.	0	3
,, ,, ,, 14 lb. and 7 lb.	0	2
,, ,, from 4 lb. to 1 lb., inclusive	0	1
,, ,, ,, 8 oz. to ½ dram, inclusive	0	0½
,, ,, ,, 4,000 grains to $\frac{1}{100}$th of a grain, inclusive	0	0½
,, ,, ,, 240 to 24 grains, inclusive, commonly called pennyweights	0	0½
Troy:		
Each weight from 500 oz. to 100 oz., inclusive	0	4
,, ,, ,, 50 oz. to 10 oz., inclusive	0	2
,, ,, ,, 5 oz. to $\frac{1}{1000}$th of an oz., inclusive	0	1
Apothecaries:		
Each weight from 10 oz. to 1 oz., inclusive	0	2
,, ,, ,, 4 drachms to ½ grain, inclusive	0	1

Measures.

Length:		
Each measure from 100 feet to 7 feet, inclusive	0	3
,, ,, ,, 6 feet to 4 feet, inclusive	0	2
,, ,, of a yard, 2 feet, foot, and inch respectively, including their subdivisions	0	1
Measures from 0·500 to 0·001 inch, in the form of wire-gauge plates:		
For each notch, or for each internal gauge or separate size, from half an inch to $\frac{1}{1000}$th of an inch	0	0¼

	s.	d.
Capacity:		
Dry and liquid measures:		
Each measure of 4 bushels (32 gallons) and 1 bushel (8 gallons)..	0	6
,, ,, from 5 gallons to 2 gallons (peck), inclusive	0	3
,, ,, ,, 1 gallon to a ¼ gill, inclusive.....	0	1
Apothecaries:		
Each subdivided measure containing:		
Not more than twelve subdivisions	0	1
More than twelve subdivisions but not more than fifteen	0	1¼
More than fifteen subdivisions but not more than eighteen	0	1½
More than eighteen subdivisions but not more than twenty-one	0	1¾
More than twenty-one subdivisions but not more than twenty-four	0	2
More than twenty-four subdivisions but not more than thirty ..	0	2½
More than thirty subdivisions but not more than thirty-six	0	3
More than thirty-six subdivisions but not more than forty-two..	0	3½
More than forty-two subdivisions but not more than fifty.....	0	4
More than fifty subdivisions but not more than one hundred ..	0	6
More than one hundred subdivisions but not more than one hundred and fifty	0	9
More than one hundred and fifty.....	1	0
Each separate measure from 40 fluid oz. to 10 fluid oz., inclusive..	0	2
,, ,, ,, ,, 10 fluid oz.	0	0½

Weighing Instruments.

For 10 tons and above	10	0
For under 10 tons and above 1 ton	5	0
For 1 ton and above 5 cwt.	2	0
For 5 cwt. and above 1 cwt.....	1	6
For 1 cwt. and above 56 lbs.....	1	0
exclusive of cost of cartage and lifting of standards in each of the above cases.		
For 56 lb. and above 14 lb.	0	6
For 14 lbs. and above 1 lb.	0	3
For 1 lb. or under	0	2

Section 21.

THIRD SCHEDULE.

Weight Ticket or Consignment Note on delivery of Coal over Two Hundredweight.

Mr. *A. B.* [*here insert the name of the buyer*].

Take notice that you are to receive herewith tons cwt. lbs. of coal.

[*When sold in sacks, add*]

in sacks, each containing cwt.

[*When sold in bulk, add*]

	tons	cwts.	lbs.
Weight of coal and vehicle			
Tare weight of vehicle.....			
Net weight of coal herewith delivered to purchaser			

C. D. [*here insert the name of the seller*].

E. F. [*here insert the name of the person in charge of the vehicle*].

Where coal is delivered by means of a vehicle, the seller must deliver or send by post or otherwise to the purchaser or his servant, before any part of the coal is unloaded, a ticket or note in this form.

Any seller of coal who delivers a less quantity than is stated in this ticket or note is liable to a fine.

Any person attending on a vehicle used for the delivery of coal who, having received a ticket or note for delivery to the purchaser, refuses or neglects to deliver it to the purchaser or his servant, is liable to a fine.

FOURTH SCHEDULE.

Section 32.

Session and Chapter.	Title.	Enactments referred to.
3 Geo. 4, c. cvi.....	An Act to repeal the Acts now in force relating to bread to be sold in the city of London and the liberties thereof, and within the weekly bills of mortality, and ten miles of the Royal Exchange; and to provide other regulations for the making and sale of bread, and preventing the adulteration of meal, flour, and bread, within the limits aforesaid.	Section nine.
6 & 7 Will. 4, c. 37..	An Act to repeal the several Acts now in force relating to bread to be sold out of the city of London and the liberties thereof, and beyond the weekly bills of mortality, and ten miles of the Royal Exchange; and to provide other regulations for the making and sale of bread, and for preventing the adulteration of meal, flour, and bread, beyond the limits aforesaid.	Section seven.

FIFTH SCHEDULE.

ENACTMENTS REPEALED.

Section 36.

Session and Chapter.	Short Title.	Extent of Repeal.
41 & 42 Vict. c. 49..	The Weights and Measures Act, 1878.	Section sixteen. Section forty-three, from "A maker or seller of weights" to "measures under this Act." Section forty-six. Section forty-seven. Section eighty-six, so far as it re-enacts section nine of the Weights and Measures Act, 1835. The Fifth Schedule.

52 & 53 VICT. c. 24.

An Act to repeal certain Statutes, relating to Master and Servants in particular Manufactures, which have ceased to be put in force, or have become unnecessary by the enactment of subsequent Statutes.

[26*th July*, 1889.]

52 & 53 VICT. c. 43.

An Act to Amend the Law relating to the Measurement of the Tonnage of Merchant Ships. [26*th August*, 1889.]

Amendment of rules for measurement of tonnage.

1.—(1.) In the measurement of a ship for the purpose of ascertaining her register tonnage, no deduction shall be allowed in respect of any space which has not been first included in the measurement of her tonnage.

(2.) In section twenty-one, paragraph (4), of the Merchant Shipping Act, 1854, the words "First, that nothing shall be added for a closed-in space solely appropriated to the berthing of the crew, unless such space exceeds one-twentieth of the remaining tonnage of the ship, and in case of such excess the excess only shall be added; and secondly"; and in section twenty-two, paragraph (2), of the same Act the words "subject to the deduction for a closed-in space appropriated to the crew, as mentioned in Rule I." shall be repealed.

Provided that this section shall not apply until after the expiration of five years from the date of the passing of this Act to any ship in the measurement or re-measurement of which the deductions prohibited by this section have been made before the tenth day of March one thousand eight hundred and eighty-nine, or to any ship the building of which was commenced before the tenth day of March one thousand eight hundred and eighty-nine, and which is registered for the first time between that date and the last day of December one thousand eight hundred and eighty-nine, unless in either case the ship is, before the expiration of the said five years, measured or re-measured in accordance with the provisions of this Act, and any such ship may be measured or re-measured at the request of the owner.

But this exemption shall not extend to any ship in the case of which the allowance for propelling-power space exceeds fifty per cent. of the gross tonnage of the ship.

Subject as aforesaid, the tonnage of every ship shall be estimated for all purposes as if any deduction prohibited by this section had not been made, and the particulars relating to the ship's tonnage in the register book, and in her certificate of registry, shall be corrected accordingly.

Rule as to allowance for engine-room in steamers.

2. In the case of any ship built or measured after the passing of this Act, such portion of the space or spaces above the crown of the engine room and above the upper deck as is framed in for the machinery or for the admission of light and air, shall not be included in the measurement of the space occupied by the propelling power, except in pursuance of a request in writing to the Board of Trade by the owner of the ship, and shall not be included in pursuance of such request unless:—

(a) that portion is first included in the measurement of the gross tonnage; and

(b) a surveyor appointed under the Fourth Part of the Merchant Shipping Act, 1854, certifies that the portion so framed in is reasonable in extent and is so constructed as to be safe and seaworthy, and that it cannot be used for any purpose other than the machinery or for the admission of light and air to the machinery or boilers of the ship.

Deductions for navigation spaces, &c.

3.—(1.) In measuring or re-measuring a ship for the purpose of ascertaining her register tonnage, the following deductions shall be made from the space included in the measurement of the tonnage:—

(a) In the case of a ship wholly propelled by sails, any space set apart and used exclusively for the storage of sails:

(b) In the case of any ship—

(i.) Any space used exclusively for the accommodation of the master;

(ii.) Any space used exclusively for the working of the helm, the capstan, and the anchor gear, or for keeping the charts, signals, and other instruments of navigation, and boatswain's stores; and

(iii.) The space occupied by the donkey engine and boiler, if connected with the main pumps of the ship.

(2.) The deductions allowed under this section shall be subject to the following provisions, namely:—

(a) The space deducted must be certified by a surveyor appointed by the Board of Trade as reasonable in extent and properly and efficiently constructed for the purpose for which it is intended;

(b) There must be permanently marked in or over every such space a notice stating the purpose to which it is to be applied and that whilst so applied it is to be deducted from the tonnage of the ship;

(c) The deduction on account of space for storage of sails must not exceed two and a half per cent. of the tonnage of the ship.

Provisions as to deductions in case of certain steamships.

4. In the case of a screw steamship which, at the passing of this Act, has an engine-room allowance of thirty-two per cent. of the gross tonnage of the ship, and in which any crew space on deck has not been included in the gross tonnage, whether its contents have been deducted therefrom or not, the crew space shall be, on the application of the owner of the ship, or by direction of the Board of Trade, measured and its contents ascertained and added to the registered tonnage of the ship; and if it appears that with such addition to the tonnage the engine room does not occupy more than thirteen per cent. of the tonnage of the ship, the existing allowance for engine room of thirty-two per cent. of the tonnage shall be continued, notwithstanding anything in this Act.

Measurement of ships with double bottoms for water ballast.

5. In the case of a ship constructed with a double bottom for water ballast, if the space between the inner and outer plating thereof is certified by a surveyor appointed by the Board of Trade to be not available for the carriage of cargo, stores, or fuel, then the depth required by section twenty-one, paragraph (2), of the Merchant Shipping Act, 1854, shall be taken to be the upper side of the inner plating of the double bottom, and that upper side shall, for the purposes of measurement, be deemed to represent the floor timber referred to in that section.

Re-measurement of foreign ships.

6. If and whenever it is made to appear to Her Majesty that the tonnage of any foreign ship, as measured by the rules of the country to which she belongs, materially differs from that which would be her tonnage if measured under the Merchant Shipping Act, 1854, and the Acts amending the same, Her Majesty may from time to time, by Order in Council, direct that, notwithstanding any Order in Council for the time being in force under those Acts, any of the ships of that country may, for all or any of the purposes of those Acts, be re-measured in accordance with the provisions of those Acts, and Her Majesty may revoke any Order so made.

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52 & 53 VICT. c. 45.

An Act to amend and consolidate the Factors Acts.

[26*th August*, 1889.]

Preliminary.

Definitions.

1. For the purposes of this Act—

(1.) The expression "mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods:

(2.) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf:

(3.) The expression "goods" shall include wares and merchandise:

(4.) The expression "document of title" shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented:

(5.) The expression "pledge" shall include any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability:

(6.) The expression "person" shall include any body of persons corporate or unincorporate.

Dispositions by Mercantile Agents.

Powers of mercantile agent with respect to disposition of goods.

2.—(1.) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

(2.) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

(3.) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

(4.) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

Effect of pledges of documents of title.

3. A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

Pledge for antecedent debt.

4. Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

Rights acquired by exchange of goods or documents.

5. The consideration necessary for the validity of a sale, pledge, or other disposition, of goods, in pursuance of this Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange.

Agreements through clerks, &c.

6. For the purposes of this Act an agreement made with a mercantile agent through a clerk or other person authorised in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent.

Provisions as to consignors and consignees.

7.—(1.) Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person.

(2.) Nothing in this section shall limit or affect the validity of any sale, pledge, or disposition, by a mercantile agent.

Dispositions by Sellers and Buyers of Goods.

Disposition by seller remaining in possession.

8. Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

Disposition by buyer obtaining possession.

9. Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

Effect of transfer of documents on vendor's lien or right of stoppage in transitu.

10. Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for

defeating any vendor's lien or right of stoppage in transitu as the transfer of a bill of lading has for defeating the right of stoppage in transitu.

Supplemental.

Mode of transferring documents.

11. For the purposes of this Act, the transfer of a document may be by endorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery.

Saving for rights of true owner.

12.—(1.) Nothing in this Act shall authorise an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing.

(2.) Nothing in this Act shall prevent the owner of goods from recovering the goods from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would by law be entitled to retain the goods or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien.

(3.) Nothing in this Act shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set off on the part of the buyer against the agent.

Saving for common law powers of agent.

13. The provisions of this Act shall be construed in amplification and not in derogation of the powers exercisable by an agent independently of this Act.

Repeal.

14. The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act, but this repeal shall not affect any right acquired or liability incurred before the commencement of this Act under any enactment hereby repealed.

Commencement.

15. This Act shall commence and come into operation on the first day of January one thousand eight hundred and ninety.

Extent of Act.

16. This Act shall not extend to Scotland.

Short title.

17. This Act may be cited as the Factors Act, 1889.

SCHEDULE.

Section 14.

ENACTMENTS REPEALED.

Session and Chapter.	Title.	Extent of Repeal.
4 Geo. 4, c. 83 ..	An Act for the better protection of the property of merchants and others who may hereafter enter into contracts or agreements in relation to goods, wares, or merchandises entrusted to factors or agents.	The whole Act.
6 Geo. 4, c. 94 ..	An Act to alter and amend an Act for the better protection of the property of merchants and others who may hereafter enter into contracts or agreements in relation to goods, wares, or merchandise entrusted to factors or agents.	The whole Act.
5 & 6 Vict. c. 39..	An Act to amend the law relating to advances bonâ fide made to agents entrusted with goods.	The whole Act.
40 & 41 Vict. c. 39	An Act to amend the Factors Acts.	The whole Act.

52 & 53 VICT. c. 46.

An Act to amend the Merchant Shipping Act, 1854, *and the Acts amending the same.*

[26*th August*, 1889.]

Remedies for recovery of master's disbursements.

1. Every master of a ship and every person lawfully acting as master of a ship by reason of the decease or incapacity from illness of the master of the ship, shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of disbursements properly made by him on account of the ship, and for liabilities properly incurred by him on account of the ship, as a master of a ship now has for the recovery of his wages; and if in any proceeding in any Court of Admiralty or Vice Admiralty, or in any County Court having Admiralty jurisdiction, touching the claim of a master or any person lawfully acting as master to wages or such disbursements or liabilities as aforesaid, any right of set-off or counterclaim is set up, it shall be lawful for the Court to enter into and adjudicate upon all questions, and to settle all accounts then arising or outstanding and unsettled between the parties to the proceeding, and to direct payment of any balance which is found to be due.

Restrictions on advance notes.

2.—(1.) Any agreement with a seaman made under section one hundred and forty-nine of the Merchant Shipping Act, 1854 (*a*), may contain a stipulation for payment to or on behalf of the seaman, conditionally on his going to sea in pursuance of the agreement, of a sum not exceeding the amount of one month's wages payable to the seaman under the agreement.

(2.) Save as authorised by this section, any agreement by or on behalf of the employer of a seaman for the payment of money to or on behalf of the seaman conditionally on his going to sea from any port in the United Kingdom shall be void, and no money paid in satisfaction or in respect of any such agreement shall be deducted from the seaman's wages, and no person shall have any right of action, suit, or set-off against the seaman or his assignee in respect of any money so paid or purporting to have been so paid.

(3.) Nothing in this section shall affect any allotment made under the Merchant Shipping Act, 1854, or the Acts amending the same.

(4.) Section two of the Merchant Seamen (Payment of Wages and Rating) Act, 1880, is hereby repealed.

Register of deserters.

3. Every superintendent of a mercantile marine office shall keep at his office a list of the seamen who, to the best of his knowledge and belief, have deserted or failed to join their ships after signing an agreement to proceed to sea in them, and shall on request show this list to any master of a ship.

A superintendent of a mercantile marine office shall not be liable in respect of any entry made in good faith in the list so kept.

Rule as to payment of British seamen in foreign money.

4. Where a seamen has agreed with the master of a British ship for payment of his wages in British sterling or any other money, any payment of, or on account of, his wages if made in any other currency than that stated in the agreement shall, notwithstanding anything in the agreement, be made at the rate of exchange for the money stated in the agreement for the time being current at the place where the payment is made.

Provisions as to steamships to apply to ships propelled by electricity, &c.

5. The provisions of the Merchant Shipping Act, 1854, and the Acts amending the same, with respect to steamships, shall apply to ships propelled by electricity or other mechanical power, with such modifications as the Board of Trade may from time to time prescribe for purposes of adaptation.

(*a*) *Supra.*

52 & 53 VICT. c. 49.

An Act for amending and consolidating the Enactments relating to Arbitration. [26*th August*, 1889.]

References by Consent out of Court.

Submission to be irrevocable, and to have effect as an order of Court.

1. A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a Judge, and shall have the same effect in all respects as if it had been made an order of Court.

Provisions implied in submissions.

2. A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the First Schedule to this Act, so far as they are applicable to the reference under the submission.

Reference to official referee.

3. Where a submission provides that the reference shall be to an official referee, any official referee to whom application is made shall, subject to any order of the Court or a Judge as to transfer or otherwise, hear and determine the matters agreed to be referred.

Power to stay proceedings where there is a submission.

4. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a Judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

Power for the Court in certain cases to appoint an arbitrator, umpire, or third arbitrator.

5. In any of the following cases:—

(a) Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen concur in the appointment of an arbitrator:

(b) If an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy:

(c) Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him:

(d) Where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy:

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator.

If the appointment is not made within seven clear days after the service of the notice, the Court or a Judge may, on application by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

Power for parties in certain cases to supply vacancy.

6. Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention—

(a) If either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place;

(b) If, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appoint-

ment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent:

Provided that the Court or a Judge may set aside any appointment made in pursuance of this section.

Powers of arbitrator.

7. The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power—

(a) to administer oaths to or take the affirmations of the parties and witnesses appearing; and

(b) to state an award as to the whole or part thereof in the form of a special case for the opinion of the Court; and

(c) to correct in an award any clerical mistake or error arising from any accidental slip or omission.

Witnesses may be summoned by subpœna.

8. Any party to a submission may sue out a writ of subpœna ad testificandum, or a writ of subpœna duces tecum, but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action.

Power to enlarge time for making award.

9. The time for making an award may from time to time be enlarged by order of the Court or a Judge, whether the time for making the award has expired or not.

Power to remit award.

10.—(1.) In all cases of reference to arbitration the Court or a Judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.

(2.) Where an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order.

Power to set aside award.

11.—(1.) Where an arbitrator or umpire has misconducted himself, the Court may remove him.

(2.) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside.

Enforcing award.

12. An award on a submission may, by leave of the Court or a Judge, be enforced in the same manner as a judgment or order to the same effect.

References under Order of Court.

Reference for report.

13.—(1.) Subject to Rules of Court and to any right to have particular cases tried by a jury, the Court or a Judge may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) for inquiry or report to any official or special referee.

(2.) The report of an official or special referee may be adopted wholly or partially by the Court or a Judge, and if so adopted may be enforced as a judgment or order to the same effect.

Power to refer in certain cases.

14. In any cause or matter (other than a criminal proceeding by the Crown),—

(a) If all the parties interested who are not under disability consent: or,

(b) If the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the Court or a Judge conveniently be made before a jury or conducted by the Court through its other ordinary officers: or,

(c) If the question in dispute consists wholly or in part of matters of account;

the Court or a Judge may at any time order the whole cause or matter, or any question on issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the Court.

Powers and remuneration of referees and arbitrators.

15.—(1.) In all cases of reference to an official or special referee or arbitrator under an order of the Court or a Judge in any cause or matter, the official or special referee or arbitrator shall be deemed to be an officer of the Court, and shall have such authority, and shall conduct the reference in such manner, as may be prescribed by Rules of Court, and subject thereto as the Court or a Judge may direct.

(2.) The report or award of any official or special referee or arbitrator on any such reference shall, unless set aside by the Court or a Judge, be equivalent to the verdict of a jury.

(3.) The remuneration to be paid to any special referee or arbitrator to whom any matter is referred under order of the Court or a Judge shall be determined by the Court or a Judge.

Court to have powers as in references by consent.

16. The Court or a Judge shall, as to references under order of the Court or a Judge, have all the powers which are by this Act conferred on the Court or a Judge as to references by consent out of Court.

Court of Appeal to have powers of Court.

17. Her Majesty's Court of Appeal shall have all the powers conferred by this Act on the Court or a Judge thereof under the provisions relating to references under order of the Court.

General.

Power to compel attendance of witness in any part of the United Kingdom, and to order habeas corpus to issue.

18.—(1.) The Court or a judge may order that a writ of subpœna ad testificandum or of subpœna duces tecum shall issue to compel the attendance before an official or special referee, or before any arbitrator or umpire, of a witness wherever he may be within the United Kingdom.

(2.) The Court or a judge may also order that a writ of habeas corpus ad testificandum shall issue to bring up a prisoner for examination before an official or special referee, or before any arbitrator or umpire.

Statement of case pending arbitration.

19. Any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a Judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference.

Costs.

20. Any order made under this Act may be made on such terms as to costs, or otherwise, as the authority making the order thinks just.

Exercise of powers by masters and other officer

21. Provision may from time to time be made by Rules of Court for conferring on any master, or other officer of the Supreme Court, all or any of the jurisdiction conferred by this Act on the Court or a judge.

Penalty for perjury.

22. Any person who wilfully and corruptly givee false evidence before any referee, arbitrator, or umpire shall be guilty of perjury, as if the evidence had been given in open Court, and may be dealt with, prosecuted, and punished accordingly.

Crown to be bound.

23. This Act shall, except as in this Act expressly mentioned, apply to any arbitration to which her Majesty the Queen, either in right of the Crown, or of the Duchy of Lancaster or otherwise, or the Duke of Cornwall, is a party, but nothing in this Act shall empower the Court or a judge to order any proceedings to which her Majesty or the Duke of Cornwall is a party, or any question or issue in any such proceedings, to be tried before any referee, arbitrator, or officer without the consent of her Majesty or the Duke of Cornwall, as the case may be, or shall affect the law as to costs payable by the Crown.

Application of Act to references under statutory powers.

24. This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration or with any rules or procedure authorised or recognised by that Act.

Saving for pending arbitrations.

25. This Act shall not affect any arbitration pending at the commencement of this Act, but shall apply to any arbitration commenced after the commencement of this Act under any agreement or order made before the commencement of this Act.

Repeal.

26.—(1.) The enactments described in the Second Schedule to this Act are hereby repealed to the extent therein mentioned, but this repeal shall not affect anything done or suffered, or any right acquired or duty imposed or liability incurred, before the commencement of this Act, or the institution or prosecution to its termination of any legal proceeding or other remedy for ascertaining or enforcing any such liability.

(2.) Any enactment or instrument referring to any enactment repealed by this Act shall be construed as referring to this Act.

Definitions.

27. In this Act, unless the contrary intention appears,—

"Submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

"Court" means Her Majesty's High Court of Justice.
"Judge" means a judge of Her Majesty's High Court of Justice.
"Rules of Court" means the Rules of the Supreme Court made by the proper authority under the Judicature Acts.

Extent. **28.** This Act shall not extend to Scotland or Ireland.

Commencement. **29.** This Act shall commence and come into operation on the first day of January one thousand eight hundred and ninety.

Short title. **30.** This Act may be cited as the Arbitration Act, 1889.

SCHEDULES.

THE FIRST SCHEDULE.

PROVISIONS TO BE IMPLIED IN SUBMISSIONS.

(a) If no other mode of reference is provided, the reference shall be to a single arbitrator.

(b) If the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award.

(c) The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award.

(d) If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission, or to the umpire a notice in writing, stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

(e) The umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire by any writing signed by him may from time to time enlarge the time for making his award.

(f) The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrators or umpire, on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire, all books, deeds, papers, accounts, writings, and documents within their possession or power respectively which may be required or called for, and do all other things which during the proceedings on the reference the arbitrators or umpire may require.

(g) The witnesses on the reference shall, if the arbitrators or umpire thinks fit, be examined on oath or affirmation.

(h) The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively.

(i) The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

THE SECOND SCHEDULE.

ENACTMENTS REPEALED.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
9 Will. 3, c. 15	An Act for determining differences by arbitration.	The whole Act.
3 & 4 Will. 4, c. 42 ..	An Act for the further amendment of the law and the better advancement of justice.	Sections thirty-nine to forty-one, both inclusive.
17 & 18 Vict. c. 125 ..	The Common Law Procedure Act, 1854.	Sections three to seventeen, both inclusive.
36 & 37 Vict. c. 66 ..	The Supreme Court of Judicature Act, 1873.	Section fifty-six from "Subject to any Rules of Court" down to "as a judgment by the Court," both inclusive, and the words "special referees or." Sections fifty-seven to fifty-nine, both inclusive.
47 & 48 Vict. c. 61 ..	The Supreme Court of Judicature Act, 1884.	Sections nine to eleven, both inclusive.

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52 & 53 VICT. C. 68.

An Act to amend the Law relating to Pilotage.

[30*th August*, 1889.]

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52 & 53 VICT. C. 73.

An Act to amend the Law relating to the use of Flags in the British Merchant Service. [30*th August*, 1889.]

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